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WHEN: Tuesday, March 13, 2012
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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Parts 2471 and 2472

Procedures of the Panel; Impasses Arising Pursuant to Agency Determinations Not To Establish or To Terminate Flexible or Compressed Work Schedules

AGENCY: Federal Labor Relations Authority.

ACTION: Final rule.

SUMMARY: The Federal Labor Relations Authority (the FLRA) is engaged in an initiative to make electronic filing or ''eFiling'' available to parties in all cases before the FLRA. Making electronic filing or ''eFiling'' available to its parties is another way in which the FLRA is using technology to improve the customer service experience. EFiling is also expected to increase efficiencies by reducing procedural filing errors and resulting processing delays.

DATES: *Effective Date:* March 8, 2012.

ADDRESSES: Written comments can be emailed to *engagetheflra@flra.gov* or sent to the Case Intake and Publication Office, Federal Labor Relations Authority, Suite 200, 1400 K Street NW., Washington, DC 20424–0001. All written comments will be available for public inspection during normal business hours at the Case Intake and Publication Office.

FOR FURTHER INFORMATION CONTACT: Sarah Whittle Spooner, Counsel for Regulatory and External Affairs, (202) 218–7791; or email: *engagetheflra@flra.gov.*

SUPPLEMENTARY INFORMATION: In this first stage in the FLRA's eFiling initiative, the FLRA revises the regulations concerning the procedures for filing requests for Federal Service Impasses Panel (Panel) assistance in the resolution of negotiation impasses. The purpose of the proposed revisions is to make it easier for parties to file such requests by permitting the use of electronic filing (eFiling). In addition, the proposed revisions allow parties to: (1) Serve copies of the requests and other documents on other parties electronically, if the receiving parties grant permission to do so; and (2) file additional documents with the Panel electronically, if the Panel has granted advance permission to do so. Further, consistent with the FLRA's other regulations and the proposed revisions regarding eFiling, the revisions change the date of service for facsimile service from the date of receipt of the transmission to the date of transmission, and change the current references to ''private delivery'' to ''commercial delivery.'' As the FLRA's eFiling procedures develop, the revisions set forth in this action may be evaluated and revised further.

Sectional Analyses

Sectional analyses of the amendments and revisions to part 2471, Procedures of the Panel, and part 2472, Impasses arising pursuant to agency determinations not to establish or terminate flexible or compressed work schedules, are as follows:

Part 2471—Procedures of the Panel

Section 2471.2

This section is amended to state that forms for parties to file either a request for consideration of an impasse or an approval of a binding arbitration procedure are available on the FLRA's Web site at *www.flra.gov.*

Section 2471.4

This section is amended to provide that requests to the Panel provided in part 2471 may be filed electronically through use of the FLRA's eFiling system on the FLRA's Web site at *www.flra.gov.*

Section 2471.5

This section is amended to provide that: requests to the Panel provided in part 2471 may be filed electronically through use of the FLRA's eFiling system; service on other parties may be made electronically with the permission of those parties; documents submitted simultaneously with eFiling under this part may be uploaded to the FLRA's eFiling system on the FLRA's Web site at *www.flra.gov;* other documents may be filed electronically with the Panel if the filing party receives advance permission from the Panel by telephone; certification of service on other parties may be made through the FLRA's eFiling system; and the date of service for both electronic and facsimile transmissions will be the date of transmission. In addition, this section is amended to change the use of the term ''private-delivery service'' to the term ''commercial delivery.''

Part 2472—Impasses Arising Pursuant to Agency Determinations Not To Establish or To Terminate Flexible or Compressed Work Schedules

Section 2472.3

This section is amended to provide that copies of the form for filing requests with the Panel under part 2472 are available on the FLRA's Web site at *www.flra.gov.*

Section 2472.5

This section is amended to provide that requests to the Panel under part 2472 may be filed electronically through use of the FLRA's eFiling system on the FLRA's Web site at *www.flra.gov.*

Section 2472.6

This section is amended to provide that: requests to the Panel under § 2472.3 may be submitted electronically through use of the FLRA's eFiling system on the FLRA's Web site at *www.flra.gov;* a party may serve other parties by electronic transmission if they have the other parties' permission; documents may be submitted simultaneously with the eFiling of a request for Panel consideration, by uploading them through use of the FLRA's eFiling system at *www.flra.gov;* other documents may be filed electronically with the Panel if the filing party receives advance permission from the Panel by telephone; certification of service on other parties may be made in the FLRA's eFiling system when the party files electronically; and the date of service by electronic or facsimile transmission shall be the date of transmission. In addition, this section is amended to change the use of the term ''private-delivery service'' to the term ''commercial delivery.''

Executive Order 12866

The FLRA is an independent regulatory agency, and as such, is not

subject to the requirements of E.O. 12866.

Executive Order 13132

The FLRA is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 13132.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman of the FLRA has determined that this rule, as amended, will not have a significant impact on a substantial number of small entities, because this rule applies only to Federal agencies, Federal employees, and labor organizations representing those employees.

Unfunded Mandates Reform Act of 1995

This rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

List of Subjects in 5 CFR Parts 2471 and 2472

Administrative practice and procedure, Government employees, Labor management relations.

PART 2471—[AMENDED]

■ 1. The authority citation for part 2471 continues to read as follows:

Authority: 5 U.S.C. 7119, 7134.

■ 2. Section 2471.2 is revised to read as follows:

§ 2471.2 Request form.

A form is available for parties to use in filing either a request for consideration of an impasse or an approval of a binding arbitration procedure. Copies are available on the FLRA's Web site at *www.flra.gov,* or from the Office of the Executive Director, Federal Service Impasses Panel, Suite 200, 1400 K Street NW., Washington, DC 20424–0001. Telephone (202) 218–7790. Use of the form is not required, provided that the request includes all of the information set forth in § 2471.3.

■ 3. Section 2471.4 is revised to read as follows:

§ 2471.4 Where to file.

Requests to the Panel provided for in this part must either be filed electronically through use of the eFiling system on the FLRA's Web site at *www.flra.gov,* or be addressed to the Executive Director, Federal Service Impasses Panel, Suite 200, 1400 K Street NW., Washington, DC 20424–0001. All inquiries or correspondence on the status of impasses or other related matters must be submitted by regular mail to the street address above, by using the telephone number (202) 218–7790, or by using the facsimile number (202) 482–6674.

■ 4. Section 2471.5 is amended by revising paragraphs (a), (b), (c), and (d) to read as follows:

§ 2471.5 Filing and service.

(a) *Filing and service of request.* (1) Any party submitting a request for Panel consideration of an impasse or a request for approval of a binding arbitration procedure shall file an original and one copy with the Panel, unless the request is filed electronically as discussed below. A clean copy may be submitted for the original. Requests may be submitted in person, electronically through use of the eFiling system on the FLRA's Web site at *www.flra.gov,* or by registered mail, certified mail, regular mail, or commercial delivery. Requests also may be accepted by the Panel if transmitted to the facsimile machine of its office. A party submitting a request by facsimile shall also file an original for the Panel's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper.

(2) The party submitting the request shall serve a copy of such request upon all counsel of record or other designated representative(s) of parties, upon parties not so represented, and upon any mediation service which may have been utilized. Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party. Service of a request may be made in person or by registered mail, certified mail, regular mail, or commercial delivery. With the permission of the person receiving the request, service may be made by electronic or facsimile transmission, or by any other agreed-upon method. When the Panel acts on a request from the Federal Mediation and Conciliation Service or acts on a request from the Executive Director under § 2471.1(a), it will notify the parties to the dispute, their counsel of record, if any, and any mediation service which may have been utilized.

(b) *Filing and service of other documents.* (1) Any party submitting a response to, or other document in connection with, a request for Panel consideration of an impasse or a request for approval of a binding arbitration procedure shall file an original and one copy with the Panel, with the exception of documents filed simultaneously with the electronic filing of a request through use of the FLRA's eFiling system. Documents may be submitted to the Panel in person or by registered mail, certified mail, regular mail, commercial delivery, or, in the case of documents submitted simultaneously with the electronic filing of a request for Panel assistance, may be uploaded electronically through use of the FLRA's eFiling system at *www.flra.gov.* Documents may also be accepted by the Panel if transmitted electronically or to the facsimile machine of the Panel's office, but only with advance permission, which may be obtained by telephone. A party submitting a document by facsimile shall also file an original for the Panel's records, but failure to do so shall not affect the validity of the submission, if otherwise proper.

(2) The party submitting the document shall serve a copy of such request upon all counsel of record or other designated representative(s) of parties, or upon parties not so represented. Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party. Service of a document may be made in person or by registered mail, certified mail, regular mail, or commercial delivery.

With the permission of the person receiving the document, service may be made by electronic or facsimile transmission, or by any other agreed-upon method.

(c) A signed and dated statement of service shall accompany each document

submitted to the Panel, unless the document is a request under § 2471.5(a) that is filed electronically through use of the FLRA's eFiling system. For requests under § 2471.5(a) that are filed electronically through use of the FLRA's eFiling system, the filing party shall certify, in the FLRA's eFiling system and at the time of filing, that copies of the request and any supporting documents have been served as required. The statement of service, however filed, shall include the names of the parties and persons served, their addresses, the date of service, the nature of the document served, and the manner in which service was made.

(d) The date of service or date served shall be the day when the matter served, if properly addressed, is deposited in the U.S. mail or is delivered in person or is deposited with a commercial-delivery service that will provide a record showing the date the document was tendered to the delivery service. Where service is made by electronic or facsimile transmission, the date of service shall be the date of transmission.

* * * * *

PART 2472—[AMENDED]

■ 5. The authority citation for part 2472 continues to read as follows:

Authority: 5 U.S.C. 6131.

■ 6. Section 2472.3 is revised to read as follows:

§ 2472.3 Request for Panel consideration.

Either party, or the parties jointly, may request the Panel to resolve an impasse resulting from an agency determination not to establish or to terminate a flexible or compressed work schedule by filing a request as hereinafter provided. A form is available for use by the parties in filing a request with the Panel. Copies are available on the FLRA's Web site at *www.flra.gov,* or from the Office of the Executive Director, Federal Service Impasses Panel, Suite 200, 1400 K Street NW., Washington, DC 20424–0001. Telephone (202) 218–7790. Fax (202) 482–6674. Use of the form is not required provided that the request includes all of the information set forth in § 2472.4.

■ 7. Section 2472.5 is revised to read as follows:

§ 2472.5 Where to file.

Requests to the Panel provided for in this part must either be filed electronically through use of the FLRA's eFiling system on the FLRA's Web site at *www.flra.gov,* or be addressed to the Executive Director, Federal Service Impasses Panel, Suite 200, 1400 K Street NW., Washington, DC 20424–0001. All inquiries or correspondence on the status of impasses or other related matters must be submitted by regular mail to the street address above, by using the telephone number (202) 218–7790, or by using the facsimile number (202) 482–6674.

■ 8. Section 2472.6 is amended by revising paragraphs (a), (b), (c), and (d) to read as follows:

§ 2472.6 Filing and service.

(a) *Filing and service of request.* (1) Any party submitting a request for Panel consideration of an impasse filed pursuant to § 2472.3 of these rules shall file an original and one copy with the Panel unless the request is filed electronically through use of the FLRA's eFiling system. A clean copy may be submitted for the original. Requests may be submitted in person, electronically, or by registered mail, certified mail, regular mail, or commercial delivery. Requests will also be accepted by the Panel if transmitted to the facsimile machine of its office. A party submitting a request by facsimile shall also file an original for the Panel's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper.

(2) The party submitting the request shall serve a copy of such request upon all counsel of record or other designated representative(s) of parties, and upon parties not so represented. Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party. Service of a request may be made in person or by registered mail, certified mail, regular mail, or commercial delivery. With the permission of the person receiving the request, service may be made by facsimile or electronic transmission, or by any other agreed-upon method.

(b) *Filing and service of other documents.* (1) Any party submitting a response to, or other document in connection with, a request for Panel consideration of an impasse filed pursuant to § 2472.3 shall file an original and one copy with the Panel, with the exception of documents that are filed simultaneously with the electronic filing of a request for Panel consideration. A clean copy may be submitted for the original. Documents may be submitted to the Panel in person or by registered mail, certified mail, regular mail, commercial delivery, or, in the case of documents submitted simultaneously with the electronic filing of a request for Panel consideration, may be uploaded electronically through use of the FLRA's eFiling system at *www.flra.gov.* Documents may also be accepted by the Panel if transmitted electronically or to the facsimile machine of its office, but only with advance permission, which may be obtained by telephone. A party submitting a document by facsimile shall also file an original for the Panel's records, but failure to do so shall not affect the validity of the submission, if otherwise proper.

(2) The party submitting the document shall serve a copy of such request upon all counsel of record or other designated representative(s) of parties, or upon parties not so represented. Service of a document may be made in person or by registered mail, certified mail, regular mail, or commercial delivery. With the permission of the person receiving the document, service may be made by electronic or facsimile transmission, or by any other agreed-upon method.

(c) A signed and dated statement of service shall accompany each document submitted to the Panel, unless the document is a request under § 2472.3 that is filed electronically. For requests under § 2472.3 that are filed electronically, the filing party shall certify, in the FLRA's eFiling system and at the time of filing, that copies of the request and any supporting documents have been served as required. The statement of service, however filed, shall include the names of the parties and persons served, their addresses, the date of service, the nature of the document served, and the manner in which service was made.

(d) The date of service or date served shall be the day when the matter served, if properly addressed, is deposited in the U.S. mail, is delivered in person, or is deposited with a commercial-delivery service that will provide a record showing the date the document was tendered to the delivery service. Where service is made by electronic or facsimile transmission, the date of service shall be the date of transmission.

* * * * *

Dated: February 1, 2012.

Carol Waller Pope,

Chairman.

[FR Doc. 2012–2694 Filed 2–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2011–1108; Special Conditions No. 25–456–SC]

Special Conditions: Learjet Inc., Model LJ–200–1A10 Airplane, Pilot-Compartment View Through Hydrophobic Windshield Coatings in Lieu of Windshield Wipers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Learjet Model LJ–200–1A10 airplane. This airplane will have a novel or unusual design feature associated with hydrophobic windshield coatings in lieu of windshield wipers. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* March 8, 2012.

FOR FURTHER INFORMATION CONTACT: Paul Bernado, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98057–3356; telephone (425) 227–1209; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Background

On January 11, 2008, Learjet Inc. applied for a type certificate for a new Model LJ–200–1A10 airplane. This airplane is 68 feet long with a 65-foot wing span and accommodates up to 10 passengers. The LJ–200–1A10 airplane uses a hydrophobic windshield coating, in lieu of windshield wipers, for an unobstructed outside view from the pilot compartment.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Learjet Inc. must show that the Model LJ–200–1A10 airplane meets the applicable provisions of part 25, as amended by Amendments 25–1 through 25–123.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model LJ–200–1A10 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Model LJ–200–1A10 airplane must comply with the fuel-vent and exhaust-emission requirements of part 34, and the noise-certification requirements of part 36, and the FAA must issue a finding of regulatory adequacy pursuant to § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Learjet Model LJ–200–1A10 airplane will incorporate the following novel or unusual design features:

The Model LJ–200–1A10 airplane flight deck design incorporates a hydrophobic windshield coating to provide, during precipitation, an adequate outside view from the pilot compartment. Sole reliance on such a coating, without windshield wipers, constitutes a novel or unusual design feature for which the applicable airworthiness regulations do not contain adequate or appropriate safety standards. Therefore, a special condition is required to provide a level of safety equivalent to that established by the regulations.

Discussion

Section 25.773(b)(1) requires a means to maintain a clear portion of the windshield for both pilots to have a sufficiently extensive view along the flight path during precipitation conditions. The regulations require this means to maintain such an area during heavy-rain precipitation at airplane speeds up to 1.5 V_{SR1}. Hydrophobic windshield coatings may depend to some degree on airflow to maintain a clear-vision area. The heavy rain and high speed conditions specified in the current rule do not necessarily represent the limiting condition for this new technology. For example, airflow over the windshield, which may be necessary to remove moisture from the windshield, may not be adequate to maintain a sufficiently clear area of the windshield in low-speed flight or during surface operations. Alternatively, airflow over the windshield may be disturbed during such critical times as the approach to land, where the airplane is at a higher-than-normal pitch attitude. In these cases, areas of airflow disturbance or separation on the windshield could cause failure to maintain a clear-vision area on the windshield.

Discussion of Comments

Notice of proposed special conditions no. 25–11–16–SC for the Learjet Model LJ–200–1A10 airplane was published in the **Federal Register** on October 14, 2011 (76 FR 63851). No comments were received, and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the Model LJ–200–1A10 airplane. Should Learjet Inc. apply at a later date for a change to the type certificate to include other type designs incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on the Model LJ–200–1A10 airplane. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type-certification basis for Learjet Inc. Model LJ–200–1A10 airplanes.

The airplane must have a means to maintain a clear portion of the windshield, during precipitation conditions, enough for both pilots to have a sufficiently extensive view along the ground or flight path in normal taxi and flight attitudes of the airplane. This means must be designed to function, without continuous attention on the part of the crew, in conditions from light misting precipitation to heavy rain, at speeds from fully stopped in still air, to 1. 5 V_{SR1} with lift and drag devices retracted.

Issued in Renton, Washington, on January 30, 2012.

K.C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–2672 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0005; Directorate Identifier 2010–SW–091–AD; Amendment 39–16914; AD 2012–01–03]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Helicopters

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

ACTION: Final rule; request for comments.

SUMMARY: We are adopting an airworthiness directive (AD) for the Eurocopter France (ECF) Model AS332L2 helicopter and superseding an AD for the Model EC225LP helicopter. This AD is prompted by the manufacturer issuing additional corrective action to prevent failure of the main gearbox (MGB) due to the degradation of the epicyclic module of the MGB and expands the applicability to include the ECF Model AS332L2 helicopter because an investigation showed a failure within the epicyclic reduction gear module resulted in the rupture of the MGB case and separation of the main rotor head of a model AS332L2 helicopter in 2009. These actions are intended to prevent failure of the MGB and subsequent loss of control of the helicopter.

DATES: This AD becomes effective February 22, 2012.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of February 22, 2012.

We must receive comments on this AD by April 9, 2012.

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

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

Examining the AD Docket: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

For service information identified in this AD, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, Texas 75052, telephone (972) 641–0000 or (800) 232–0323, fax (972) 641–3775, or at *http://www.eurocopter.com/techpub.* You may review copies of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Rao Edupuganti, Aerospace Engineer, FAA, Rotorcraft Directorate, Regulations and Policy Group, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–4389; fax: (817) 222–5961, email *rao.edupaganti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments prior to it becoming effective. However, we invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that resulted from adopting this AD. The most helpful comments reference a specific portion of the AD, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit them only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking during the comment period. We will consider all the comments we receive and may conduct additional rulemaking based on those comments.

Discussion

We issued Emergency AD (EAD) 2009–09–51 on April 17, 2009, to all known owners and operators of the Eurocopter Model EC225LP helicopter, and published that EAD as Amendment 39–16101 (74 FR 65679, December 11, 2009) to require determining whether or not the ''CHIP'' detector light on the instrument panel had previously illuminated. If the ''CHIP'' detector light had illuminated because of a metal particle on the chip detector of the module, or if you could not determine from the maintenance records which ''CHIP'' detector caused the ''CHIP'' detector light to illuminate, or if the chip detector light stayed illuminated after the ''CHIP'' detector switch was turned to the ''CHIP PULSE'' setting, you are required to replace the module with an airworthy module before further flight. You are also required, before further flight, to inspect the MGB module magnetic ''CHIP'' detector electrical circuit and determine whether the system is functioning properly, including whether the ''CHIP'' detector light annunciates on the instrument panel. This condition, if not corrected, could result in failure of the MGB and loss of control of the helicopter.

Since issuing that AD, we have determined the AD should also apply to the Model AS332L2 helicopters. We have also determined that we incorrectly described a part as ''magnetic plug'', and the correct nomenclature is ''chip detector.'' Finally, we have determined that modifying the chip collector and inspecting the chip detector should be required to enhance the early detection capability of the chip detectors of the gearbox sump and the epicyclic module.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Emergency AD No. 2009–0099–E, dated April 23, 2009 (EAD No. 2009–0099–E), which supersedes AD No. 2009–0087–E, dated April 11, 2009 and AD No. 2009–0095–E, dated April 17, 2009, to correct an unsafe condition for the Eurocopter Model AS332L2 and EC225LP helicopters. EASA advises that early investigations showed that a failure within the epicyclic reduction gear module of the MGB resulted in the rupture of the MGB case, which allowed the main rotor head to separate from the helicopter.

FAA's Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, their technical representative, has notified us of the unsafe condition described in the EASA AD. We are issuing this AD

because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs.

Related Service Information

Eurocopter has issued two Emergency Alert Service Bulletins (EASBs) with four numbers: No. 05.00.81 for FAA type-certificated Model AS332L2 helicopters; No. 05.00.58 for non-FAA type-certificated military Model AS532A2 and U2 helicopters; No. 05A016 for non-FAA type-certificated military Model EC725AP helicopters; and No. 05A017 for FAA type-certificated Model EC225LP helicopters. Both EASBs are Revision 2, and are dated April 23, 2009. The EASBs specify checking the chip detector on the MGB epicyclic module, modifying the main module chip collector, reidentifying the chip collector, and installing the chip collector (MOD 0752522). EASA classified these EASBs, or later approved versions, as mandatory and issued EAD No. 2009–0099–E to ensure continued airworthiness of these helicopters.

AD Requirements

This AD requires:

• Determining from the maintenance records whether, within the last 200 hours time-in-service (TIS), the ''CHIP'' detector light illuminated because of a metal particle on the chip detector of the module, and if so, whether the ''CHIP'' detector light stayed illuminated after the ''CHIP'' detector switch was turned to the ''CHIP PULSE'' setting to activate the ''fuzz burn-off'' feature.

• If the maintenance records indicate that the ''CHIP'' detector light illuminated because of a metal particle on the chip detector of the module, and the ''CHIP'' detector light stayed illuminated after the ''CHIP'' detector switch was turned to the ''CHIP PULSE'' setting, replace the module with an airworthy module before further flight.

• If the maintenance records do not indicate which ''CHIP'' detector caused the ''CHIP'' detector light to illuminate, or whether the detector light stayed illuminated after the ''CHIP'' detector switch was turned to the ''CHIP PULSE'' setting, replace the module with an airworthy module before further flight.

• Inspecting the MGB module magnetic chip detector electrical circuit and determining whether the system is functioning properly, including whether the ''CHIP'' detector light annunciates on the instrument panel (Vehicle Monitoring System Screen).

• Thereafter, if the ''CHIP'' detector light illuminates, stays illuminated after the ''CHIP'' detector switch is turned to the ''CHIP PULSE'' setting, and there is a metal particle on the epicyclic module chip detector, (rather than the main reduction gear (lower MGB), the flared housing (mast assembly), the intermediate gearbox, or the tail rotor gearbox chip detectors) that caused the ''CHIP'' detector light to illuminate, replace the module with an airworthy module.

• Unless accomplished previously, within 50 hours TIS, remove, modify, reidentify, and reinstall the chip collector.

• Before installing a MGB on any Eurocopter Model AS332L2 or EC225LP helicopter, modify, reidentify, and reinstall the chip collector in accordance with paragraph (f)(3) of this AD.

Differences Between This AD and the EASA AD

The differences between this AD and the EASA AD are:

• We use the term ''hours time-in-service'' rather than ''flight hours'' to describe compliance times.

• We use the term ''chip detector'' rather than ''magnetic plug'' to refer to the same part.

• If it is determined that within the past 200 hours TIS a ''CHIP'' light was caused by a particle in the module, we require replacing the module with an airworthy module rather than inspecting it and returning the same module to service.

• We do not mandate a calendar time for complying with this AD.

• The EASA AD specifies, for Eurocopter Model AS332L2 helicopters, checking the chip detector of the module after the last flight of the day, not to exceed 10 hours TIS, and for the Model EC225LP helicopters, complying with the maintenance manual each time a particle is detected. This AD requires treating both models the same, since both models have the same type of chip detectors and anticipate compliance with ''normal'' maintenance procedures each time a particle is detected after accomplishing paragraph (f)(3) of this AD.

• We do not require returning unairworthy parts or found particles to the manufacturer.

Costs of Compliance

We estimate that this AD will affect 4 helicopters of U.S. registry. We estimate that it will take about 1.0 work hour to inspect maintenance records to determine if a ''CHIP'' light illuminated within the past 200 hours TIS; 10 work-hours to remove, inspect, and replace a module; 14 work-hours to remove, modify, and replace the module to incorporate the ''CHIP'' collector and flange modifications (MOD 0752522); and 0.2 work-hour, per inspection, to conduct the initial and repetitive inspection of the chip detector for metal particles. The average labor rate is $85 per work-hour, and we estimate it will cost $85 to inspect the maintenance records; $850 to remove, inspect, and replace a module; $1,190 to incorporate MOD 0752522; and $408 to inspect the chip detector (assumes 24 inspections per year per helicopter), for an estimated total labor cost of $2,533 per helicopter. Required parts cost is approximately $512,318 to replace a module. Based on these figures, we estimate the cost of this AD on U.S. operators is $522,450, assuming all required inspections and modifications are completed on all helicopters and 1 helicopter requires a module replacement

FAA's Justification and Determination of the Effective Date

The short compliance time involved is required because the previously described critical unsafe condition can adversely affect both the structural integrity and controllability of the helicopter. Therefore, because the determination of the ''CHIP'' light illumination, inspection, and replacement of the module (on condition) are required before further flight, this AD must be issued immediately.

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

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation

is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed, I certify that this AD:

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

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

3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2012–01–03 Eurocopter France: Amendment No. 39–16914; Docket No. FAA–2012–0005; Directorate Identifier 2010–SW–091–AD.

(a) *Applicability.* This AD applies to Model AS332L2 and EC225LP helicopters, certificated in any category.

(b) *Unsafe Condition.* This AD defines the unsafe condition as degradation of the epicyclic reduction gear module within the main gearbox (MGB). This condition could result in failure of the MGB and subsequent loss of control of the helicopter.

(c) *Other Affected ADs.* This AD supersedes AD 2009–09–51, Amendment 39–16101, Docket No. FAA–2009–1089, Directorate Identifier 2009–SW–16–AD, (74 FR 65679, Dec. 11, 2009).

(d) *Effective Date.* This airworthiness directive (AD) becomes effective February 22, 2012.

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

(f) *Required Actions.* To prevent failure of the main gearbox (MGB) and loss of control of the helicopter:

(1) Before further flight:

(i) Determine from the maintenance records whether, within the last 200 hours time-in-service (TIS), the ''CHIP'' detector light illuminated because of a metal particle on the chip detector of the MGB epicyclic module (module), and if so, whether the ''CHIP'' detector light stayed illuminated after the ''CHIP'' detector switch was turned to the ''CHIP PULSE'' setting to activate the ''fuzz burn-off'' feature.

(A) If the maintenance records indicate that the ''CHIP'' detector light illuminated because of a metal particle on the chip detector of the module, and the ''CHIP'' detector light stayed illuminated after the ''CHIP'' detector switch was turned to the ''CHIP PULSE'' setting, replace the module with an airworthy module before further flight.

(B) If the maintenance records do not indicate which ''CHIP'' detector caused the ''CHIP'' detector light to illuminate, or whether the detector light stayed illuminated after the ''CHIP'' detector switch was turned to the ''CHIP PULSE'' setting, replace the module with an airworthy module before further flight.

(ii) Inspect the module magnetic chip detector electrical circuit and determine whether the system is functioning properly, including whether the ''CHIP'' detector light annunciates on the instrument panel (Vehicle Monitoring System Screen).

(2) After accomplishing paragraph (f)(1) of this AD, thereafter, if the ''CHIP'' detector light illuminates, stays illuminated after the chip detector switch is turned to the ''CHIP PULSE'' setting, and there is a metal particle on the module magnetic chip detector (rather than the main reduction gear (lower MGB), the flared housing (mast assembly), the intermediate gearbox, or the tail rotor gearbox chip detectors) that caused the ''CHIP'' detector light to illuminate, replace the module with an airworthy module.

(3) Within 50 hours TIS, remove, modify, reidentify, and reinstall the chip collector as shown in Figures 2 through 5, and in accordance with the Accomplishment Instructions, paragraph 2.B.3.b.1) through 2.B.3.b.5) of Eurocopter Emergency Alert Service Bulletin (EASB) No. 05.00.81, Revision 2, dated April 23, 2009, or Eurocopter EASB No. 05A017, Revision 2, dated April 23, 2009, for your model helicopter.

(4) Before installing a MGB, modify, reidentify, and reinstall the chip collector in accordance with paragraph (f)(3) of this AD.

Note 1 to paragraph (f) of this AD: Eurocopter has issued two EASBs with four different numbers (Nos. 05.00.81, 05.00.58, 05A017, and 05A016) that apply to 5 different Eurocopter model helicopters. EASB No. 05.00.58 is for Eurocopter military Model AS532A2, and U2 helicopters, and EASB No. 05A016 is for Eurocopter military Model EC725AP helicopters that are non-FAA type-certificated. EASB No. 05.00.81 is for FAA type-certificated Eurocopter Model AS332L2 helicopters and EASB No. 05A017 is for FAA type-certificated Eurocopter Model EC225LP helicopters. This AD does not incorporate by reference EASB Nos. 05A016 or 05.00.58.

(g) *Alternative Methods of Compliance (AMOCs).*

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Rao Edupuganti, Aerospace Engineer, FAA, Rotorcraft Directorate, Regulations and Policy Group, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–4389; fax: (817) 222–5961, email *rao.edupaganti@faa.gov*.

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

(h) *Additional Information.* The subject of this AD is addressed in European Aviation Safety Agency AD No. 2009–0099–E, dated April 23, 2009.

(i) *Subject.* JASC Code: 6300: Rotor Drive System.

(j) *Material Incorporated by Reference.* You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) of the following service information under 5 U.S.C. 552(a) and 1 CFR part 51:

(1) Eurocopter Emergency Alert Service Bulletin No. 05.00.81, Revision 2, dated April 23, 2009, for the model AS332L2; and

(2) Eurocopter Emergency Alert Service Bulletin No. 05A017, Revision 2, dated April 23, 2009, for the model EC225LP helicopters.

(3) For service information identified in this AD, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, Texas 75052, telephone (972) 641–0000 or (800) 232–0323, fax (972) 641–3775, or at *http://www.eurocopter.com/techpub.*

(4) You may review copies of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth Texas 76137 or 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.*

Issued in Fort Worth, Texas, on December 28, 2011.

M. Monica Merritt,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–1118 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0086; Directorate Identifier 2011–SW–045–AD; Amendment 39–16936; AD 2012–02–13]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Helicopters

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

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Eurocopter France EC130B4 helicopters that have not had Eurocopter Modification 073880 incorporated. This AD is prompted by several reports of cracks in the tailboom/Fenestron junction frame, which could result in structural failure of the tail boom, resulting in detachment of the Fenestron (tail rotor) and subsequent loss of control of the helicopter. We are issuing this AD to correct the unsafe condition on these helicopters.

DATES: This AD becomes effective February 22, 2012.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of February 22, 2012.

We must receive comments on this AD by April 9, 2012.

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

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

Examining the AD Docket: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (telephone (800) 647–5227) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

For service information identified in this AD, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, TX 75052, telephone (972) 641–0000 or (800) 232–0323, fax (972) 641–3775, or at *http://www.eurocopter.com/techpub.* You may review copies of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth Texas 76137.

FOR FURTHER INFORMATION CONTACT: Jim Grigg, Manager, FAA, Rotorcraft Directorate, Safety Management Group, 2601 Meacham Blvd., Fort Worth, TX 76137, telephone (817) 222–5126, email: *jim.grigg@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2011–0116, dated July 6, 2011 (AD 2011–0116) to correct an unsafe condition for Eurocopter EC 130 B4 helicopters. EASA advises of several reports of cracks in the tailboom/Fenestron junction frame. Prompted by these reports, Eurocopter published Information Notice No. 2167–I–53 (2167–I–53). Since publication of 2167–I–53, new cases of cracks in the tailboom/Fenestron junction frame have been reported. Examination of the parts revealed the cracks were longer than the previously reported cracks and started to develop in the plane of the rivet head countersink on the right hand (RH) side of the Fenestron and spread to the web of the frame. This condition, if not corrected, could lead to structural failure, which could result in Fenestron detachment and consequent loss of control of the helicopter. AD 2011–0116 requires repetitive inspections of the affected area and depending on findings, accomplishing corrective actions.

FAA's Determination

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

Related Service Information

We reviewed Eurocopter Emergency Alert Service Bulletin 53A019, dated June 14, 2011 (EASB). The EASB describes procedures for inspecting the RH side of the tailboom/Fenestron junction frame from the inside and outside for cracks. If a crack is present, the EASB requires contacting Eurocopter for approved repair instructions.

AD Requirements

This AD requires compliance with specified portions of the manufacturer's service bulletin, except as discussed under ''Differences Between this AD and the EASA AD.''

Differences Between This AD and the EASA AD

The EASA AD allows for flights for a certain period of time with known cracks. Except for limited ferry flights, this AD does not permit operations with known cracks. The EASA AD allows for an initial inspection which does not

require stripping the paint, and then stripping the paint prior to inspection within 110 flight hours. This AD mandates stripping the paint as part of the initial inspection.

Costs of Compliance

We estimate that this AD will affect 109 helicopters of U.S. Registry.

We estimate that operators may incur the following costs in order to comply with this AD. To inspect the tailboom/Fenestron junction frame for a crack will require 1 work-hour at an average labor cost of $85 per hour, for a total cost per inspection cycle of $85 per helicopter and $9,265 for the entire fleet. To replace a tailboom with an airworthy tailboom will require 50 work-hours and a parts cost of $60,000, for a total cost per helicopter of $64,250.

FAA's Justification and Determination of the Effective Date

These helicopters are used primarily by air tour and helicopter Emergency medical services. Helicopters used in these industries average in excess of 100 hours TIS per month. The cracks are in a primary structure of the helicopter that may prevent further safe flight. Therefore, we find that the risk to the flying public justifies waiving notice and comment prior to the adoption of this rule because the required corrective actions must be accomplished within 10 hours TIS, a very short time period based on the average flight-hour utilization rate of these helicopters. Since an unsafe condition exists that requires the immediate adoption of this AD, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify that this AD:

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

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

3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2012–02–13 Eurocopter France: Amendment 39–16936; Docket No. FAA–2012–0086; Directorate Identifier 2011–SW–045–AD.

(a) *Applicability.* This AD applies to Model EC130B4 helicopters that do not have Eurocopter Modification (MOD) 073880 incorporated, all serial numbers, certificated in any category.

(b) *Unsafe Condition.* This AD defines the unsafe condition as cracks on the tailboom/Fenestron junction frame. This condition could result in structural failure of the tailboom, detachment of the Fenestron, and subsequent loss of control of the helicopter.

(c) *Effective Date.* This airworthiness directive (AD) becomes effective February 22, 2012.

(d) *Compliance.* You are responsible for performing each action required by this AD within the specified compliance time unless accomplished previously.

(e) *Corrective Actions.*

(1) Within 10 hours time-in-service (TIS):

(i) Inspect the right hand side of the tailboom/Fenestron junction frame for cracks in the web from the inside as depicted in Details C and D of Figure 2 of Eurocopter Emergency Alert Service Bulletin 53A019, dated June 14, 2011 (EASB).

(ii) Strip the paint on the areas of the right hand side of the tailboom/Fenestron junction frame depicted in Detail E of Figure 3 of the EASB. Apply a coat of primer to the stripped area. Apply varnish to the stripped area.

(iii) Inspect the stripped area of the frame for cracks from the outside.

(2) Thereafter at intervals not to exceed 50 hours TIS, inspect the frame by following the inspection requirements of paragraphs (1)(i) and (1)(iii) of this AD.

(3) If there is a crack, before further flight, replace the tailboom with an airworthy tailboom that incorporates Eurocopter MOD 073880.

(4) After the effective date of this AD, do not install a tailboom that does not incorporate Eurocopter MOD 073880 on any helicopter.

(f) *Special flight permits.* Special flight permits may be issued for up to 2 hours TIS to ferry the helicopter to a repair facility if the crack does not extend into the web of the tailboom/Fenestron junction frame.

(g) *Alternative Methods of Compliance (AMOCs).*

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Jim Grigg, Manager, FAA, Rotorcraft Directorate, Safety Management Group, 2601 Meacham Blvd., Fort Worth, TX 76137, telephone (817) 222–5126, email: *jim.grigg@faa.gov.*

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

(h) *Subject.* Joint Aircraft System Component (JASC) Code: 5302: Rotorcraft Tail Boom.

(i) *Additional Information.* The subject of this AD is addressed in European Aviation Safety Agency (France) AD No. 2011–0116, dated July 6, 2011.

(j) *Material Incorporated by Reference.* You must use the specified portions of Eurocopter Emergency Alert Service Bulletin 53A019, dated June 14, 2011, to do the specified actions required by this AD.

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

(2) For service information identified in this AD, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, TX 75052, telephone (972) 641–0000

or (800) 232–0323, fax (972) 641–3775, or at *http://www.eurocopter.com/techpub.*

(3) You may review copies of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth Texas 76137 or 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.*

Issued in Fort Worth, Texas, on January 23, 2012.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–2418 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1171; Directorate Identifier 2011–NM–101–AD; Amendment 39–16932; AD 2012–02–09]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 737–100, –200, –200C, and –300 series airplanes. This AD was prompted by a report from the airplane manufacturer that airplanes were assembled with air distribution ducts in the environmental control system (ECS) wrapped with Boeing Material Specification (BMS) 8–39 or Aeronautical Materials Specifications (AMS) 3570 polyurethane foam insulation, a material with fire-retardant properties that deteriorate with age. This AD requires reworking certain air distribution ducts in the ECS. We are issuing this AD to prevent ignition of the BMS 8–39 or AMS 3570 polyurethane foam insulation on the duct assemblies of the ECS due to a potential electrical arc, which could start a small fire and lead to a larger fire that may spread throughout the airplane through the ECS.

DATES: This AD is effective March 13, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 13, 2012.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone (206) 544–5000, extension 1; fax (206) 766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Kimberly A. DeVoe, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6495; fax: (425) 917–6590; email: *Kimberly.Devoe@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM published in the **Federal Register** on November 7, 2011 (76 FR 68666). That NPRM proposed to require reworking certain air distribution ducts in the ECS.

Comments

We gave the public the opportunity to participate in developing this AD. We have considered the comments received. Boeing supports the NPRM (76 FR 68666, November 7, 2011).

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD as proposed—except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (76 FR 68666, November 7, 2011) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (76 FR 68666, November 7, 2011).

Costs of Compliance

We estimate that this AD affects 292 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Duct assembly rework/part marking	250 work-hours × $85 per hour = $21,250	$3,545	$24,795	$7,240,140

Authority for This Rulemaking

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

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

products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2012–02–09 The Boeing Company: Amendment 39–16932; Docket No. FAA–2011–1171; Directorate Identifier 2011–NM–101–AD.

(a) Effective Date

This AD is effective March 13, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–100, –200, –200C, and –300 series airplanes, certificated in any category; as identified in Boeing Service Bulletin 737–21A1132, Revision 3, dated February 16, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 21, Air conditioning.

(e) Unsafe Condition

This AD was prompted by a report from the airplane manufacturer that airplanes were assembled with air distribution ducts in the environmental control system (ECS) wrapped with Boeing Material Specification (BMS) 8–39 or Aeronautical Materials Specifications (AMS) 3570 polyurethane foam insulation, a material with fire retardant properties that deteriorate with age. We are issuing this AD to prevent ignition of the BMS 8–39 or AMS 3570 polyurethane foam insulation on the duct assemblies of the ECS due to a potential electrical arc, which could start a small fire and lead to a larger fire that may spread throughout the airplane through the ECS.

(f) Compliance

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

(g) Air Distribution Duct Rework

Within 72 months after the effective date of this AD, rework the applicable duct assemblies in the ECS specified in and in accordance with the Accomplishment Instructions and Appendix A of Boeing Service Bulletin 737–21A1132, Revision 3, dated February 16, 2011.

(h) Credit for Actions Accomplished in Accordance With Previous Service Information

Reworking the applicable duct assemblies in the ECS in accordance with the Accomplishment Instructions and Appendix A of Boeing Service Bulletin 737–21A1132, Revision 2, dated June 13, 2007, before the effective date of this AD is acceptable for compliance with the corresponding actions required by paragraph (g) of this AD.

(i) Parts Installation

As of the effective date of this AD, no person may install an ECS duct assembly with BMS 8–39 or AMS 3570 polyurethane foam insulation on any airplane.

(j) Alternative Methods of Compliance (AMOCs)

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

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

(k) Related Information

(1) For more information about this AD, contact Kimberly A. DeVoe, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6495; fax: (425) 917–6590; email: *Kimberly.Devoe@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; phone: 206–544–5000, extension 1; fax: 206–766–5680; email: me.boecom@boeing.com; Internet: *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

(l) Material Incorporated by Reference

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 of the following service information:

(i) Boeing Service Bulletin 737–21A1132, Revision 3, dated February 16, 2011.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone (206) 544–5000, extension 1; fax (206) 766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

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

Issued in Renton, Washington, on January 12, 2012.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–2004 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1091; Directorate Identifier 2011–NM–037–AD; Amendment 39–16916; AD 2012–01–04]

RIN 2120–AA64

Airworthiness Directives; EADS CASA (Type Certificate Previously Held by Construcciones Aeronauticas, S.A.) Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Model CN–235–100, CN–235–200, and CN–235–300 airplanes. This AD was prompted by reports of failures of the engine condition control cable which led to an engine shut down. This AD requires an inspection to determine the part number of the engine condition control cable, repetitive inspections for excessive wear of the affected engine condition control cable, and replacement of the affected part. We are issuing this AD to detect and correct failure of the engine condition control cable which could cause a consequent runway excursion during take-off, or reduced control of the airplane during flight.

DATES: This AD becomes effective March 13, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 13, 2012.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on October 25, 2011 (76 FR 65995). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> EADS–CASA received reports of engine condition control cable (Part Number (P/N) 35–56382–0003) failures that, in one of the cases, occurred during the starting phase of one engine which led to an engine shut down following the procedures described within the Aircraft Operation Manual.
>
> The investigation revealed that the cable failure is due to a fracture in the area of the pulley MS 20219–1. The root cause of the fracture is an unsuitable ratio between the diameter of the pulley and the cable type and diameter.
>
> This condition, if not detected and corrected, could lead to the engine condition control cable failure and consequent runway excursion if it occurs during take-off or reduced control of the aeroplane if it occurs during flight.
>
> To address this condition, EADS–CASA has developed an engine condition control cable P/N 35–56382–0005 with improved characteristics.
>
> For the reason described above, this [EASA] AD requires, at first, [an inspection to determine the part number of the engine condition control cable], [repetitive detailed] inspections for [excessive wear] of the [affected] engine condition control cable, and its replacement (scheduled or depending on the inspection findings) with engine condition control cable P/N 35–56382–0005.

You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (76 FR 65995, October 25, 2011) or on the determination of the cost to the public.

Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (76 FR 65995, October 25, 2011) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (76 FR 65995, October 25, 2011).

Costs of Compliance

We estimate that this AD will affect 7 products of U.S. registry. We also estimate that it will take about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $1,190, or $170 per product.

In addition, we estimate that any necessary follow-on actions would take about 12 work-hours and require parts costing $1,087, for a cost of $2,107 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM 2011–1091 (76 FR 65995, October 25, 2011), the regulatory evaluation, any comments received, and

other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2012–01–04 EADS CASA (Type Certificate Previously Held by Construcciones Aeronauticas, S.A.): Amendment 39–16916. Docket No. FAA–2011–1091; Directorate Identifier 2011–NM–037–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective March 13, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to EADS CASA (Type Certificate previously held by Construcciones Aeronauticas, S.A.) Model CN–235–100, CN–235–200, and CN–235–300 airplanes; certificated in any category; serial numbers C–030 through C–149 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 76: Engine controls.

(e) Reason

This AD was prompted by reports of failures of the engine condition control cable which led to an engine shut down. We are issuing this AD to detect and correct failure of the engine condition control cable which could cause a consequent runway excursion during take-off, or reduced control of the airplane during flight.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Inspections

Within 9 months or 300 flight hours, whichever occurs first after the effective date of this AD, inspect to determine whether the engine condition control cable has part number (P/N) 35–56382–0003. If an engine condition control cable having P/N 35–56382–0003 is installed, within 9 months or 300 flight hours, whichever occurs first after the effective date of this AD, do a detailed inspection for excessive wear of the engine condition control cable (including control rods, levers, and pulleys near the flight compartment center console having incorrect freedom and range of movement, incorrect assembly and locking, distortion, damage, corrosion, incorrect security of attachment; and control rod end fittings having excessive wear, *i.e.,* kinks or distortion, corrosion, reduced diameter of cable, and broken wires); in accordance with Section 76–10–00, ''Power and Condition Control,'' Block 601 (Configuration 1), ''Inspection/Check,'' Paragraph 1.B., of the Airbus Military CN–235 Aircraft Maintenance Manual, Revision 57, dated July 15, 2010.

(h) Repetitive Inspections

For airplanes with engine condition control cable having P/N 35–56382–0003: Within 9 months or 300 flight hours after doing the detailed inspection required by paragraph (g) of this AD, whichever occurs first, repeat the detailed inspection specified in paragraph (g) of this AD.

(i) Replacement of Engine Condition Control Cable Due to Excessive Wear

If, during any inspection required by paragraph (g) or (h) of this AD, excessive wear of the engine condition control cable is found: Before further flight, replace the engine condition control cable with P/N 35–56382–0005, in accordance with Section 76–10–12, ''Power and Condition Control Cables,'' Block 401 (Configuration 1), ''Removal/Installation,'' Paragraph 3., of the Airbus Military CN–235 Aircraft Maintenance Manual, Revision 57, dated July 15, 2010.

(j) Replacement of Engine Condition Control Cable

Within 27 months or 900 flight hours, whichever occurs first after the effective date of this AD: Unless the engine condition control cable has already been replaced in accordance with paragraph (i) of this AD, replace the engine condition control cable having P/N 35–56382–0003 with an engine condition control cable having P/N 35–56382–0005, in accordance with Section 76–10–12, ''Power and Condition Control Cables,'' Block 401 (Configuration 1), ''Removal/Installation,'' Paragraph 3., of the Airbus Military CN–235 Aircraft Maintenance Manual, Revision 57, dated July 15, 2010.

(k) Parts Installation

As of the effective date of this AD, no person may install an engine condition control cable having P/N 35–56382–0003, on any airplane.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(m) Related Information

Refer to MCAI EASA Airworthiness Directive 2011–0010, dated January 20, 2011; and Section 76–10–00, ''Power and Condition Control,'' Block 601 (Configuration 1), ''Inspection/Check,'' Paragraph 1.B., and Section 76–10–12, ''Power and Condition Control Cables,'' Block 401 (Configuration 1), ''Removal/Installation,'' Paragraph 3., of the Airbus Military CN–235 Aircraft Maintenance Manual, Revision 57, dated July 15, 2010; for related information.

(n) Material Incorporated by Reference

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the **Federal Register** approved the incorporation by reference (IBR) of the following service information under 5 U.S.C. 552(a) and 1 CFR part 51:

(i) Section 76–10–00, ''Power and Condition Control,'' Block 601 (Configuration 1) (pages 601 through 606), ''Inspection/Check,'' Paragraph 1.B. of the Airbus Military CN–235 Aircraft Maintenance Manual, Revision 57, dated July 15, 2010. Only the title page and Record of Revisions of Airbus Military CN–235 Aircraft Maintenance Manual, Revision 57, dated July 15, 2010, specify the revision level of the document.

(ii) Section 76–10–12, ''Power and Condition Control Cables,'' Block 401 (Configuration 1) (pages 401 through 406), ''Removal/Installation,'' Paragraph 3., of the Airbus Military CN–235 Aircraft Maintenance Manual, Revision 57, dated July 15, 2010. Only the title page and Record of Revisions of Airbus Military CN–235 Aircraft Maintenance Manual, Revision 57, dated July 15, 2010, specify the revision level of the document.

(2) For service information identified in this AD, contact EADS–CASA, Military Transport Aircraft Division (MTAD), Integrated Customer Services (ICS),

Technical Services, Avenida de Aragón 404, 28022 Madrid, Spain; telephone +34 91 585 55 84; fax +34 91 585 55 05; email *MTA.TechnicalService@casa.eads.net;* Internet *http://www.eads.net.*

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

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on January 6, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–2291 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1204; Directorate Identifier 2010–NM–147–AD; Amendment 39–16931; AD 2012–02–08]

RIN 2120–AA64

Airworthiness Directives; Aviation Communication & Surveillance Systems (ACSS) Traffic Alert and Collision Avoidance System (TCAS) Units

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain ACSS TCAS units installed on but not limited to various transport and small airplanes. This AD was prompted by reports of anomalies with TCAS units during a flight test over a high density airport. The TCAS units dropped several reduced surveillance aircraft tracks because of interference limiting. This AD requires upgrading software. We are issuing this AD to prevent TCAS units from dropping tracks, which could compromise separation of air traffic and lead to subsequent mid-air collisions.

DATES: This AD is effective March 13, 2012.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of March 13, 2012.

ADDRESSES: For service information identified in this AD, contact Aviation Communication & Surveillance Systems, LLC, 19810 North 7th Avenue, Phoenix, Arizona 85027–4741; phone: 623–445–7040; fax: 623–445–7004; email: *acss.orderadmin@L-3com.com;* Internet: *http://www.acss.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Abby Malmir, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: 562–627–5351; fax: 562–627–5210; email: *abby.malmir@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to the specified products. That SNPRM was published in the **Federal Register** on October 7, 2011 (76 FR 62321). The original NPRM (75 FR 81512, December 28, 2010) proposed to require upgrading software. The SNPRM proposed to require new updated software for certain TCAS units.

Comments

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

Request To Allow TCAS 7.1 Modification

UPS, Qantas, and Dassault requested that we allow the TCAS 7.1 modification (as an alternative to the modification specified in the proposed AD) as an acceptable method of compliance with the proposed AD, since the 7.1 modification incorporates the intent of the proposed AD. The commenters reported that the European Aviation Safety Agency (EASA) has proposed rulemaking to mandate the 7.1 modification for airplanes operating in European airspace (EASA Notice of Proposed Amendment 2010–03, dated March 25, 2010). The requirements of the FAA and EASA rules therefore could overlap: an airplane equipped with the 7.1 modification in compliance with the EASA rule would require an alternative method of compliance (AMOC) to be in compliance with the FAA AD. The commenters concluded that, if the 7.1 modification were allowed in the FAA AD, these affected ACSS TCAS computers would need to be modified only once and would still be in compliance with both FAA and EASA rules. Dassault noted that ACSS is developing service bulletins to provide procedures for upgrading to the 7.1 standard.

We disagree to change this final rule to also allow the version 7.1 modification for all TCAS products. ACSS has not developed all software versions that implement the 7.1 standard for all affected TCAS units and airplane models covered by this AD, so there is no complete list of service information available that includes the procedures and information for incorporating the 7.1 modification. Because additional changes will likely be added in the future, additional software versions with different part numbers will be produced, and it will be necessary to issue AMOCs to accommodate requests to install such future software versions. Under the provisions of paragraph (i) of this final rule, we will consider requests for an alternative method of compliance with the AD requirements to allow different software versions.

Request To Extend Compliance Time

UPS requested that we reinstate the 48-month compliance time, as originally proposed, to accommodate the extent of the work necessary to comply with the proposed AD—including updating the fleet supplemental type certificates (STCs), and changing affected maintenance programs. Qantas noted that reducing the compliance time from 48 to 36 months will affect U.S. operators and also affect airplanes operating outside the U.S. Quantas stated many operators will choose the option to do the modification off-wing (a burden on authorized workshops due

to the number of affected airplanes), and this will affect U.S. operators' ability to comply with the reduced compliance time.

We disagree to change the compliance time for several reasons. Since the original NPRM was issued, we have received a report that another ''Altitude Failure Annunciation'' occurred. We had based the proposed 36-month compliance time on the anticipated availability of the corrective action by December 2011, and determined that the compliance time change was necessary to address the identified unsafe condition. ACSS has completed the development of the software modification for fixing this anomaly for all the TCAS models and has received FAA approval. Therefore, since the modification involves only a software change, we have determined that 36 months is sufficient to complete the requirements of the AD. We have not changed the final rule regarding this issue. Under the provisions of paragraph (i) of the final rule, however, we may consider requests to adjust the compliance time if data are submitted to substantiate that such an adjustment would provide an acceptable level of safety.

Request To Revise Cost Estimate

Qantas suggested that we consider additional factors that could increase the cost estimate for operators that choose to do the modification off-wing in a workshop.

We infer that Quantas is requesting that we revise the cost estimate provided in the proposed AD. We disagree. Based on available data, the manufacturer provided the number of work-hours necessary to do the required actions. This number represents the time necessary to perform only the actions actually required by this AD. We recognize that, in doing the actions required by an AD, operators might incur incidental costs in addition to the direct costs. The cost analysis in AD rulemaking actions, however, typically does not include the additional costs, which might vary significantly among operators and are almost impossible to calculate. We have not changed the final rule regarding this issue.

Explanation of Change to This AD

We have revised paragraph (c) of this AD to clarify the document reference specified in that paragraph.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the change described previously.

Costs of Compliance

We estimate that this AD affects 9,000 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Software upgrade	2 work-hours × $85 per hour = $170	$2,870	$3,040	$27,360,000

Authority for this Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2012–02–08 Aviation Communication & Surveillance Systems, LLC: Amendment 39–16931; Docket No. FAA–2010–1204; Directorate Identifier 2010–NM–147–AD.

(a) Effective Date

This AD is effective March 13, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Aviation Communication & Surveillance Systems (ACSS) traffic alert and collision avoidance system (TCAS) units with part numbers identified in ACSS Technical Newsletter 8008359, Revision B, dated August 3, 2011, as installed on but not limited to various transport and small airplanes, certificated in any category.

Note 1 to paragraph (c) of this AD: Table 1 of this AD also provides a cross-referenced list of part numbers with associated service bulletins to help operators identify affected parts.

TABLE 1—SERVICE BULLETIN AND LRU CROSS-REFERENCE

ACCS Product—	Affected LRU Part Numbers (P/Ns)—	ACSS Service Bulletin—
TCAS 3000SP	9003500–10900, –10901, –10902, –55900, –55901, –55902, –57901, –65900, –65901, –65902.	8008221–001, Revision 01, dated February 4, 2011 (ATA Service Bulletin 9003500–34–6014).
TCAS 3000SP	9003500–10001, –10002, –10003, –10004, –55001, –55002, –55003, –55004, –65001, –65002, –65003, –65004.	8008222–001, Revision 01, dated February 4, 2011 (ATA Service Bulletin 9003500–34–6015).
TCAS 3000SP	9003500–10802	8008223–001, Revision 01, dated February 4, 2011 (ATA Service Bulletin 9003500–34–6016).
TCAS 2000	7517900–10003, –10004, –10006, –10007, –10011, –55003, –55004, –55006, –55007, –55009, –55011, –71003, –71004, –71006, –71007, –71011.	8008229–001, Revision 02, dated June 28, 2011 (ATA Service Bulletin 7517900–34–6040).
TCAS II	4066010–910, –912	8008230–001, Revision 02, dated June 28, 2011 (ATA Service Bulletin 4066010–34–6036).
Military TCAS 2000	7517900–56101, –56102, –56104, –56105, 56107	8008231–001, Revision 02, dated June 28, 2011 (ATA Service Bulletin 7517900–34–6041).
T2CAS	9000000–10002, –10003, –10004, –10005, –10006, –10008, –10204, –10205, –10206, –10208, –20002, –20003, –20004, –20005, –20006, –20008, –20204, –20205, –20206, –20208, –55002, –55003, –55004, –55005, –55006, –55008, –55204, –55205, –55206, –55208.	8008233–001, Revision 03, dated June 30, 2011 (ATA Service Bulletin 9000000–34–6016).
T2CAS	9000000–10110, –11111	8008234–001, Revision 02, dated June 30, 2011 (ATA Service Bulletin 9000000–34–6017).
TCAS 3000	9003000–10001, –10002, –10003, –55001, –55002, –55003, –65001, –65002, –65003.	8008235–001, Revision 02, dated February 3, 2011 (ATA Service Bulletin 9003000–34–6006).
Military TCAS 2000 MASS	7517900–20001, –20002, –65001, –65002	8008236–001, Revision 03, dated June 30, 2011 (ATA Service Bulletin 7517900–34–6042).
Military T2CAS MASS	9000000–30006, –40006, –60006	8008238–001, Revision 02, dated June 30, 2011 (ATA Service Bulletin 9000000–34–6018).

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 34, Navigation.

(e) Unsafe Condition

This AD was prompted by reports of anomalies with TCAS units during a flight test over a high density airport. The TCAS units dropped several reduced surveillance aircraft tracks because of interference limiting. We are issuing this AD to prevent TCAS units from dropping tracks, which could compromise separation of air traffic and lead to subsequent mid-air collisions.

(f) Compliance

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

(g) Upgrade Software

Within 36 months after the effective date of this AD, upgrade software for the ACSS TCAS, in accordance with the Accomplishment Instructions of the applicable ACSS publication identified in table 1 of this AD.

Note 2 to paragraph (g) of this AD: ACSS Service Bulletin 8008233–001 (ATA Service Bulletin 9000000–34–6016), Revision 03, dated June 30, 2011, contains three part numbers (P/Ns 9000000–10007, –20007, and –55007) that were never produced.

(h) Credit for Actions Done in Accordance With Previous Service Information

A software upgrade done before the effective date of this AD in accordance with the applicable service bulletin identified in paragraphs (h)(1) through (h)(13) of this AD is acceptable for compliance with the requirements of paragraph (g) of this AD.

(1) ACSS Service Bulletin 8008221–001 (ATA Service Bulletin 9003500–34–6014), dated May 27, 2010.

(2) ACSS Service Bulletin 8008222–001 (ATA Service Bulletin 9003500–34–6015), dated May 27, 2010.

(3) ACSS Service Bulletin 8008223–001 (ATA Service Bulletin 9003500–34–6016), dated May 27, 2010.

(4) ACSS Service Bulletin 8008229–001 (ATA Service Bulletin 7517900–34–6040), Revision 01, dated September 30, 2010.

(5) ACSS Service Bulletin 8008230–001 (ATA Service Bulletin 4066010–34–6036), Revision 01, dated February 1, 2011.

(6) ACSS Service Bulletin 8008231–001 (ATA Service Bulletin 7517900–34–6041), Revision 01, dated October 15, 2010.

(7) ACSS Service Bulletin 8008233–001 (ATA Service Bulletin 9000000–34–6016), Revision 02, dated February 1, 2011.

(8) ACSS Service Bulletin 8008234–001 (ATA Service Bulletin 9000000–34–6017), Revision 01, dated February 1, 2011.

(9) ACSS Service Bulletin 8008235–001 (ATA Service Bulletin 9003000–34–6006), dated June 4, 2010.

(10) ACSS Service Bulletin 8008236–001 (ATA Service Bulletin 7517900–34–6042), dated May 27, 2010.

(11) ACSS Service Bulletin 8008236–001 (ATA Service Bulletin 7517900–34–6042), Revision 02, dated February 1, 2011.

(12) ACSS Service Bulletin 8008238–001 (ATA Service Bulletin 9000000–34–6018), dated June 4, 2010.

(13) ACSS Service Bulletin 8008238–001 (ATA Service Bulletin 9000000–34–6018), Revision 01, dated February 1, 2011.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

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

(j) Related Information

For more information about this AD, contact Abby Malmir, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: (562) 627–5351; fax: (562) 627–5210; email: *abby.malmir@faa.gov.*

(k) Material Incorporated by Reference

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) of the following service information under 5 U.S.C. 552(a) and 1 CFR part 51:

(i) ACSS Service Bulletin 8008221–001, Revision 01, dated February 4, 2011 (ATA Service Bulletin 9003500–34–6014).

(ii) ACSS Service Bulletin 8008222–001, Revision 01, dated February 4, 2011 (ATA Service Bulletin 9003500–34–6015).

(iii) ACSS Service Bulletin 8008223–001, Revision 01, dated February 4, 2011 (ATA Service Bulletin 9003500–34–6016).

(iv) ACSS Service Bulletin 8008229–001, Revision 02, dated June 28, 2011 (ATA Service Bulletin 7517900–34–6040).

(v) ACSS Service Bulletin 8008230–001, Revision 02, dated June 28, 2011 (ATA Service Bulletin 4066010–34–6036).

(vi) ACSS Service Bulletin 8008231–001, Revision 02, dated June 28, 2011 (ATA Service Bulletin 7517900–34–6041).

(vii) ACSS Service Bulletin 8008233–001, Revision 03, dated June 30, 2011 (ATA Service Bulletin 9000000–34–6016).

(viii) ACSS Service Bulletin 8008234–001, Revision 02, dated June 30, 2011 (ATA Service Bulletin 9000000–34–6017).

(ix) ACSS Service Bulletin 8008235–001, Revision 02, dated February 3, 2011 (ATA Service Bulletin 9003000–34–6006).

(x) ACSS Service Bulletin 8008236–001, Revision 03, dated June 30, 2011 (ATA Service Bulletin 7517900–34–6042).

(xi) ACSS Service Bulletin 8008238–001, Revision 02, dated June 30, 2011 (ATA Service Bulletin 9000000–34–6018).

(xii) ACSS Technical Newsletter 8008359, Revision B, dated August 3, 2011.

(2) For service information identified in this AD, contact Aviation Communication & Surveillance Systems, LLC, 19810 North 7th Avenue, Phoenix, Arizona 85027–4741; phone: (623) 445–7040; fax: (623) 445–7004; email: *acss.orderadmin@L-3com.com;* Internet: *http://www.acss.com.*

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

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on January 17, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–2560 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1245; Directorate Identifier 2011–CE–033–AD; Amendment 39–16925; AD 2012–02–02]

RIN 2120–AA64

Airworthiness Directives; Cessna Aircraft Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for certain Cessna Aircraft Company (Cessna) Models 172R and 172S airplanes. That AD currently requires you to inspect the fuel return line assembly for chafing; replace the fuel return line assembly if chafing is found; and inspect the clearance between the fuel return line assembly and both the right steering tube assembly and the airplane structure, adjusting as necessary. Since we issued that AD, we have received a field report of a fuel return line chafing incident on a Cessna Model 172 airplane with a serial number (S/N) that was not included in the AD. This AD retains the actions of the current AD and adds S/Ns to the Applicability section of the AD. Chafing of the fuel return line assembly could lead to fire. This new AD requires the actions of the current AD and adds S/Ns to the Applicability section of the AD. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective March 13, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 13, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of March 6, 2008 (73 FR 5737, January 31, 2008).

ADDRESSES: For service information identified in this AD, contact Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, KS 67277; telephone: (316) 517–6000; fax: (316) 517–8500; email: *Customercare@cessna.textron.com;* Internet: *http://www.cessna.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Trenton Shepherd, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road Room 100, Wichita, Kansas 67209; phone: (316) 946–4143; fax: (316) 946–4107; email: *trent.shepherd@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2008–03–02, Amendment 39–15351 (73 FR 5737, January 31, 2008). That AD applies to the specified products. The NPRM published in the **Federal Register** on November 14, 2011 (76 FR 70379). That NPRM proposed to continue to require actions of the current AD and add S/Ns to the Applicability section of the AD.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (76 FR 70379, November 14, 2011) or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (76 FR 70379, November 14, 2011) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (76 FR 70379, November 14, 2011).

Costs of Compliance

We estimate that this AD affects 768 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of the fuel return line assembly for chafing and clearance.	1 work-hour × $85 per hour = $85	Not applicable ...	$85	65,280

The difference in estimated costs of this AD and AD 2008–03–02 (73 FR 5737, January 31, 2008) is an increase in the estimated labor cost for those airplanes affected by AD 2008–03–02 and the costs of the additional airplanes added to the AD.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement of the fuel return line assembly and adjustment of the clearance between the fuel return line assembly and both the right steering tube assembly and the airplane structure.	0.5 work-hour × $85 per hour = $42.50.	$123	$165.50

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2008–03–02, Amendment 39–15351 (73 FR 5737, January 31, 2008), and adding the following new AD:

2012–02–02 Cessna Aircraft Company: Amendment 39–16925; Docket No. FAA–2011–1245; Directorate Identifier 2011–CE–033–AD.

(a) Effective Date

This airworthiness directive (AD) is effective March 13, 2012.

(b) Affected ADs

This AD supersedes AD 2008–03–02, Amendment 39–15351 (73 FR 5737, January 31, 2008).

(c) Applicability

This AD applies to the following Cessna Aircraft Company airplanes, certificated in any category:

(1) *Group 1:* Model 172R, serial numbers (S/N) 17281188 through 17281390;

(2) *Group 2:* Model 172S, S/N 172S9491 through 172S10489;

(3) *Group 3:* Model 172R, S/N 17281391 through 17281572; and

(4) *Group 4:* Model 172S, S/N 172S10490 through 172S11073.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code Fuel, 28.

(e) Unsafe Condition

This AD was prompted by a field report of a fuel return line chafing incident on a Cessna Model 172 airplane with a serial number that was not in the Applicability statement of AD 2008–03–02 (73 FR 5737, January 31, 2008). Chafing of the fuel return line assembly could result in fuel leaking and fuel vapors, which could lead to fire. We are issuing this AD to correct the unsafe condition on these products.

(f) Compliance

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

(g) Inspection Requirement Retained From AD 2008–03–02, Amendment 39–15351 (73 FR 5737, January 31, 2008)

(1) *For Group 1 and Group 2 Airplanes:* Within the next 100 hours time-in-service (TIS) after March 6, 2008 (the effective date retained from AD 2008–03–02) or within the next 12 months after March 6, 2008 (the effective date retained from AD 2008–03–02), whichever occurs first, inspect the fuel return line assembly (Cessna part number (P/N) 0500118–49) for chafing. Do the inspection following Cessna Service Bulletin SB07–28–01, dated June 18, 2007; or Cessna Service

Bulletin SB07–28–01, Revision 1, dated September 22, 2011.

(2) *For Group 3 and Group 4 Airplanes:* Within the next 100 hours TIS after March 13, 2012 (the effective date of this AD) or within the next 12 months after March 13, 2012 (the effective date of this AD), whichever occurs first, inspect the fuel return line assembly (Cessna P/N 0500118–49) for chafing. Do the inspection following Cessna Service Bulletin SB07–28–01, Revision 1, dated September 22, 2011.

(h) Replacement Requirement Retained From AD 2008–03–02, Amendment 39–15351 (73 FR 5737, January 31, 2008)

For All Airplanes: Before further flight after the inspection required in paragraph (g)(1) or (g)(2) of this AD where evidence of chafing was found, replace the fuel return line assembly (Cessna P/N 0500118–49). Do the replacement following Cessna Service Bulletin SB07–28–01, dated June 18, 2007; or Cessna Service Bulletin SB07–28–01, Revision 1, dated September 22, 2011.

(i) Inspection and Adjustment Requirement Retained From AD 2008–03–02, Amendment 39–15351 (73 FR 5737, January 31, 2008)

For All Airplanes: Before further flight after the inspection required in paragraph (g)(1) or (g)(2) of this AD if no chafing is found or after the replacement required in paragraph (h) of this AD, whichever of the previous situations applies, inspect for a minimum clearance of 0.5 inch between the following parts throughout the entire range of copilot rudder pedal travel. If less than 0.5 inch clearance is found, before further flight, adjust the clearance. Follow paragraph 6 of the Instructions section of Cessna Service Bulletin SB07–28–01, dated June 18, 2007; or Cessna Service Bulletin SB07–28–01, Revision 1, dated September 22, 2011. This AD requires a minimum clearance of 0.5 inch. The requirements of this AD take precedence over the actions required in the service information.

(1) The fuel return line assembly (Cessna P/N 0500118–49) and the steering tube assembly (Cessna P/N MC0543022–2C); and

(2) The fuel return line assembly (Cessna P/N 0500118–49) and the airplane structure.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

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

(k) Related Information

For more information about this AD, contact Trenton Shepherd, Aerospace Engineer, Wichita ACO, FAA, 1801 Airport Road, Room 100, Wichita, Kansas 67209; phone: (316) 946–4143; fax: (316) 946–4107; email: *trent.shepherd@faa.gov.*

(l) Material Incorporated by Reference

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 of the following service information:

(i) Cessna Service Bulletin SB07–28–01, Revision 1, dated September 22, 2011, approved for IBR March 13, 2012.

(ii) Cessna Service Bulletin SB07–28–01, dated June 18, 2007, approved for IBR March 6, 2008 (73 FR 5737, January 31, 2008)

(2) For service information identified in this AD, contact Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, KS 67277; telephone: (316) 517–6000; fax: (316) 517–8500; email: *Customercare@cessna.textron.com;* Internet: *http://www.cessna.com.*

(3) You may review copies of the service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

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

Issued in Kansas City, Missouri, on January 18, 2012.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–1451 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P?≤

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9574]

RIN 1545–BK64

Application for Recognition as a 501(c)(29) Organization

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations authorizing the IRS to prescribe the procedures by which certain entities may apply to the IRS for recognition of exemption from Federal income tax. These regulations affect qualified nonprofit health insurance issuers, participating in the Consumer Operated and Oriented Plan program established by the Centers for Medicare and Medicaid Services, that seek exemption from Federal income tax under the Internal Revenue Code. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on February 7, 2012.

Applicability Date: For date of applicability, see § 1.501(c)(29)–1T(c).

FOR FURTHER INFORMATION CONTACT: Amy Franklin or Martin Schäffer, (202) 622–6070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 501(c)(29) of the Internal Revenue Code (Code) provides requirements for tax exemption under section 501(a) for qualified nonprofit health insurance issuers (QNHIIs). Section 501(c)(29) was added to the Code by section 1322(h)(1) of the Patient Protection and Affordable Care Act (Affordable Care Act), Public Law 111–148 (March 23, 2010).

Section 1322 of the Affordable Care Act directs the Centers for Medicare and Medicaid Services (CMS) to establish the Consumer Operated and Oriented Plan (CO–OP) program. The purpose of the CO–OP program is to foster the creation of member-governed QNHIIs that will operate with a strong consumer focus and offer qualified health plans in the individual and small group markets. CMS will provide loans and repayable grants (collectively, loans) to organizations applying to become QNHIIs, to help cover start-up costs and meet any solvency requirements in States in which the organization is licensed to issue qualified health plans. A Funding Opportunity Announcement for the CO–OP program (CFDA Number 93.545), published by CMS on July 28, 2011 (and amended on September 16, 2011), provides that for each loan the appropriate CMS official will issue a Notice of Award and Loan Agreement to the QNHII. In addition, the Chief Executive Officer of the QNHII, or an officer of the QNHII's Board of Directors, must sign and return the Loan Agreement to CMS. On December 13, 2011, CMS issued final regulations implementing the CO–OP program at 76 FR 77392.

The CMS final regulations define a QNHII as an entity that, within specified time frames, satisfies or can reasonably be expected to satisfy the standards in section 1322(c) of the Affordable Care Act and in the CMS final regulations.

The entity will constitute a QNHII until such time as CMS determines the entity does not satisfy or cannot reasonably be expected to satisfy these standards. Section 1322(c) of the Affordable Care Act imposes a number of requirements, including that a QNHII be organized as a nonprofit member corporation under State law and that substantially all its activities consist of the issuance of qualified health plans in the individual and small group markets in each State in which it is licensed to issue such plans.

Section 501(c)(29)(A) of the Code provides that a QNHII (within the meaning of section 1322(c) of the Affordable Care Act) which has received a loan or grant under the CO–OP program may be recognized as exempt from taxation under section 501(a), but only for periods for which the organization is in compliance with the requirements of section 1322 of the Affordable Care Act and of any loan or grant agreement with the Secretary of Health and Human Services. Section 501(c)(29)(B) provides that a QNHII will not qualify for tax-exemption unless it meets four additional requirements. First, the QNHII must give notice to the Secretary of the Treasury, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of exemption as an organization described in section 501(c)(29). Second, no part of the QNHII's net earnings may inure to the benefit of any private shareholder or individual, except to the extent permitted by section 1322(c)(4) of the Affordable Care Act (which requires that any profits be used to lower premiums, to improve benefits, or for other programs intended to improve the quality of health care delivered to the organization's members). Third, no substantial part of the QNHII's activities may consist of carrying on propaganda, or otherwise attempting, to influence legislation. Finally, the QNHII may not participate in or intervene in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office. As required by section 1322(b)(2)(C)(iii) of the Affordable Care Act, CMS must notify the IRS of any determination of a failure to comply with the CO–OP program standards, including any loan agreement, that may affect a QNHII's tax-exempt status under section 501(c)(29) of the Code.

The IRS issued Notice 2011–23, 2011–13 IRB 588 (March 10, 2011) (see § 601.601(d)(2)(ii)(*b*) of this chapter), which addresses the requirements for tax exemption for QNHIIs described in section 501(c)(29). The Notice provides guidance on the annual filing requirement for QNHIIs that intend to apply for recognition of exempt status under section 501(c)(29). The Notice also states that the Treasury Department and the IRS intend to recognize a QNHII that has received a loan or grant under the CO–OP program as exempt effective from the later of the date of its formation or March 23, 2010, provided that the organization's purposes and activities have been consistent with the requirements for exemption since that date. In addition, the Notice states that the IRS intends to issue a revenue procedure explaining how and when a QNHII may apply for recognition of exempt status as an organization described in section 501(c)(29).

Under the authority provided by these temporary regulations, the Treasury Department and the IRS are issuing a revenue procedure regarding the application for recognition of exemption as an organization described in section 501(c)(29). The revenue procedure will provide that a substantially completed application for recognition of exemption under section 501(c)(29) must include a copy of both the Notice of Award issued by CMS and the fully executed Loan Agreement with CMS.

Explanation of Provisions

Section 501(c)(29)(B)(i) provides that a QNHII which has received a loan through the CO–OP program may be recognized as exempt from taxation under section 501(a) only if, among other things, the QNHII gives notice to the IRS, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition as an organization described in section 501(c)(29). These temporary regulations provide that the Commissioner has the authority to prescribe the application procedures that a QNHII seeking such recognition must follow. These temporary regulations expressly authorize the Commissioner to recognize a QNHII as exempt effective as of a date prior to the date of its application, provided that the application is submitted in the manner and within the time prescribed by the Commissioner and the QNHII's prior purposes and activities were consistent with the requirements for exempt status under section 501(c)(29).

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. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**. 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 comments regarding its impact on small businesses.

Drafting Information

The principal authors of these regulations are Amy Franklin and Martin Schäffer of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other persons in the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.501(c)(29)–1T also issued under 26 U.S.C. 501(c)(29)(B)(i). * * *

■ **Par. 2.** Section 1.501(c)(29)–1T is added to read as follows:

§ 1.501(c)(29)–1T CO–OP Health Insurance Issuers (temporary).

(a) *Organizations must notify the Commissioner that they are applying for recognition of section 501(c)(29) status.* An organization will not be treated as described in section 501(c)(29) unless the organization has given notice to the Commissioner that it is applying for recognition as an organization described in section 501(c)(29) in the manner prescribed by the Commissioner in published guidance.

(b) *Effective date of recognition of section 501(c)(29) status.* An organization may be recognized as an organization described in section 501(c)(29) as of a date prior to the date of the notice required by paragraph (a) of this section if the notice is given in the manner and within the time

prescribed by the Commissioner and the organization's purposes and activities prior to giving such notice were consistent with the requirements for exempt status under section 501(c)(29). However, an organization may not be recognized as an organization described in section 501(c)(29) before the later of its formation or March 23, 2010.

(c) *Effective/applicability date.* Paragraphs (a) and (b) of this section are effective on February 7, 2012.

(d) *Expiration date.* The applicability of this section expires on February 6, 2015.

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: January 26, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury.

[FR Doc. 2012–2338 Filed 2–6–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100, 117, 147, and 165

[USCG–2012–0062]

Quarterly Listings; Safety Zones, Security Zones, Special Local Regulations, Drawbridge Operation Regulations and Regulated Navigation Areas

AGENCY: Coast Guard, DHS.

ACTION: Notice of expired temporary rules issued.

SUMMARY: This document provides required notice of substantive rules issued by the Coast Guard and that were made temporarily effective between May 2011 and November 2011, and that expired before they could be published in the **Federal Register**. This notice lists temporary safety zones, security zones, special local regulations, drawbridge operation regulations and regulated navigation areas, all of limited duration and for which timely publication in the **Federal Register** was not possible.

DATES: This document lists temporary Coast Guard rules between May 1, 2011, and November 15, 2011, that became effective and were terminated before they could be published in the **Federal Register**.

ADDRESSES: The Docket Management Facility maintains the public docket for this notice. Documents indicated in this notice will be 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: For questions on this notice contact Yeoman First Class Marcus Hyde, Office of Regulations and Administrative Law, telephone (202) 372–3862. For questions on viewing, or on submitting material to the docket, contact Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION: Coast Guard District Commanders and Captains of the Port (COTP) must be immediately responsive to the safety and security needs within their jurisdiction; therefore, District Commanders and COTPs have been delegated the authority to issue certain local regulations. *Safety zones* may be established for safety or environmental purposes. A safety zone may be stationary and described by fixed limits or it may be described as a zone around a vessel in motion. *Security zones* limit access to prevent injury or damage to vessels, ports, or waterfront facilities. *Special local regulations* are issued to enhance the safety of participants and spectators at regattas and other marine events. *Drawbridge operation regulations* authorize changes to drawbridge schedules to accommodate bridge repairs, seasonal vessel traffic, and local public events. *Regulated Navigation Areas* are water areas within a defined boundary for which regulations for vessels navigating within the area have been established by the regional Coast Guard District Commander.

Timely publication of these rules in the **Federal Register** is often precluded when a rule responds to an emergency, or when an event occurs without sufficient advance notice. The affected public is, however, often informed of these rules through Local Notices to Mariners, press releases, and other means. Moreover, actual notification is provided by Coast Guard patrol vessels enforcing the restrictions imposed by the rule. Because **Federal Register** publication was not possible before the end of the effective period, mariners were personally notified of the contents of these safety zones, security zones, special local regulations, regulated navigation areas or drawbridge operation regulations by Coast Guard officials on-scene prior to any enforcement action. However, the Coast Guard, by law, must publish in the **Federal Register** notice of substantive rules adopted. To meet this obligation without imposing undue expense on the public, the Coast Guard periodically publishes a list of these temporary safety zones, security zones, special local regulations, regulated navigation areas and drawbridge operation regulations. Permanent rules are not included in this list because they are published in their entirety in the **Federal Register**. Temporary rules are also published in their entirety if sufficient time is available to do so before they are placed in effect or terminated. The temporary rules listed in this notice have been exempted from review under Executive Order 12666, Regulatory Planning and Review, because of their emergency nature, or limited scope and temporary effectiveness.

The following unpublished rules were placed in effect temporarily during the period between May 1, 2011 and November 15, 2011 unless otherwise indicated. To view copies of these rules, visit www.regulations.gov and search by the docket number indicated in the list below.

Dated: January 30, 2012.

K.A. Sinniger,

Chief, Office of Regulations and Administrative Law.

3RD–4TH QUARTER 2011 LISTING

Docket No.	Location	Type	Effective date
USCG–2011–0062	Mobile, AL	Safety Zone (Part 165)	9/1/2011
USCG–2011–0191	Chicago, IL	Safety Zone (Part 165)	8/5/2011
USCG–2011–0228	Chicago, IL	Safety Zone (Part 165)	7/18/2011
USCG–2011–0249	Greenville, MS	Safety Zone (Part 165)	7/4/2011
USCG–2011–0285	Little Rock, AR	Special Local Regulation (Part 100)	6/4/2011
USCG–2011–0319	Rhode Island	Safety Zone (Part 165)	6/23/2011
USCG–2011–0353	Brookings, OR	Safety Zone (Part 165)	7/18/2011

3RD–4TH QUARTER 2011 LISTING—Continued

Docket No.	Location	Type	Effective date
USCG–2011–0354	Rosario Strait, WA	Safety Zone (Part 165)	10/10/2011
USCG–2011–0355	Seattle, WA	Safety Zone (Part 165)	10/14/2011
USCG–2011–0413	St. Mary Parish, LA	Safety Zone (Part 165)	5/12/2011
USCG–2011–0417	South Bass Island, OH	Safety Zone (Part 165)	6/25/2011
USCG–2011–0423	Lower Mississippi River	Safety Zone (Part 165)	5/11/2011
USCG–2011–0424	Memphis, TN	Safety Zone (Part 165)	5/27/2011
USCG–2011–0455	Valdez, AK	Safety Zone (Part 165)	7/3/2011
USCG–2011–0487	Lower Mississippi River	Safety Zone (Part 165)	7/2/2011
USCG–2011–0491	Vicksburg, MS	Safety Zone (Part 165)	7/4/2011
USCG–2011–0500	Pittsburgh, PA	Safety Zone (Part 165)	7/4/2011
USCG–2011–0504	Mobile, AL	Safety Zone (Part 165)	6/11/2011
USCG–2011–0509	New York, NY	Drawbridge Operation Regulation (Part 117)	9/7/2011
USCG–2011–0513	Fort Smith, AR	Special Local Regulation (Part 100)	7/30/2011
USCG–2011–0524	Pittsburgh, PA	Special Local Regulation (Part 100)	7/16/2011
USCG–2011–0537	Natchez, MS	Safety Zone (Part 165)	7/4/2011
USCG–2011–0538	Port Valdez, AK	Safety Zone (Part 165)	7/4/2011
USCG–2011–0543	Oakmont, PA	Safety Zone (Part 165)	7/24/2011
USCG–2011–0554	Tampa, FL	Safety Zone (Part 165)	7/30/2011
USCG–2011–0555	Pensacola, FL	Safety Zone (Part 165)	7/6/2011
USCG–2011–0556	Niceville, FL	Safety Zone (Part 165)	7/4/2011
USCG–2011–0557	Fort Walton Beach, FL	Safety Zone (Part 165)	7/4/2011
USCG–2011–0558	Fort Walton Beach, FL	Safety Zone (Part 165)	7/1/2011
USCG–2011–0559	Biloxi, MS	Safety Zone (Part 165)	7/4/2011
USCG–2011–0596	Grande Isle, LA	Safety Zone (Part 165)	7/2/2011
USCG–2011–0609	Buffalo, NY	Safety Zone (Part 165)	7/4/2011
USCG–2011–0609	Buffalo, NY	Safety Zone (Part 165)	7/24/2011
USCG–2011–0631	Sector Columbia River	Safety Zone (Part 165)	7/8/2011
USCG–2011–0636	Philadelphia, PA	Security Zone (Part 165)	6/30/2011
USCG–2011–0638	Haines, AK	Safety Zone (Part 165)	7/4/2011
USCG–2011–0639	Skagway, AK	Safety Zone (Part 165)	7/3/2011
USCG–2011–0640	Wrangell, AK	Safety Zone (Part 165)	7/4/2011
USCG–2011–0649	DC, Arlington, Fairfax, VA	Security Zone (Part 165)	9/8/2011
USCG–2011–0654	Charles County, MD	Safety Zone (Part 165)	7/23/2011
USCG–2011–0660	Sector Columbia River	Safety Zone (Part 165)	7/4/2011
USCG–2011–0664	Alaska Hwy Ferry Terminal	Safety Zone (Part 165)	7/5/2011
USCG–2011–0665	Alaska Hwy Ferry Terminal	Safety Zone (Part 165)	7/7/2011
USCG–2011–0666	Alaska Hwy Ferry Terminal	Safety Zone (Part 165)	9/7/2011
USCG–2011–0670	Santa, CA	Safety Zone (Part 165)	8/5/2011
USCG–2011–0678	Alaska Hwy Ferry Terminal	Safety Zone (Part 165)	7/9/2011
USCG–2011–0680	Baton Rouge, LA	Safety Zone (Part 165)	7/13/2011
USCG–2011–0682	Cleveland, OH	Safety Zone (Part 165)	7/30/2011
USCG–2011–0683	Ogdensburg, NY	Safety Zone (Part 165)	7/29/2011
USCG–2011–0684	Cleveland, OH	Safety Zone (Part 165)	7/30/2011
USCG–2011–0685	Sackets Harbor, NY	Safety Zone (Part 165)	7/16/2011
USCG–2011–0686	Lake Erie, Rocky River, OH	Safety Zone (Part 165)	7/14/2011
USCG–2011–0700	Marblehead, MA	Safety Zone (Part 165)	7/23/2011
USCG–2011–0707	Wheeling, WV	Safety Zone (Part 165)	7/23/2011
USCG–2011–0715	Suffolk, VA	Safety Zone (Part 165)	7/22/2011
USCG–2011–0716	Port of New York	Safety Zone (Part 165)	9/10/2011
USCG–2011–0720	Chaumont, NY	Safety Zone (Part 165)	7/23/2011
USCG–2011–0722	Grand Haven, MI	Safety Zone (Part 165)	8/3/2011
USCG–2011–0722	Cleveland, OH	Safety Zone (Part 165)	8/7/2011
USCG–2011–0725	Pittsburgh, PA	Special Local Regulation (Part 100)	7/31/2011
USCG–2011–0726	Lake Tahoe	Safety Zone (Part 165)	9/4/2011
USCG–2011–0729	Oswego, NY	Safety Zone (Part 165)	7/30/2011
USCG–2011–0730	Manchester Bay, MA	Safety Zone (Part 165)	7/30/2011
USCG–2011–0742	Caribbean Sea, PR	Safety Zone (Part 165)	9/18/2011
USCG–2011–0743	Tampa, FL	Special Local Regulation (Part 100)	10/8/2011
USCG–2011–0746	Wheeling, WV	Special Local Regulation (Part 100)	9/3/2011
USCG–2011–0747	Baton Rouge, LA	Safety Zone (Part 165)	8/28/2011
USCG–2011–0751	Buffalo, NY	Safety Zone (Part 165)	7/29/2011
USCG–2011–0753	Port Huron, MI	Special Local Regulation (Part 100)	8/7/2011
USCG–2011–0756	Baldwinsville, NY	Safety Zone (Part 165)	8/5/2011
USCG–2011–0757	Conneaut, OH	Safety Zone (Part 165)	8/20/2011
USCG–2011–0760	Washington DC	Security Zone (Part 165)	8/28/2011
USCG–2011–0764	Chicago, IL	Security Zone (Part 165)	8/3/2011
USCG–2011–0765	Pittsburgh, PA	Safety Zone (Part 165)	8/17/2011
USCG–2011–0776	Buffalo, NY	Safety Zone (Part 165)	8/14/2011
USCG–2011–0779	San Diego, CA	Safety Zone (Part 165)	8/14/2011
USCG–2011–0780	Cook Inlet, AK	Safety Zone (Part 165)	8/7/2011
USCG–2011–0790	San Diego, CA	Safety Zone (Part 165)	9/1/2011
USCG–2011–0791	Boothbay Harbor, ME	Safety Zone (Part 165)	8/13/2011

3RD–4TH QUARTER 2011 LISTING—Continued

Docket No.	Location	Type	Effective date
USCG–2011–0792	Hampton Bays, NY	Security Zone (Part 165)	8/15/2011
USCG–2011–0793	Pascagoula, MS	Safety Zone (Part 165)	8/15/2011
USCG–2011–0794	Panama City, FL	Safety Zone (Part 165)	10/7/2011
USCG–2011–0800	Oahu, HI	Security Zone (Part 165)	11/10/2011
USCG–2011–0802	Sussex County, DE	Safety Zone (Part 165)	8/15/2011
USCG–2011–0811	West Linn, OR	Safety Zone (Part 165)	9/4/2011
USCG–2011–0813	Ashland City, TN	Special Local Regulation (Part 100)	9/10/2011
USCG–2011–0815	Upper Mississippi River	Security Zone (Part 165)	8/17/2011
USCG–2011–0818	Grand Island, NY	Safety Zone (Part 165)	9/10/2011
USCG–2011–0819	Kendall, NY	Safety Zone (Part 165)	9/3/2011
USCG–2011–0820	Laughlin, NV	Safety Zone (Part 165)	9/4/2011
USCG–2011–0823	Illinois River	Safety Zone (Part 165)	9/17/2011
USCG–2011–0824	Erie, PA	Safety Zone (Part 165)	8/21/2011
USCG–2011–0827	San Diego, CA	Safety Zone (Part 165)	9/16/2011
USCG–2011–0832	San Diego, CA	Safety Zone (Part 165)	9/18/2011
USCG–2011–0833	Southport, ME	Drawbridge Operation Regulation (Part 117)	9/8/2011
USCG–2011–0835	San Francisco, CA	Safety Zone (Part 165)	9/27/2011
USCG–2011–0836	Sausalito, CA	Safety Zone (Part 165)	9/24/2011
USCG–2011–0840	Oceanside, CA	Safety Zone (Part 165)	9/25/2011
USCG–2011–0845	San Francisco, CA	Special Local Regulation (Part 100)	10/6/2011
USCG–2011–0849	Hampton Roads, VA	Safety Zone (Part 165)	8/26/2011
USCG–2011–0850	Baltimore, MD	Safety Zone (Part 165)	8/27/2011
USCG–2011–0853	Bronx, NY	Safety Zone (Part 165)	9/8/2011
USCG–2011–0858	Virginia Beach, VA	Safety Zone (Part 165)	9/4/2011
USCG–2011–0859	Fall River, MA	Drawbridge Operation Regulation (Part 117)	9/11/2011
USCG–2011–0860	Agate Pass, WA	Safety Zone (Part 165)	9/14/2011
USCG–2011–0863	Detroit, MI	Security Zone (Part 165)	9/5/2011
USCG–2011–0866	Sacramento, CA	Drawbridge Operation Regulation (Part 117)	10/9/2011
USCG–2011–0871	Alaska Hwy Ferry Terminal	Safety Zone (Part 165)	9/8/2011
USCG–2011–0872	Miami, FL	Safety Zone (Part 165)	9/25/2011
USCG–2011–0873	Virginia Beach, VA	Safety Zone (Part 165)	10/1/2011
USCG–2011–0889	Clearwater, FL	Safety Zone (Part 165)	10/1/2011
USCG–2011–0892	Tampa, FL	Safety Zone (Part 165)	10/11/2011
USCG–2011–0896	Clearwater, FL	Safety Zone (Part 165)	10/15/2011
USCG–2011–0898	Upper Mississippi River	Safety Zone (Part 165)	9/13/2011
USCG–2011–0900	Portland, OR	Safety Zone (Part 165)	10/1/2011
USCG–2011–0913	San Diego, CA	Special Local Regulation (Part 100)	10/15/2011
USCG–2011–0927	Kodiak Island, AK	Safety Zone (Part 165)	9/27/2011
USCG–2011–0928	Philadelphia, PA	Safety Zone (Part 165)	9/24/2011
USCG–2011–0930	Liberty Island, NY	Safety Zone (Part 165)	10/28/2011
USCG–2011–0933	Portsmouth, NH	Safety Zone (Part 165)	10/2/2011
USCG–2011–0935	Marco Island, FL	Safety Zone (Part 165)	10/29/2011
USCG–2011–0951	Somers Point, NJ	Safety Zone (Part 165)	10/3/2011
USCG–2011–0952	Bratenahl, OH	Safety Zone (Part 165)	10/4/2011
USCG–2011–0957	Ogdensburg, NY	Safety Zone (Part 165)	10/8/2011
USCG–2011–0963	Wilmington, DE	Safety Zone (Part 165)	10/8/2011
USCG–2011–0965	Pittsburgh, PA	Security Zone (Part 165)	10/11/2011
USCG–2011–0988	Zilwaukee, MI	Safety Zone (Part 165)	10/21/2011
USCG–2011–1012	Jacksonville, FL	Safety Zone (Part 165)	11/3/2011
USCG–2011–1016	Matlacha, FL	Safety Zone (Part 165)	10/25/2011
USCG–2011–1018	St. Petersburg, FL	Safety Zone (Part 165)	11/4/2011
USCG–2011–1031	Baltimore, MD	Security Zone (Part 165)	11/1/2011
USCG–2011–1036	Pittsburgh, PA	Security Zone (Part 165)	11/4/2011
USCG–2011–1040	Washington DC	Security Zone (Part 165)	11/2/2011
USCG–2011–1043	Hampton, VA	Safety Zone (Part 165)	11/4/2011
USCG–2011–1054	Miami, FL	Safety Zone (Part 165)	11/8/2011
USCG–2011–1064	Portland, OR	Drawbridge Operation Regulation (Part 117)	11/15/2011

[FR Doc. 2012–2742 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2011–0443]

RIN 1625–AA01

Anchorage Regulations; Newport, RI

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the shape and expanding the dimensions of anchorage ''D'' at Newport, Rhode Island, to better accommodate increasing cruise ship visits to Newport and to improve navigation safety.

DATES: This rule is effective April 9, 2012.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0443 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0443 in the ''Keyword'' box, and then clicking ''Search.'' This material is 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 Mr. Edward G. LeBlanc, Chief, Waterways Management Division, Coast Guard Sector Southeastern New England, at 401–435–2351, or *Edward.G.LeBlanc@uscg.mil* or Lieutenant Junior Grade Isaac M. Slavitt, Waterways Management Division, Coast Guard First District, at 617–223–8385. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On September 27, 2011, we published a notice of proposed rulemaking (NPRM) entitled ''Anchorage Regulations; Newport, RI'' in the **Federal Register** (76 FR 59596). We received no comments on the proposed rule.

Basis and Purpose

The Secretary of Homeland Security has delegated to the Coast Guard the authority to establish and regulate anchorage grounds in accordance with 33 U.S.C. 471, 1221 through 1236, 2030, 2035, and 2071; 33 CFR 1.05–1; and Department of Homeland Security Delegation No. 0170.1. The purpose of this rule is to change the shape and expand the dimensions of anchorage ''D'' at Newport, Rhode Island, to better accommodate increasing cruise ship visits to Newport, and to improve navigation safety.

Background

This rule changes the shape and expands the size of anchorage ''D'' west of Goat Island, Newport, RI, to safely accommodate up to three cruise ships simultaneously. Currently, it is a trapezoid-shaped anchorage of approximately 0.11 square nautical miles that can safely accommodate only two cruise ships simultaneously. Over the past several years, cruise ship visits to Newport, RI, have been more frequent. On occasion, there is a need to anchor up to three cruise ships simultaneously in anchorage ''D''. For the convenience and safety of passengers and to improve navigation safety, an increase in the size of the anchorage is necessary. The Coast Guard believes the depth of water, water-sheet area, and density of vessel traffic in the vicinity of Newport west of Goat Island are sufficient to accommodate this change.

Consequently, the Coast Guard is changing the shape of anchorage ''D'' from a trapezoid to a square, and expanding its size from approximately 0.11 to 0.24 square nautical miles. The rule also includes specific anchorage points when there are one, two, or three vessels anchored in anchorage ''D''.

This rule will not change the current provision in 33 CFR 110.145(a)(4)(i) and (ii) that gives preference to the U.S. Navy from May 1 to October 1 each year should it require the anchorage, and the rule allows temporary floats or buoys for marking of anchors or moorings.

Discussion of Comments and Changes

We received no comments on and made no changes to the proposed rule. No public meeting was requested, and none was held.

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.

Executive Order 12866 and Executive Order 13563

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, 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 economic impact of this rule will not be significant because it only modifies the shape of a currently-existing anchorage at Newport, RI, and although it also increases the size of the anchorage, the water-sheet area covered by the proposed anchorage is still less than 0.25 square nautical miles.

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 may affect the following entities, some of which might be small entities: the owners or operators of vessels that have a need to anchor in anchorage ''D'' at Newport, RI.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule only modifies the shape of a currently-existing anchorage at Newport, RI, and although it also increases the size of the anchorage, the water-sheet area covered by the proposed anchorage is still less than 0.25 square nautical miles; it does not impose new requirements that would affect vessels' schedules or their ability to transit in the Newport, RI, area or Narragansett Bay, nor does it require the purchase of any new equipment or the hiring of any additional crew.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could 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 does not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 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 that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(f) of the Instruction because it involves the modification of a currently-existing anchorage area. 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 110

Anchorage grounds.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

■ 1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035, 2071; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 110.145, revise paragraphs (a)(4) introductory text, and (d)(2), and add paragraphs (a)(4)(iii) and (a)(4)(iv) to read as follows:

§ 110.145 Narragansett Bay, R.I.

(a) * * *

(4) Anchorage D. West of Goat Island, an area bounded by the following coordinates:

Northeast Corner: 41°29.484′ N, 071°19.975′ W
Northwest Corner: 41°29.484′ N, 071°20.578′ W
Southwest Corner: 41°29.005′ N, 071°20.578′ W
Southeast Corner: 41°29.005′ N, 071°19.975′ W

* * * * *

(iii) Should any part of an anchored vessel extend into the recommended vessel route in the East Passage of Narragansett Bay, a securite call notifying mariners of the vessel's exact position and status shall be made at least hourly on VHF channels 13 and 16.

(iv) As much as practicable vessels anchoring will do so in the following order:

(A) Primary anchoring point: 41°29.25′ N, 071°20.15′ W

(B) Secondary anchoring point: 41°29.38′ N, 071°20.45′ W

(C) Tertiary anchoring point: 41°29.15′ N, 071°20.50′ W

Note to paragraph (a): ''Anchoring point'' is the intended position of the anchor at rest on the bottom of the anchorage. All coordinates referenced use datum: NAD 83.

* * * * *

(d) * * *

(2) Anchors must not be placed outside the anchorage areas, nor shall any vessel be so anchored that any portion of the hull or rigging shall at any time extend outside the boundaries of the anchorage area. However, Anchorage D (paragraph (a)(4) of this section) is exempt from this requirement.

* * * * *

Dated: January 20, 2012.

Daniel A. Neptun,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 2012–2549 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0033]

Drawbridge Operation Regulations; Hutchinson River (Eastchester Creek), Bronx, NY

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 Amtrak Pelham Bay Railroad Bridge, mile 0.5, across the Hutchinson River (Eastchester Creek) at the Bronx, New York. The deviation is necessary to facilitate scheduled maintenance at the bridge. This deviation allows the bridge to remain in the closed position during two separate phases.

DATES: This deviation is effective from 10 p.m. on February 10, 2012 through 4 a.m. on February 20, 2012.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2012–0033 and are available online at *www.regulations.gov,* inserting USCG–2012–0033 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 email Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, *judy.k.leung-yee@uscg.mil,* or 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 Amtrak Pelham Bay Railroad Bridge, across the Hutchinson River (Eastchester Creek), mile 0.5, at the Bronx, New York, has a vertical clearance in the closed position of 8 feet at mean high water and 15 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.793(a)(3).

The waterway users are mostly commercial operators.

The owner of the bridge, National Railroad Passenger Company (Amtrak), requested a temporary deviation from the regulations to facilitate scheduled maintenance by replacing overhead fiber optic cables at the bridge. The maintenance will be conducted during two separate phases.

During the first phase of the temporary deviation, the Amtrak Pelham Bay Railroad Bridge may remain in the closed position from 10 p.m. on February 10, 2012 through 4 a.m. on February 13, 2012. At the end of the first phase the bridge will return to its regular operating schedule. During the second phase of the temporary deviation, the bridge may remain in the closed position from 10 p.m. on February 17, 2012 through 4 a.m. on February 20, 2012. At the end of the second phase the bridge will return to its regular operating schedule. Vessels that can pass under the bridge in the closed position may do so at any time.

The commercial users were notified. No objections were received.

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 periods. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: January 26, 2012.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2012–2783 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0034]

Drawbridge Operation Regulations; Annisquam River and Blynman Canal, Gloucester, MA

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 SR127 Bridge at mile 0.0 across the Annisquam River and Blynman Canal. The deviation is necessary to facilitate bridge rehabilitation repairs. This deviation allows the bridge to remain in the closed position during two separate phases.

DATES: This deviation is effective from February 15, 2012 through April 10, 2012.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2012–0034 and are available online at *www.regulations.gov,* inserting USCG–2012–0034 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 email Mr. John McDonald, Project Officer, First Coast Guard District, *john.w.mcdonald@uscg.mil,* or telephone (617) 223–8364. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION: The SR127 Bridge, across the Annisquam River/Blynman Canal, mile 0.0, at Gloucester, Massachusetts, has a vertical clearance in the closed position of 7 feet at mean high water and 16 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.586.

The owner of the bridge, Massachusetts Department of Transportation, requested a temporary deviation from the regulations to

facilitate bridge rehabilitation repairs during two separate phases.

During the first phase of the temporary deviation, the SR127 Bridge may remain in the closed position from February 15, 2012 through March 8, 2012, to replace bridge stringers. At the end of the first phase the bridge will return to its regular operating schedule. During the second phase of the temporary deviation, the bridge may remain in the closed position from March 12, 2012 through April 10, 2012, to rehabilitate the bridge operating machinery. At the end of the second phase the bridge will return to its regular operating schedule.

The Gloucester Harbor Master and the local marinas were notified and no objections were received.

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 periods. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: January 25, 2012.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2012–2780 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2012–0017]

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 New Jersey Transit Rail Operation (NJTRO) Railroad Bridge across Cheesequake Creek, mile 0.2, at Morgan, New Jersey. Under this temporary deviation, the bridge may remain in the closed position for four days to facilitate scheduled bridge repairs.

DATES: This deviation is effective from 6 a.m. on February 11, 2012 through 12 p.m. on March 4, 2012.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2012–0017 and are available online at *www.regulations.gov,* inserting USCG–2012–0017 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 email Mr. Joe Arca, Project Officer, First Coast Guard District, *joe.m.arca@uscg.mil,* or (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 NJTRO railroad bridge has a vertical clearance of 3 feet at mean high water, and 8 feet at mean low water in the closed position. The existing drawbridge operating regulations are found at 33 CFR 117.709(b).

The bridge owner, New Jersey Transit Rail Operations (NJTRO), requested a bridge closure to facilitate structural track repairs at the bridge.

Under this temporary deviation, the NJTRO railroad bridge may remain in the closed position on two weekends from 6 a.m. on February 11, 2012 through 12 noon on February 12, 2012 and from 6 a.m. on February 25, 2012 through 12 noon on February 26, 2012.

In the event of inclement weather the above repairs will be undertaken on two alternate weekends from 6 a.m. on February 25, 2012 through 12 noon on February 26, 2012 and from 6 a.m. on March 3, 2012 through 12 noon on March 4, 2012.

Cheesequake Creek is predominantly a recreational waterway. The bridge rarely opens in the winter months when this temporary deviation will be in effect.

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

Dated: January 25, 2012.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2012–2778 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–1063]

RIN 1625–AA87

Moving Security Zone Around Escorted Vessels On the Lower Mississippi River Between Mile Marker 90.0 Above Head of Passes to Mile Marker 110.0 Above Head of Passes

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Captain of the Port of New Orleans (COTP New Orleans) has established moving security zones on the Mississippi River, from mile marker 90 through mile marker 110, extending 300 yards on all sides of vessels being escorted by one or more Coast Guard assets or other federal, state, or local law enforcement agency assets clearly identifiable by lights, vessel markings, or with agency insignia. This moving security zone regulation is necessary to protect vessels deemed to be in need of escort protection by the COTP New Orleans for security reasons. No person or vessel is permitted to enter or transit the security zones created by this temporary rule without permission of the COTP New Orleans.

DATES: This rule is effective from January 1, 2012, through March 31, 2012.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–1063 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–1063 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 email Lieutenant Commander (LCDR) Kenneth Blair, Sector New Orleans, Coast Guard; telephone 504–365–2392, email *Kenneth.E.Blair@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. Certain vessels qualifying as vessels requiring security escorts will transit through the COTP New Orleans area of responsibility. Based on risk evaluations completed, and information gathered from November 26, 2011, to December 26, 2011, and after evaluating the security needs for escorted vessels, the Coast Guard determined that a security zone regulation is required, beginning January 1, 2012. This temporary final rule establishing moving security zones is needed to protect escorted vessels and personnel from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature. The NPRM process would unnecessarily delay the effective dates and would be contrary to public interest by delaying or foregoing the necessary protections required for the escorted vessels and their personnel. The moving security zones established by this rulemaking are temporary. A rulemaking proposing to establish moving security zones on a permanent basis is anticipated; that rulemaking would provide notice and a comment period.

For these same reasons, 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**. This temporary final rule establishing moving security zones is needed to protect escorted vessels and personnel from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature. A 30-day delayed-effective-date period would be contrary to the public interest because it would delay necessary protections required for these escorted vessels and personnel.

Basis and Purpose

Certain vessels, including high capacity passenger vessels, vessels carrying certain dangerous cargoes as defined in 33 CFR part 160, tank vessels constructed to carry oil or hazardous materials in bulk, and vessels carrying liquefied hazardous gas as defined in 33 CFR part 127 have been deemed by the COTP New Orleans to require escort protection during transit between mile marker 90.0 to mile marker 110.0 of the Lower Mississippi River. This temporary rule establishes moving security zones to assist and support the Coast Guard with the required vessel escorts between mile marker 90.0 to mile marker 110.0. These moving security zones extend 300 yards in all directions from the escorted vessels. Vessels will not be allowed to transit through these moving security zones without the permission of the Captain of the Port, New Orleans or the on-scene Coast Guard or enforcement agency asset. The moving security zones established by this temporary rule are necessary to protect escorted vessels and personnel from destruction, loss or injury from sabotage or other subversive acts, accidents or other causes of a similar nature.

Discussion of Rule

Under the authority of the Magnuson Act, 50 U.S.C. 191–195, and 33 CFR part 6, the Coast Guard has established a moving security zone regulation to protect escorted vessels and personnel. While this temporary rule is effective, vessels are prohibited from transiting within 300 yards in all directions from each escorted vessel. Deviations from this rule may be requested from the Captain of the Port New Orleans through the on-scene Coast Guard or enforcement agency asset, via VHF Ch. 67 or the Coast Guard Vessel Traffic Center at (504) 365–2230. Notice of the moving security zones established by this temporary rule will be made through broadcast notices to mariners.

You may request permission of the COTP New Orleans or the on-scene Coast Guard or enforcement agency asset to enter the security zone. If permitted to enter the security zone, a vessel must proceed at the minimum safe speed and must comply with the order of the COTP New Orleans or the on-scene asset. No vessel may enter the inner 50-yard portion of the security zone closest to the vessel being escorted. The COTP New Orleans will inform the public of the existence or status of the security zones around escorted vessels in the regulated area by Marine Safety Information Bulletins or Broadcast Notice to Mariners. Coast Guard assets or other Federal, State or local law enforcement agency assets will be clearly identified by lights, vessel markings, or with agency insignia.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Due to its duration and location the impacts of this rule on routine navigation are expected to be minimal.

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 or operators of vessels, intending to transit in the vicinity of mile marker 90.0 through mile marker 110.0 of the Lower Mississippi River, extending 300 yards in all directions of an escorted vessel. This security zone regulation will not have significant impact on a substantial number of small entities because of its location and duration. If you are a small business entity and are significantly affected by this regulation please contact Lieutenant Commander (LCDR) Kenneth Blair, Sector New Orleans, at 504–365–2392, or email *Kenneth.E.Blair@uscg.mil.*

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 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not affect 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.

An environmental analysis checklist and a categorical exclusion determination will be made available and accessible in the docket as indicated in the **ADDRESSES** section.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record-keeping 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. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.06–1, 6.05–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. A new temporary § 165.T08–040 is added to read as follows:

§ 165.T08–040 Moving Security Zone, Escorted Vessels

(a) *Location.* The following areas are security zones: Navigable waters of the Lower Mississippi River, from mile marker 90.0 to mile marker 110.0, extending 300 yards in all directions of escorted vessels. Escorted vessels will be escorted by one or more Coast Guard assets or other federal, state, or local law enforcement agency assets clearly identifiable by lights, vessel markings, or with agency insignia.

(b) *Effective period.* This rule is effective from January 1, 2012, through March 31, 2012.

(c) *Regulation.* (1) Under the general regulations in § 165.33 of this part, vessels are prohibited from entering or transiting the security zones described in paragraph (a) of this temporary section, § 165.T08–040.

(2) If granted permission to enter a security zone, a vessel must operate at the minimum speed necessary to maintain a safe course, unless required to maintain speed by the Navigation Rules, and shall proceed as directed by the Coast Guard. When within the security zone, no vessel or person is allowed within 50 yards of the escorted vessel unless authorized by the Coast Guard.

(3) Persons or vessels requiring deviations from this rule must request permission from the Captain of the Port New Orleans through the on-scene Coast Guard or other agency asset, via VHF Ch. 67 or the Coast Guard Vessel Traffic Center at (504) 365–2230.

(4) All persons and vessels granted permission to enter a security zone must comply with the instructions of the Captain of the Port New Orleans and designated personnel. Designated personnel include commissioned, warrant and petty officers of the U.S. Coast Guard, and local, state, and federal law enforcement officers on clearly identified law enforcement agency vessels.

(d) *Informational broadcasts.* The Captain of the Port or a designated representative will inform the public through marine safety information bulletins or broadcast notices to mariners of this regulation.

Dated: December 27, 2011.

J. J. Arenstam,

Captain, U.S. Coast Guard, Acting Captain of the Port New Orleans.

[FR Doc. 2012–2674 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–0483–201201; FRL–9627–5]

Approval and Promulgation of Implementation Plans; State of Tennessee: Prevention of Significant Deterioration and Nonattainment New Source Review Rules: Nitrogen Oxides as a Precursor to Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve changes to the Tennessee State Implementation Plan (SIP), submitted by the Tennessee Department of Environment and Conservation (TDEC), through the Division of Air Pollution Control, to EPA on May 28, 2009. The SIP revision modifies Tennessee's New Source Review (NSR) Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) programs. The SIP revision addresses three related issues. First, the SIP revision updates Tennessee's SIP-approved regulations to incorporate NSR permitting requirements promulgated in the 1997 8–Hour Ozone national ambient air quality standards (NAAQS) Implementation Rule NSR Update Phase II (hereafter referred to as the ''Ozone Implementation NSR Update'' or ''Phase II Rule''). Second, Tennessee's May 28, 2009, SIP revision updates to Tennessee's PSD and NNSR permitting regulations regarding the addition of clean coal technology (CCT) provisions. Third, the SIP revision provides clarifying changes and corrections to portions of the Tennessee NSR rule. All changes in the SIP revision comply with federal NSR permitting regulations found at 40 CFR 51.165 and 51.166. EPA is approving Tennessee's May 28, 2009, SIP revision because it is in accordance with the Clean Air Act (CAA or Act).

DATES: *Effective Date:* This rule will be effective March 8, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2010–0483. All documents in the docket are listed on the *www.regulations.gov* web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the 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 Tennessee SIP, contact Ms. Twunjala Bradley, 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. Telephone number: (404) 562–9352; email address: *bradley.twunjala@epa.gov.* For information regarding NSR, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. Telephone number: (404) 562–9214; email address: *adams.yolanda@epa.gov.* For information regarding 8-hour ozone NAAQS, contact Ms. Jane Spann, Regulatory Development Section, at the same address above. Telephone number: (404) 562–9029; email address: *spann.jane@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. This Action
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background

EPA is taking final action to approve changes to the Tennessee SIP such that it is consistent with federal requirements for NSR permitting.[1] On May 28, 2009, Tennessee submitted a SIP revision to EPA for approval which revised Tennessee's Air Quality Regulations, Chapter 1200–3–9—*Construction and Operating Permits, Rule Number .01—Construction Permit, .02—Operating Permits, and .03—General Provisions* to adopt federal PSD and NNSR requirements.[2] First, the SIP revision addressed requirements promulgated in the Phase II Rule including the following provisions: (1) Recognizing nitrogen oxides (NO_X) emissions as ozone precursors; (2) adopting NNSR provisions for major stationary source thresholds for sources in certain classes of nonattainment areas for 8-hour ozone, carbon monoxide and particulate matter with a nominal aerodynamic diameter less than or equal to 10 microns (PM_{10}); (3) addressing changes to offset ratios for marginal, moderate, serious, severe, and extreme ozone nonattainment areas; and (4) modifying provisions addressing offset requirements for facilities that shut down or curtail operation. Second, the SIP revision includes updates to the Tennessee PSD and NNSR permitting regulations regarding the adoption of CCT definitions at 1200–3–9. Lastly, the SIP revision includes clarifying changes and corrections to the State's rules at 1200–3–9–.01 through –.03.

EPA notes that Tennessee's May 28, 2009, submittal also includes the removal of provisions for clean units (CU) and pollution control projects (PCP) from the State's PSD and NNSR regulations that were submitted by the State to be consistent with then-applicable federal regulations. EPA did

[1] Tennessee's May 28, 2009, SIP revision also contained changes to Tennessee's SIP-approved NSR permitting regulations regarding ''baseline actual emissions.'' At this time, EPA is not taking action on this portion of Tennessee's submission.

[2] Tennessee's May 28, 2009, SIP submittal also made changes to the State's title V regulations at 1200–3–9–.02(11). EPA is not taking action on Tennessee's revisions to the State's title V regulations at this time.

not take action to approve these CU and PCP revisions into Tennessee's federally-approved SIP, and the federal requirement for these provisions was ultimately vacated by the United States Court of Appeals for the District of Columbia Circuit (DC Circuit Court) [3] Consequently, because these revisions were never incorporated into the State's SIP and the federal requirements have since been vacated, there is no federal action necessary with respect to the removal of the CU and PCP provisions from State law.

On December 5, 2011, EPA published a proposed rulemaking to approve the aforementioned changes to Tennessee's NSR programs. *See* 76 FR 75845. No comments, adverse or otherwise, were received on EPA's December 5, 2011, proposed rulemaking. EPA is now taking final action to approve the changes to Tennessee's NSR programs as provided in EPA's December 5, 2011, proposed rulemaking. A summary of the background for today's final actions is provided below.

a. Phase II Rule

With regard to the 1997 8-hour ozone NAAQS,[4] EPA's Phase II Rule, finalized on November 29, 2005, addressed control and planning requirements as they applied to areas designated nonattainment for the 1997 8-hour ozone NAAQS such as reasonably available control technology, reasonably available control measures, reasonable further progress, modeling and attainment demonstrations, NSR, and the impact to reformulated gas for the 1997 8-hour ozone NAAQS transition. *See* 70 FR 71612. The NSR permitting requirements established in the rule included the following provisions: recognizing NO_x as an ozone precursor for PSD purposes; changes to the NNSR rules establishing major stationary thresholds (marginal, moderate, serious, severe, and extreme nonattainment (NAA) classifications) and significant emission rates for the 8-hour ozone, PM_{10} and carbon monoxide NAAQS; revising the criteria for crediting emission reductions credits from operation shutdowns and curtailments as offsets, and changes to offset ratios for marginal, moderate, serious, severe, and extreme ozone NAA.

The Phase II Rule made changes to federal regulations at 40 CFR 51.165 and 51.166 (which govern the NNSR and PSD permitting programs respectively). Pursuant to these requirements, states were required to submit SIP revisions adopting the relevant federal requirements of the Phase II Rule (at 40 CFR 51.165 and 51.166) into their SIP no later than June 15, 2007. Tennessee's May 28, 2009, SIP revision adopts the relevant provisions at 40 CFR 51.165 and 51.66 into the Tennessee SIP to be consistent with federal regulations for NSR permitting requirements promulgated in the Phase II Rule with minor NNSR variations. States may meet the requirements of 40 CFR Part 51 and the Phase II Rules with alternative but equivalent regulations. As part of its analysis of Tennessee's May 28, 2009 SIP revision, EPA conducted a thorough review of the state's submittal including those provisions that differ from the federal rules (specifically NNSR provisions at 40 CFR 51.165(a)(1)(iv)(A)(2), 51.165(a)(1)(v)(E) and 51.165(a)(1)(x)(C)). EPA determined that Tennessee's equivalent provisions to the federal NNSR regulations are consistent with the program requirements for NSR, set forth at 40 CFR 51.165 and 51.166. For more detail on Tennessee's equivalent NNSR provisions related to the Phase II Rule, please refer to EPA's proposed rulemaking at 76 FR 75845 (December 5, 2011).

b. Clean Coal Technology Revisions

With regard to the CCT changes, Tennessee's May 28, 2009, SIP submittal revised the State's NSR regulations at 1200–3–9 to adopt CCT and repowering definitions promulgated by EPA in a portion of the 1992 WEPCO Rule (*Wisconsin Electric Power Co.* v. *Reilly,* 893 F.2d 901 (7th Cir. 1990)) on July 21, 1992 (57 FR 32314) and now codified at 40 CFR 51.165(a)(1)(xxii)–(xxiv) and 51.166(b)(33)–(36). In addition, Tennessee's SIP submittal modified the definition of ''major modification'' to exempt ''clean coal technology demonstration projects'' (consistent with 51.165(a)(1)(v)(C)(9) and 51.166(b)(2)(iii)(i)–(j)).[5] EPA has determined that the rule changes made by Tennessee are consistent with the current federal regulations at 40 CFR 51.165 and 51.166.

c. Tennessee's Clarifying Changes and Corrections

Finally, TDEC's May 28, 2009, SIP submittal incorporated clarifying changes and typographical corrections to portions of the State's NSR regulations at 1200–3–9–.01 through –.03. Specifically, Tennessee made typographical corrections to the definition of ''major stationary source'' at rule 1200–3–09–.01(5)(b)1(iv)(II) [6] by removing the ''s'' from the word ''items'' between the word ''under'' and before numerical (''iv''). In addition, Tennessee replaced the word ''data'' with ''date'' at paragraph (1) of rule 1200–3–9–.03. Tennessee's clarifying changes also revised paragraph (1) at rule 1200–3–9–.02 to clarify the timeframe and conditions for an air contaminant source to apply for an operating permit. Finally, as a result of the removal of all references to the ''clean units'' language (due to the above-described vacatur), Tennessee, where appropriate at Rule 1200–3–9–.01, replaced the terms ''clean units'' or ''clean'' with the terms ''new emission units'' or ''new'' consistent with the hybrid test applicability provision amended in the 2002 NSR Reform Rule. *See* 67 FR 8018 at 80260). EPA has determined that the clarifying changes and corrections made by Tennessee are consistent with section 110 of the CAA and its implementing regulations.

II. This Action

Tennessee's May 28, 2009, SIP revision updates the State's PSD and NNSR provisions at Chapter 1200–3–9 to adopt the NSR requirements promulgated in the Phase II Rule regarding: (1) Recognizing NO_x emissions as ozone precursors; (2) NNSR provisions for major stationary source thresholds for sources in certain classes of nonattainment areas for 8-hour ozone, carbon monoxide and PM_{10}; (3) addressing changes to offset ratios for marginal, moderate, serious, severe, and extreme ozone nonattainment areas;

[3] On December 31, 2002, (67 FR 80186), EPA published final rule changes to 40 CFR parts 51 and 52, regarding the CAA's PSD and NNSR programs. On November 7, 2003, (68 FR 63021), EPA published a notice of final action on the reconsideration of the December 31, 2002, final rule changes. The December 31, 2002, and the November 7, 2003, final actions are collectively referred to as the ''2002 NSR Reform Rules.'' On June 24, 2005, the DC Circuit Court vacated portions of the 2002 NSR Reform Rules pertaining to CU and PCP.

[4] On July 18, 1997, EPA promulgated a revised 8-hour ozone NAAQS of 0.08 parts per million—also referred to as the 1997 8-hour ozone NAAQS. On April 30, 2004, EPA designated areas as unclassifiable/attainment, nonattainment and unclassifiable for the 1997 8-hour ozone NAAQS. In addition, on April 30, 2004, as part of the framework to implement the 1997 8-hour ozone NAAQS, EPA promulgated an implementation rule in two phases (Phase I and II). The Phase I Rule (effective on June 15, 2004), provided the implementation requirements for designating areas under subpart 1 and subpart 2 of the CAA. *See* 69 FR 23951.

[5] The WEPCO rule exempted CCT demonstration projects (that constitute re-powering) from PSD requirements (major modification) as long as the projects do not cause an increase in potential to emit of a regulated NSR pollutant emitted by the unit.

[6] EPA notes that in the proposed rule for this action, the Agency incorrectly cited Tennessee's definition of ''major stationary source'' as ''1200–3–0–.01(5)(b)(i)1(iv)(II)'' instead of ''1200–3–09–.01(5)(b)1(iv)(II)'' regarding the typographical correction. *See* 76 FR 75845, 75848.

and (4) addressing changes to provisions pertaining to offset requirements for facilities that shut down or curtail operation. Tennessee's SIP submittal also adopted CCT definitions established in a portion of the WEPCO Rule (including demonstration project, temporary CCT demonstration project, and re-powering found at 40 CFR 51.165(xxii)–(xxiv) and 51.166(b)(33)–(36)) and revised the definition of ''major modification'' by exempting CCT demonstration projects (that constitute re-powering) from PSD requirements currently at 40 CFR 51.165(a)(1)(v)(C)(9) and 51.166(b)(2)(iii)(i)–(j). Additionally, Tennessee's SIP submittal made clarifying changes and corrected typographical errors at Tennessee NSR regulations in Chapter 1200–3–9–.01 through –.03.

EPA has determined that Tennessee's May 28, 2009, SIP revision, which became state-effective on May 10, 2009, meets the NSR permitting requirements established in the Phase II Rule and is consistent with the provisions promulgated in a portion of the WEPCO Rule. Further, EPA has determined that Tennessee's May 28, 2009, SIP revision is consistent with section 110 of the CAA.

III. Final Action

Pursuant to section 110 of the CAA, EPA is taking final action to approve Tennessee's May 28, 2009, SIP revisions adopting federal regulations amended in the Phase II Rule (specifically recognizing NO_x as an ozone precursor) into the Tennessee SIP. EPA is also taking final action to approve Tennessee's changes to its PSD and NNSR permitting regulations regarding the addition of CCT requirements (established in a portion of EPA's WEPCO Rule) at 1200–3–9.01; and the clarifying changes and correction to Tennessee's NSR rule. EPA is approving these revisions into the Tennessee SIP because they are consistent with section 110 of the CAA and its implementing regulations.

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 approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 9, 2012. 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* CAA section 307(b)(2), 42 U.S.C. 7607(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: January 27, 2012.

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 RR—Tennessee

■ 2. Section 52.2220 (c) is amended under Chapter 1200–3–9 by revising the entries for ''Section 1200–3–9–.01,'' ''Section 1200–3–9–.02,'' and ''Section 1200–3–9–.03'' to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

TABLE 1—EPA APPROVED TENNESSEE REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
Chapter 1200–3–9 Construction and Operating Permits				
Section 1200–3–9–.01	Construction Permits ...	5/10/2009	2/7/2012 [Insert citation of publication].	EPA is approving Tennessee's May 28, 2009 SIP revisions to Chapter 1200–3–9–.01 with the exception of the ''baseline actual emissions'' calculation revision found at 1200–3–9–.01 (4)(b)45(i)(III), (4)(b)45(ii)(IV), (5)(b)1(xlvii)(I)(III) and (5)(b)1(xlvii)(II)(IV) of the submittal.
Section 1200–3–9–.02	Operating Permits	5/10/2009	2/7/2012 [Insert citation of publication].	
Section 1200–3–9–.03	General Provisions	5/10/2009	2/7/2012 [Insert citation of publication].	
*	*	*	*	*

* * * * *

[FR Doc. 2012–2601 Filed 2–6–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 110826540–2069–02]

RIN 0648–XA674

Western Pacific Fisheries; 2012 Annual Catch Limits and Accountability Measures

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

ACTION: Final specifications.

SUMMARY: In this rule, NMFS specifies annual catch limits for western Pacific bottomfish, crustacean, precious coral, and coral reef ecosystem fisheries, and accountability measures to correct or mitigate any overages of catch limits. The catch limits and accountability measures support the long-term sustainability of fishery resources of the U.S. Pacific Islands.

DATES: The final specifications are effective March 8, 2012 through December 31, 2012.

ADDRESSES: Copies of the fishery ecosystem plans are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel. (808) 522–8220, fax (808) 522–8226, or *www.wpcouncil.org.* Copies of the environmental assessments and findings of no significant impact for this action are available from *www.regulations.gov,* or Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1601 Kapiolani Blvd., 1110, Honolulu, HI 96814.

FOR FURTHER INFORMATION CONTACT: Jarad Makaiau, NMFS PIR Sustainable Fisheries, (808) 944–2108.

SUPPLEMENTARY INFORMATION: On January 3, 2012, NMFS published a request for public comments (77 FR 66) on proposed specifications that are finalized here. Additional background information on this action is found in the preamble to the proposed specifications, and is not repeated here.

Through this action, NMFS specifies annual catch limits (ACLs) and accountability measures (AM) for bottomfish, crustacean, precious coral, and coral reef ecosystem fishery management unit species (MUS) in the U.S. Exclusive Economic Zone (EEZ, generally 3–200 nm from shore) around American Samoa, Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and Hawaii. The ACLs are specified for the 2012 fishing year, which begins on January 1 and ends on December 31, except for precious coral fisheries, which began on July 1, 2011, and end on June 30, 2012.

NMFS is not specifying ACLs at this time for bottomfish, crustacean, precious coral, or coral reef ecosystem MUS in the Pacific Remote Island Areas, because commercial fishing is prohibited out to 50 nautical miles by Presidential Proclamation 8336 (establishing the Pacific Remote Island Marine National Monument (74 FR 1565, January 12, 2009)), and because there is no habitat to support such fisheries in the EEZ beyond the monument boundaries. The Council is separately working on a draft amendment to the relevant FEP containing fishery management measures for the Pacific Remote Islands Marine National Monument (as well as the Rose Atoll and Mariana Trench Marine National Monuments). Additionally, NMFS is not specifying ACLs for MUS that are currently subject to Federal fishing moratoria or prohibitions. These include all species of gold coral (73 FR 47098, August 13, 2008), all species of deepwater precious corals at the Westpac Bed Refugia (75 FR 2198, January 14, 2010), and the three Hawaii seamount groundfish: pelagic armorhead, alfonsin, and raftfish (75 FR 69015, November 10, 2010). The current prohibitions on fishing for these MUS serve as a functional equivalent of an ACL of zero.

2012 Annual Catch Limit Specifications

TABLE 1—AMERICAN SAMOA

Fishery	Management unit species	ACLs
Bottomfish	Bottomfish multi-species stock complex	99,200 lb (44,996 kg).
Crustacean	Deepwater Shrimp	80,000 lb (36,287 kg).
	Spiny Lobster	2,300 lb (1,043 kg).

TABLE 1—AMERICAN SAMOA—Continued

Fishery	Management unit species	ACLs
	Slipper Lobster	30 lb (14 kg).
	Kona Crab	3,200 lb (1,451 kg).
Precious Coral	Black Coral	1,742 lb (790 kg).
	Precious Corals in the American Samoa Exploratory Area	2,205 lb (1,000 kg).
Coral Reef Ecosystem	Acanthuridae—surgeonfish	19,516 lb (8,852 kg).
	Lutjanidae—snappers	18,839 lb (8,545 kg).
	Selar crumenophthalmus—atule or bigeye scad	8,396 lb (3,808 kg).
	Mollusks—turbo snail; octopus; giant clams	16,694 lb (7,572 kg).
	Carangidae—jacks	9,490 lb (4,305 kg).
	Lethrinidae—emperors	7,350 lb (3,334 kg).
	Scaridae—parrotfish	8,145 lb (3,695 kg).
	Serranidae—groupers	5,600 lb (2,540 kg).
	Holocentridae—squirrelfish	2,585 lb(1,173 kg).
	Mugilidae—mullets	2,857 lb (1,296 kg).
	Crustaceans—crabs	2,248 lb (1,020 kg).
	Bolbometopon muricatum—bumphead parrotfish	235 lb (107 kg).
	Cheilinus undulatus—Humphead (Napoleon) wrasse	1,743 lb (791 kg).
	Carcharhinidae—Reef Sharks	1,309 lb (594 kg).
	All Other CREMUS combined	18,910 lb (8,577 kg).

TABLE 2—MARIANAS ARCHIPELAGO—GUAM

Fishery	Management unit species	ACLs
Bottomfish	Bottomfish multi-species stock complex	48,200 lb (21,863 kg).
Crustaceans	Deepwater Shrimp	48,488 lb (21,994 kg).
	Spiny Lobster	2,700 lb (1,225 kg).
	Slipper Lobster	20 lb (9 kg).
	Kona Crab	1,900 lb (862 kg).
Precious Coral	Black Coral	700 kg (1,543 lb).
	Precious Corals in the Guam Exploratory Area	1,000 kg (2,205 lb).
Cora Reef Ecosystem	Acanthuridae—surgeonfish	70,702 lb (32,070 kg).
	Carangidae—jacks	45,377 lb (20,583 kg).
	Selar crumenophthalmus—atulai or bigeye scad	56,514 lb (25,634 kg).
	Lethrinidae—emperors	38,720 lb (17,563 kg).
	Scaridae—parrotfish	28,649 lb (12,995 kg).
	Mullidae—goatfish	25,367 lb (11,506 kg).
	Mollusks—turbo snail; octopus; giant clams	21,941 lb (9,952 kg).
	Siganidae—rabbitfish	26,120 lb (11,848 kg).
	Lutjanidae—snappers	17,726 lb (8,040 kg).
	Serranidae—groupers	17,958 lb (8,146 kg).
	Mugilidae—mullets	15,032 lb (6,818 kg).
	Kyphosidae—chubs/rudderfish	13,247 lb (6,009 kg).
	Crustaceans—crabs	5,523 lb (2,505 kg).
	Holocentridae—squirrelfish	8,300 lb (3,765 kg).
	Algae	5,329 lb (2,417 kg).
	Labridae—wrasses	5,195 lb (2,356 kg).
	Bolbometopon muricatum—bumphead parrotfish	797 lb (362 kg) (CNMI and Guam combined).
	Cheilinus undulatus—Humphead (Napoleon) wrasse	1,960 lb (889 kg).
	Carcharhinidae—Reef Sharks	6,942 lb (3,149 kg).
	All Other CREMUS combined	83,214 lb (37,745 kg).

TABLE 3—MARIANAS ARCHIPELAGO—CNMI

Fishery	Management unit species	ACLs
Bottomfish	Bottomfish multi-species stock complex	182,500 lb (82,781 kg).
Crustacean	Deepwater Shrimp	275,570 lb (124,996 kg).
	Spiny Lobster	5,500 lb (2,495 kg).
	Slipper Lobster	60 lb (27 kg).
	Kona Crab	6,300 lb (2,858 kg).
Precious Coral	Black Coral	2,100 kg (4,630 lb).
	Precious Corals in the CNMI Exploratory Area	1,000 kg (2,205 lb).
Coral Reef Ecosystem	Lethrinidae—emperors	27,466 lb (12,458 kg).
	Carangidae—jacks	21,512 lb (9,758 kg).
	Acanthuridae—surgeonfish	6,884 lb (3,123 kg).
	Selar crumenophthalmus—atulai or bigeye scad	7,459 lb (3,383 kg).
	Serranidae—groupers	5,519 lb (2,503 kg).
	Lutjanidae—snappers	3,905 lb (1,771 kg).
	Mullidae—goatfish	3,670 lb (1,665 kg).

TABLE 3—MARIANAS ARCHIPELAGO—CNMI—Continued

Fishery	Management unit species	ACLs
	Scaridae—parrotfish	3,784 lb (1,716 kg).
	Mollusks—turbo snail; octopus; giant clams	4,446 lb (2,017 kg).
	Mugilidae—mullets	3,308 lb (1,500 kg).
	Siganidae—rabbitfish	2,537 lb (1,151 kg).
	Bolbometopon muricatum—bumphead parrotfish	797 lb (362 kg) (CNMI and Guam combined).
	Cheilinus undulatus—Humphead (Napoleon) wrasse	2,009 lb (911 kg).
	Carcharhinidae—Reef Sharks	5,600 lb (2,540 kg).
	All Other CREMUS combined	9,820 lb (4,454 kg).

TABLE 4—HAWAII

Fishery	Management unit species	ACLs
Bottomfish	Non-Deep 7 Bottomfish	135,000 lb (61,235 kg).
Crustacean	Deepwater Shrimp	250,773 lb (113,749 kg).
	Spiny Lobster	10,000 lb (4,536 kg).
	Slipper Lobster	280 lb (127 kg).
	Kona Crab	27,600 lb (12,519 kg).
Precious Coral	Auau Channel Black Coral	2,500 kg (5,512 lb).
	Pink/Bamboo Coral; Makapuu Bed	2,205/551 lb (1,000/250 kg).
	Pink/Bamboo Coral; 180 Fathom Bank	489/123 lb (222/56 kg).
	Pink/Bamboo Coral; Brooks Bank	979/245 lb (444/111 kg).
	Pink/Bamboo Coral; Kaena Point Bed	148/37 lb (67/17 kg).
	Pink/Bamboo Coral; Keahole Bed	148/37 lb (67/17 kg).
	Precious Corals in the Hawaii Exploratory Area	2,205 lb (1,000 kg).
Coral Reef Ecosystem	*Selar crumenophthalmus*—akule, bigeye scad	651,292 lb (295,421 kg).
	Decapterus macarellus—opelu, mackerel scad	393,563 lb (178,517 kg).
	Carangidae—jacks	193,423 lb (87,735 kg).
	Mullidae—goatfish	125,813 lb (57,068 kg).
	Acanthuridae—surgeonfish	80,545 lb (36,535 kg).
	Lutjanidae—snappers	65,102 lb (29,530 kg).
	Holocentridae—squirrelfish	44,122 lb (20,013 kg).
	Mugilidae—mullets	41,112 lb (18,648 kg).
	Mollusks—turbo snails; octopus; giant clams	28,765 lb (13,048 kg).
	Scaridae—parrotfish	33,326 lb (15,116 kg).
	Crustaceans—crabs	20,686 lb (9,383 kg).
	Carcharhinidae—Reef Sharks	111,566 lb (50,605 kg).
	All Other CREMUS combined	142,282 lb (64,538 kg).

NMFS and the Council, relying on information from local resource management agencies in American Samoa, Guam, the CNMI, and Hawaii, will conduct a post-season accounting of the annual catch for each stock and stock complex immediately after the end of the fishing year. If an ACL is exceeded, the Council will take action in accordance with 50 CFR 600.310(g), which may include a recommendation that NMFS reduce the ACL for the subsequent fishing year by the amount of the overage, or other measure, as appropriate.

Comments and Responses

The comment period for the proposed specifications ended on January 18, 2012. NMFS received no comments, and so is adopting the specifications unchanged from the proposal.

Changes From the Proposed Specifications

There are no changes in the final specifications.

Classification

The Regional Administrator, NMFS PIR, determined that this action is necessary for the conservation and management of Pacific Islands fishery resources, and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed specification stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed specifications and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required, and none was prepared.

This action is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 2, 2012.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator, for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2012–2753 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 25
Tuesday, February 7, 2012

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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 213

RIN 3206–AM07

Excepted Service—Appointment of Persons With Intellectual Disabilities, Severe Physical Disabilities, and Psychiatric Disabilities

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is proposing to amend its regulations pertaining to the appointment of persons with disabilities. The proposed changes eliminate the requirement that an applicant supply a certification of job readiness and provide clarification on appointments under this authority. In addition, OPM is cognizant of a change in terminology as evinced, for example in ''Rosa's Law,'' which Congress enacted in October of 2010. Although Rosa's Law is not applicable here, it has prompted us to reconsider our own use of terminology, and we propose to substitute the phrase ''intellectual disability'' for the phrase ''mental retardation'' throughout this Part, without any change in the intended coverage.

DATES: We will consider comments received on or before April 9, 2012.

ADDRESSES: You may submit comments, identified by RIN number 3206–AM07, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this proposed rulemaking. Additional instructions are provided at the regulations.gov Web site.

Email: employ@opm.gov. Include the RIN 3206–AM07 in the subject line of the message.

Fax: (202) 606–2329.

Mail: Karen R. Jacobs, Acting Deputy Associate Director for Recruitment and Hiring Policy, U.S. Office of Personnel Management, Room 6551, 1900 E Street NW., Washington, DC 20415–9700.

Hand Delivery/Courier: OPM, Room 6551, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Gale Perryman by telephone on (202) 606–1143, by FAX on (202) 606–4430, by TDD on (202) 418–3134, or by email at *gale.perryman@opm.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is proposing to revise the regulations in 5 CFR 213.3102(u) governing the appointment of people with mental retardation, severe physical disabilities, and psychiatric disabilities. Paragraph (u) of section 213.3102 implements Executive Orders 12125 and 13124 to provide a special hiring authority for people with intellectual disabilities, severe physical disabilities, and psychiatric disabilities. This Schedule A authority is subject to the general provisions of Subpart A, 5 CFR PART 213 for temporary and time-limited appointments. The proposed revisions are described below:

Subpart C Excepted Schedules

On October 6, 2010, Congress enacted ''Rosa's Law,'' which changes references from ''mental retardation'' or ''individuals with mental retardation'' to ''intellectual disability'' or ''individual with intellectual disability'' in various statutes the law amended and required conforming changes in related regulations. Although Rosa's Law is inapplicable to the President's creation of an excepted service hiring authority for persons with specified disabilities, this statute nevertheless prompted OPM to reconsider its own use of terminology. As a result of that process, we propose to revise our language to replace the term ''mental retardation'' with the currently more commonly used term ''intellectual disability.'' We added a new paragraph (u)(2) Definitions, to define ''intellectual disability'' as meaning only those intellectual disabilities that would, under prior iterations of this regulation, have been encompassed by the term ''mental retardation.'' This addition causes all current paragraphs to change by one number.

Section 213.3102(u)(3)(i) currently requires all applicants seeking either a permanent or time-limited appointment to supply a ''certification of job readiness.'' This certification, which may be prepared by one of the entities identified in 213.3102(u)(2), has been used as the basis for determining that an applicant can reasonably be expected to perform in a particular work environment. For instance, the certification of readiness for an individual applying for a position as an Administrative Assistant or Accountant might state that the applicant ''is likely to succeed performing work in an office environment.'' In the alternative, the current 213.3102(u)(3)(ii) allows agencies to give individuals a temporary appointment to establish their ability to perform in the relevant environment when the certification of job readiness has not been provided.

We believe that a requirement that applicants provide a separate ''certification of job readiness'' is not necessary. Persons with disabilities today often have work, educational, or other relevant experience that an agency may rely upon to determine whether they are likely to succeed in a particular work environment. Agencies also possess the option of giving individuals a temporary appointment that will allow them to establish their job readiness. In those circumstances, the agency may convert the individual to a permanent appointment, once it determines that the individual is able to perform the duties of the position.

Elimination of the requirement that applicants supply a certification of job readiness will speed the hiring process for agencies and remove an unnecessary burden on applicants with disabilities. This is consistent with the policy outlined in the President's Memorandum of May 11, 2010 regarding the elimination of unnecessary complexities and inefficiencies in the federal hiring process.

The proposed section 213.3102(u)(4) provides for permanent or time-limited appointment options when individuals have proof of disability and an agency determines that they are ''job ready''—that is, that they are likely to succeed in performing in the required work environment. Under the proposed regulations, the agency determination of job readiness may be based upon any

relevant work, educational, or other experience. Section 213.3102(u)(5) addresses temporary employment options, mainly when a determination of job readiness cannot be made based on an individual's prior work, educational, or other experience. We propose to modify this section to clarify the appropriate uses of the temporary employment option (i.e. to determine job readiness, or when the duties to be performed are truly of a short-term nature).

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain potential applicants and Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 213

Government employees, Excepted Schedules.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM is proposing to revise 5 CFR 213.3102 as follows:

PART 213—EXCEPTED SERVICE

1. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; Sec. 213.101 also issued under 5 U.S.C. 2103. Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 13318, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 *et seq.;* Pub. L. 105–339, 112 Stat 3182–83; E.O. 13162; E.O. 12125, 3 CFR 1979 Comp., p. 16879; and E.O. 13124, 3 CFR 1999 Comp., p. 31103; and Presidential Memorandum—Improving the Federal Recruitment and Hiring Process (May 11, 2010).

2. In § 213.3102 revise paragraph (u) to read as follows:

§ 213.3102 Entire executive civil service.

* * * * *

(u) *Appointment of persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities—(1) Purpose.* An agency may appoint, on a permanent, time-limited, or temporary basis, a person with an intellectual disability, a severe physical disability, or a psychiatric disability according to the provisions described below.

(2) *Definition.* ''Intellectual disabilities'' means only those disabilities that would have been encompassed by the term ''mental retardation'' in previous iterations of this regulation and the associated Executive Order, Executive Order 12125, dated March 15, 1979.

(3) *Proof of disability.* (i) An agency must require proof of an applicant's intellectual disability, severe physical disability, or psychiatric disability prior to making an appointment under this section.

(ii) An agency may accept, as proof of disability, appropriate documentation (e.g., records, statements, or other appropriate information) issued from a licensed medical professional (*e.g.,* a physician or other medical professional duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine); a licensed vocational rehabilitation specialist (State or private); or any Federal agency, State agency, or an agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

(4) *Permanent or time-limited employment options.* An agency may make permanent or time-limited appointments under this subsection where an applicant supplies proof of disability as described in paragraph (3) above and the agency determines that the individual is likely to succeed in the performance of the duties of the position for which he or she is applying. In determining whether the individual is likely to succeed in performing the duties of his position, the agency may rely upon the applicant's employment, educational, or other relevant experience, including but not limited to service under another type of appointment in the competitive or excepted services.

(5) *Temporary employment options.* An agency may make a temporary appointment when:

(i) It is necessary to observe the applicant on the job to determine whether the applicant is able or ready to perform the duties of the position. When an agency uses this option to determine an individual's job readiness, the hiring agency may convert the individual to a permanent appointment in the excepted service whenever the agency determines the individual is able to perform the duties of the position; or

(ii) The work is of a temporary nature.

(6) *Noncompetitive conversion to the competitive service.* (i) An agency may noncompetitively convert to the competitive service an employee who has completed 2 years of satisfactory service under this authority in accordance with the provisions of Executive Order 12125 as amended by Executive Order 13124 and § 315.709 of this chapter, except as provided in (u)(6)(ii).

(ii) Time spent on a temporary appointment specified in paragraph (u)(5)(ii) of this section does not count towards the 2-year requirement.

* * * * *

[FR Doc. 2012–2660 Filed 2–6–12; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0038; Directorate Identifier 2011–NM–209–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A300 B4–600 series airplanes and Model A310–203, –204, –221, and –222 airplanes. This proposed AD was prompted by a report of a capacitive density condensator (cadensicon) coil overheating during testing. This proposed AD would require an inspection to determine if a certain fuel quantity indication computer (FQIC) is installed, replacement of identified FQICs, and modification of the associated wiring. We are proposing this AD to detect and correct potential overheating of the cadensicon coil, which could create an ignition source inside a fuel tank, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by March 23, 2012.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE.,

Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0038; Directorate Identifier 2011–NM–209–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0186, dated September 23, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> In view to address the scope of Special Federal Aviation Regulation 88 (SFAR 88) (66 FR 23086, May 7, 2001) and the equivalent JAA Internal Policy INT/POL/25/12, a safety analysis of Fuel Quantity Indication Computers (FQIC) fitted to Wide Body aeroplanes has been performed.
>
> Detailed analysis has shown that on early standard FQIC, Type 1, there is an insufficient gap on the printed circuit board between a 115V [volt] supply and a direct path to the Capacitive Density Condensator (Cadensicon).
>
> During tests that were carried out applying 115V to the Cadensicon coil, measured temperature levels were in excess of the acceptable level of 200 °C. This potential overheating of the Cadensicon coil could be a possible ignition point within the fuel tank.
>
> This condition, if left uncorrected, could create an ignition source in the tank vapour space, possibly resulting in a wing fuel tank explosion and consequent loss of the aeroplane.
>
> For the reasons explained above, this [EASA] AD requires the replacement of all Type 1 FQICs with Type 2 FQICs.

You may obtain further information by examining the MCAI in the AD docket.

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 (66 FR 23086, May 7, 2001) requires certain type design (*i.e.,* type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: Single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) has issued a regulation that is similar to SFAR 88 (66 FR 23086, May 7, 2001). (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States who have agreed to co-operate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Relevant Service Information

Airbus has issued Mandatory Service Bulletins A300–28–6024, Revision 02, dated January 19, 2011; and A310–28–2039, Revision 01, dated January 19, 2011. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information

referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 53 products of U.S. registry. We also estimate that it would take about 6 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $200 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $37,630, or $710 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2012–0038; Directorate Identifier 2011–NM–209–AD.

(a) Comments Due Date

We must receive comments by March 23, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes, and Model A310–203, –204, –221, and –222 airplanes; certificated in any category; all manufacturer serial numbers.

(d) Subject

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

(e) Reason

This AD was prompted by a report of a capacitive density condensator (cadensicon) coil overheating during testing. We are issuing this AD to detect and correct potential overheating of the cadensicon coil, which could create an ignition source inside a fuel tank, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Actions

Within 30 months after the effective date of this AD, inspect to determine whether any fuel quantity indication computer (FQIC) Type 1, having part number (P/N) SIC5054 or P/N SIC5051 (as applicable to the airplane model), is installed, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6024, Revision 02, dated January 19, 2011; or Airbus Mandatory Service Bulletin A310–28–2039, Revision 01, dated January 19, 2011; as applicable. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number of the FQIC can be conclusively determined from that review. If any FQIC Type 1 having P/N SIC5054 or P/N SIC5051 is installed, within 30 months after the effective date of this AD, replace the FQIC Type 1 with a FQIC Type 2 having P/N SIC5055, P/N SIC5076, P/N SIC5082, or P/N SIC5083 (as applicable to Model A310 series airplanes) or with a FQIC Type 2 having P/N SIC5077 (as applicable to Model A300 B4–600 series airplanes), and modify the associated wiring, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6024, Revision 02, dated January 19, 2011; or Airbus Mandatory Service Bulletin A310–28–2039, Revision 01, dated January 19, 2011; as applicable.

(h) Parts Installation

As of the effective date of this AD, no person may install any FQIC Type 1 having P/N SIC5054 or P/N SIC5051, on any airplane.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Information may be emailed to: *9–ANM–116–AMOC–REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(j) Related Information

Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2011–0186, dated September 23, 2011, and the service information specified in paragraphs (j)(1) and (j)(2) of this AD, for related information.

(1) Airbus Mandatory Service Bulletin A300–28–6024, Revision 02, dated January 19, 2011.

(2) Airbus Mandatory Service Bulletin A310–28–2039, Revision 01, dated January 19, 2011.

Issued in Renton, Washington on January 12, 2012.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–2678 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1181; Airspace Docket No. 11–ANM–20]

Proposed Amendment of Class E Airspace; Boise, ID

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Boise Air Terminal (Gowen Field), Boise, ID. Decommissioning of the Donnelly Tactical Air Navigation System (TACAN) has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport. This action also would adjust the geographic coordinates of the airport.

DATES: Comments must be received on or before March 23, 2012.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2011–1181; Airspace Docket No. 11–ANM–20, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2011–1181 and Airspace Docket No. 11–ANM–20) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2011–1181 and Airspace Docket No. 11–ANM–20''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by amending Class E airspace extending upward from 700 feet above the surface at Boise Air Terminal (Gowen Field), Boise, ID. Airspace reconfiguration is necessary due to the decommissioning of the Donnelly TACAN. The geographic coordinates of the airport would be adjusted in accordance with the FAA's aeronautical database. Controlled airspace is necessary for the safety and management of IFR operations at the airport.

Class E airspace designations are published in paragraph 6005, of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation; (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority

described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Boise Air Terminal (Gowen Field), Boise, ID.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ANM ID E5 Boise, ID [Amended]

Boise Air Terminal (Gowen Field), ID
(Lat. 43°33′52″ N., long. 116°13′22″ W.)

That airspace extending upward from 700 feet above the surface bounded by a line beginning at lat. 43°56′00″ N., long. 116°33′04″ W.; to lat. 43°51′15″ N., long. 116°25′03″ W., thence via the 18.8-mile radius of the Boise Air Terminal (Gowen Field), clockwise to long. 116°14′03″ W.; to lat. 43°45′00″ N., long. 116°14′03″ W.; to lat. 43°31′00″ N., long. 115°52′03″ W.; to lat. 43°20′00″ N., long. 115°58′03″ W.; to lat. 43°25′00″ N., long. 116°25′03″ W.; to lat. 43°27′00″ N., long. 116°29′03″ W.; to lat. 43°25′12″ N., long. 116°32′23″ W.; to lat. 43°29′25″ N., long. 116°37′53″ W.; to lat. 43°32′45″ N., long. 116°49′04″ W.; to lat. 43°37′35″ N., long. 116°47′04″ W.; to lat. 43°42′00″ N., long. 116°57′04″ W., thence to the point of beginning; that airspace extending upward from 1,200 feet above the surface within the 30.5-mile radius of the airport beginning at the 122° bearing of the airport, thence via a line to the intersection of the 34.8-mile radius of the airport and the 224° bearing of the airport, thence clockwise along the 34.8-mile radius of the airport to that airspace 7 miles each side of the 269° bearing of the airport extending from the 34.8-mile radius to 49.6 miles west of the airport, and within 7 miles northeast and 9.6 miles southwest of the 295° bearing of the airport extending from the 34.8-mile radius to 65.3 miles northwest of the airport, to lat. 44°00′27″ N., long. 117°10′58″ W., thence along the 223° bearing to V–253, thence south along V–253, thence along the 30.5-mile radius of the airport to the point of beginning; that airspace southeast of the airport extending upward from 9,000 feet MSL bounded on the north by V–444, on the east by V–293, on the south by V–330 and on the southwest by V–4; that airspace northeast of the airport extending upward from 11,500 feet MSL, bounded on the northeast by V–293, on the south by V–444, on the southwest by the 30.5-mile radius of the airport and on the west by V–253.

Issued in Seattle, Washington, on January 27, 2012.

Robert Henry,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. 2012–2761 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–135071–11]

RIN 1545–BK63

Application for Recognition as a 501(c)(29) Organization

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** are temporary regulations authorizing the IRS to prescribe the procedures by which a qualified nonprofit health insurance issuer participating in the Consumer Operated and Oriented Plan program, established by the Centers for Medicare and Medicaid Services, may apply for recognition as a tax-exempt organization under the Internal Revenue Code. The text of those regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by April 9, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–135071–11), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–135071–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–135071–11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Amy Franklin or Martin Schäffer at (202) 622–6070; concerning submission of comments and request for hearing, Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

The temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** make additions to the Income Tax Regulations (26 CFR part 1) relating to section 501(c)(29) of the Internal Revenue Code (Code). The temporary regulations provide that the Commissioner has the authority to prescribe the procedures under which a qualified nonprofit health insurance issuer (within the meaning of section 1322(c) of the Patient Protection and Affordable Care Act, Public Law 111–148 (March 23, 2010)) which has received a loan or grant from the Centers for Medicare and Medicaid Services under the Consumer Operated and Oriented Plan program may request to be recognized as tax-exempt under section 501(a) as an organization described in section 501(c)(29). The temporary regulations expressly authorize the Commissioner to recognize a qualified nonprofit health insurance issuer as exempt effective as of a date prior to the date of its application, provided that the application is submitted in the manner and within the time prescribed by the Commissioner and the organization's prior purposes and activities were consistent with the requirements for exempt status under section 501(c)(29). The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the additions.

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, and because no collection of information is imposed 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, the proposed regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The IRS and the Treasury Department request comments on the proposed regulations, including how they might be made easier to understand. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Amy Franklin and Martin Schäffer of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other persons in the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendment to the Regulations

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

PART 1—INCOME TAXES

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

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

Section 1.501(c)(29)–1 also issued under 26 U.S.C. 501(c)(29)(B)(i). * * *

Par. 2. Section 1.501(c)(29)–1 is added to read as follows:

§ 1.501(c)(29)–1 CO–OP Health Insurance Issuers.

[The text of proposed amendment to § 1.501(c)(29)–1 is the same as the text for § 1.501(c)(29)–1T(a) through (c) published elsewhere in this issue of the **Federal Register**].

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–2339 Filed 2–6–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 48

[REG–113770–10]

RIN 1545–BJ44

Taxable Medical Devices

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Proposed Rulemaking and Notice of Public Hearing.

SUMMARY: This document contains proposed regulations that provide guidance on the excise tax imposed on the sale of certain medical devices under section 4191 of the Internal Revenue Code, enacted by the Health Care and Education Reconciliation Act of 2010 in conjunction with the Patient Protection and Affordable Care Act. The proposed regulations affect manufacturers, importers, and producers of taxable medical devices. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by May 7, 2012. Outlines of topics to be discussed at the public hearing scheduled for May 16, 2012, at 10 a.m., must be received by May 7, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–113770–10), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–113770–10), 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–113770–10). The public hearing will be held on May 16, 2012, in the IRS Auditorium, beginning at 10 a.m., at the Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Natalie Payne or Stephanie Bland, at (202) 622–3130; concerning submission of comments, the public hearing, and/or to be placed on the building access list to attend the public hearing, contact Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Statutory Provisions

This document contains proposed regulations that provide guidance on the excise tax imposed on the sale of certain medical devices under section 4191 of the Internal Revenue Code (Code), enacted by section 1405 of the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)), in conjunction with the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)) (jointly, the ACA).

Section 4191 imposes an excise tax on the sale of certain medical devices by the manufacturer, producer, or importer of the device in an amount equal to 2.3 percent of the sale price. Section 4191 applies to sales of taxable medical devices after December 31, 2012.

Section 4191(b)(1) provides that, in general, a ''taxable medical device'' is any device, as defined in section 201(h) of the Federal Food, Drug & Cosmetic Act (FFDCA), (codified as amended at 21 U.S.C. 301 et seq. (2006)), that is intended for humans. Section 201(h) of the FFDCA provides generally that the term ''device'' means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them; intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease; or intended to affect the structure or any function of the body, and that does not achieve its primary intended purposes through chemical action within or on the body and that is not dependent upon being metabolized for the achievement of its primary intended purposes.

Section 4191(b)(2) provides that the term ''taxable medical device'' does not include eyeglasses, contact lenses, hearing aids, and any other medical device determined by the Secretary to be of a type that is generally purchased by the general public at retail for individual use.

In addition, the ACA amended section 4221(a) to limit tax-free sales of taxable

medical devices to sales (i) for use by the purchaser for further manufacture, or for resale by the purchaser to a second purchaser for use by such second purchaser in further manufacture, and (ii) for export, or for resale by the purchaser to a second purchaser for export. The ACA makes a corresponding amendment to section 6416(b)(2) with regard to claims for refund.

Manufacturers Excise Tax Rules Generally

The ACA added section 4191 to chapter 32, subtitle D of the Code, which relates to taxes imposed upon the sales of taxable articles by manufacturers, producers, and importers (commonly referred to as ''manufacturers excise taxes''). Therefore, the existing rules governing chapter 32 apply to section 4191. The substantive regulations relating to manufacturers excise taxes are contained in part 48 (Manufacturers and Retailers Excise Tax Regulations) of Title 26 of the Code of Federal Regulations (CFR). The procedural regulations governing manufacturers excise taxes are contained in part 40 (Excise Tax Procedural Regulations) of 26 CFR.

The manufacturers excise tax rules are discussed in Part VII under ''Explanation of Provisions,'' in this preamble. For additional information on the manufacturers excise tax rules generally, see chapter 5 of IRS Publication 510, ''Excise Taxes,'' available at *http://www.irs.gov/publications/p510/ch05.html*.

Notice 2010–89

On December 27, 2010, the IRS published Notice 2010–89 (2010–52 IRB 908) to request comments on the implementation and administration of the new tax under section 4191. The IRS and the Treasury Department received numerous comments in response to the notice and considered all comments in the drafting of the proposed regulations. The comments are discussed in more detail in this preamble. The IRS and the Treasury Department also consulted with the Food and Drug Administration (FDA) and the Centers for Medicare and Medicaid Services (CMS) in developing these regulations.

Explanation of Provisions

I. Definition of ''Taxable Medical Device''

Section 4191(b)(1) links the definition of ''taxable medical device'' to the definition of ''device'' in section 201(h) of the FFDCA. The FDA generally administers the provisions of the FFDCA, including section 201(h) and other provisions relating to medical devices.

The FDA generally requires owners or operators of places of business (also called establishments) that are located in the United States, or in foreign countries that export devices to the United States, and that manufacture, prepare, propagate, compound, assemble, process, repackage, or relabel medical devices intended for human use to register their establishments and list their devices upon first entering into operation, and to update this information on an annual basis with the FDA. See sections 510(a)–(d), (i), and (j) of the FFDCA, 21 CFR 807.20, and 21 CFR 807.21.

Various commentators observed that the statutory definition of ''taxable medical device'' leaves uncertainty as to which devices are included in the definition. The proposed regulations address this concern by providing that for purposes of the medical device excise tax, a device defined in section 201(h) of the FFDCA that is intended for humans means a device that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807, pursuant to FDA requirements. The FDA listing requirements are longstanding. Further, device manufacturers must comply with these requirements as part of the FDA's device regulation process. Therefore, device manufacturers can be expected to know which devices fall within the definition.

The FDA has promulgated classification regulations for approximately 1,700 different generic types of devices. Each classification regulation includes one or more product codes that describe a subcategory of the device type described in the regulation. Currently, manufacturers may, in certain circumstances, list multiple different devices that fall within the same product code under a single listing. Therefore, all devices that are listed under a single product code listing in conjunction with the FDA's device listing requirement are ''taxable medical devices'' unless they fall within an exemption under section 4191(b)(2).

The proposed regulations also provide that if a device is not listed with the FDA but the FDA later determines that the device should have been listed as a device, the device will be deemed to have been listed as a device with the FDA as of the date the FDA notifies the manufacturer or importer in writing that corrective action with respect to listing is required.

II. The Retail Exemption

Section 4191(b)(2) provides that the term ''taxable medical device'' does not include eyeglasses, contact lenses, hearing aids, and any other medical device determined by the Secretary to be of a type that is generally purchased by the general public at retail for individual use (the retail exemption).

The FDA has grouped each of the 1,700 classification regulations into 16 medical specialties (21 CFR, parts 862–892). Each of these generic types of devices is assigned to one (or sometimes more than one) of three regulatory classes based on the level of control necessary to assure the safety and effectiveness of the device. The three classes of FDA devices are Class I (general controls), Class II (special controls), and Class III (pre-market approval). A number of device types that predate the enactment of the Medical Device Amendments to the Food, Drug, and Cosmetic Act of 1976 remain unclassified.

With regard to the retail exemption, section 4191 makes no reference to the three regulatory classes. Further, the Joint Committee on Taxation's Technical Explanation of the ACA makes clear that the FDA regulatory classes do not, by themselves, determine whether a device falls within the retail exemption. Specifically, the Technical Explanation states, ''The exemption for such items is not limited by device class as defined in section 513 of the Federal Food, Drug, and Cosmetic Act.'' Rather, the Technical Explanation notes that the exemption could cover ''Class I items such as certain bandages and tipped applicators, Class II items such as certain pregnancy test kits and diabetes testing supplies, and Class III items such as certain denture adhesives and snake bite kits.'' The Technical Explanation also emphasizes that ''items would only be exempt if they are generally designed and sold for individual use.'' Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111th Congress (JCS–2–11), March 2011, at 366.

The proposed regulations provide a facts and circumstances approach to evaluating whether a taxable medical device is of a type that is generally purchased by the general public at retail for individual use. Under the proposed regulations, a device is considered to be of a type generally purchased by the general public at retail for individual use if (i) the device is regularly available for purchase and use by individual consumers who are not medical professionals, and (ii) the device's design demonstrates that it is not

primarily intended for use in a medical institution or office, or by medical professionals. The proposed regulations provide a set of non-exclusive factors for use in evaluating whether a taxable medical device is of a type that is generally purchased by the general public at retail for individual use. The proposed regulations also include a safe harbor provision.

The proposed regulations provide a non-exclusive list of factors to be considered in determining whether a device is regularly available for purchase and use by individual consumers who are not medical professionals. Those factors are (i) whether consumers who are not medical professionals can purchase the device through retail businesses that also sell items other than medical devices, including drug stores, supermarkets, and similar vendors; (ii) whether consumers who are not medical professionals can safely and effectively use the device for its intended medical purpose with minimal or no training from a medical professional; and (iii) whether the device is classified by the FDA under Subpart D of 21 CFR Part 890 (Physical Medicine Devices).

The proposed regulations also provide a non-exclusive list of factors to be considered in determining whether the design of a device demonstrates that it is primarily intended for use in a medical institution or office, or by medical professionals, and therefore not intended for purchase and use by individual consumers. Those factors are (i) whether the device generally must be implanted, inserted, operated, or otherwise administered by a medical professional; (ii) whether the cost to acquire, maintain, and/or use the device requires a large initial investment and/or ongoing expenditure that is not affordable for the average consumer; (iii) whether the device is a Class III device under the FDA system of classification; (iv) whether the device is classified by the FDA under certain parts or subparts of 21 CFR; and (v) whether the device qualifies as durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) for which payment is available exclusively on a rental basis under the Medicare Part B payment rules and is an ''item requiring frequent and substantial servicing'' as defined in 42 CFR 414.222. With regard to the regulatory classifications incorporated into the fourth factor described in this preamble, the IRS and the Treasury Department have determined, based on all the facts and circumstances, that the overwhelming majority of product codes that fall within these regulatory categories do not include devices that are of a type generally purchased by the general public at retail for individual use.

Whether a device is of a type generally purchased by the general public at retail for individual use is determined based on all relevant facts and circumstances. Thus, there may be relevant facts and circumstances in addition to the factors specifically identified in the proposed regulations.

To provide greater certainty, the proposed regulations also include a safe harbor provision that identifies certain categories of taxable medical devices that the IRS and the Treasury Department have determined fall within the retail exemption. The safe harbor includes (i) devices that are identified in the FDA's IVD Home Use Lab Tests (Over-the-Counter Tests) database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfIVD/Search.cfm;* (ii) devices described as ''OTC'' or ''over the counter'' devices in the relevant FDA classification regulation heading; (iii) devices that are described as ''OTC'' or ''over the counter'' devices in the FDA's product code name, the FDA's device classification name, or the ''classification name'' field in the FDA's device registration and listing database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfrl/rl.cfm;* and (iv) certain devices that qualify as DMEPOS for which payment is available on a purchase basis under Medicare Part B payment rules in accordance with the fee schedule published by CMS.

The IRS and the Treasury Department recognize the challenges involved in applying a facts and circumstances test to the wide array of devices that are potentially subject to the medical device excise tax, including for smaller manufacturers or importers for which the application of the retail exemption may determine whether they are subject to the tax at all. The IRS and the Treasury Department intend through the rulemaking process to continue their efforts to find ways to make the test easier to apply to particular cases and to provide certainty with respect to a substantial majority of devices. To that end, comments are requested on additional factors, examples, or safe harbors that could be added to provide greater certainty for a larger number of devices. Comments are particularly requested on how to provide greater clarity with respect to taxable medical devices that are sold primarily or exclusively through specialty medical retailers that sell medical devices and related materials. Comments are also requested on whether the packaging and labeling of a taxable medical device, the terms and conditions of the manufacturer's warranty with respect to a device, and substantial sales of a device over the internet would be meaningful factors for use in establishing whether a device qualifies for the retail exception, and if so, how any such factor should be described and applied. Comments are also requested on other types of DMEPOS that should be considered for safe harbor treatment and how those items can be consistently and specifically identified. For example, ''inexpensive equipment,'' as defined in 42 CFR 414.220(a)(1), appears to describe items that may meet the retail exception under an application of the facts and circumstances test. However, comments are requested on how devices that fall under the definition would be identified given that the CMS fee schedule categorizes ''inexpensive equipment'' together with other medical devices that appear not to fall within the retail exception.

The IRS and the Treasury Department received numerous comments suggesting that it is not feasible to base the retail exception on quantitative data that compares the relative number of sales of a certain taxable medical device at retail to the number of sales of the device to doctors' offices, hospitals, and other medical and health care providers and institutions. Several commentators stated that for a given device, numerical data on the proportion of sales to retail purchasers and to non-retail purchasers is often not available to the manufacturers and importers of the device, even with respect to the devices that they manufacture or import. Further, the commentators noted that even if the data is available, a rule that looks to industry-wide data regarding the percentage of retail and non-retail sales of a device would require an ongoing, resource-intensive effort to collect industry-wide sales information, and would not provide certainty to stakeholders because the data may change from year to year. In light of these difficulties, the proposed regulations do not adopt a market data approach to the retail exception.

One commentator suggested that the IRS and the Treasury Department provide a retail exception safe harbor based on a manufacturer's or importer's proportion of sales of a particular device at retail, compared to that manufacturer's or importer's overall sales of the device. Under this suggestion, if the retail sales of a particular device by a manufacturer or importer met or exceeded a certain ratio

or percentage, as compared to overall sales by the manufacturer or importer of that device, then all sales of the device would be exempt from tax. The proposed regulations do not adopt this approach to the retail exception because the suggested safe harbor could result in inconsistent treatment of different manufacturers of the same device. The language of section 4191 applies the retail exception to types of devices, not to manufacturers and importers based on the nature of their distributions or sales.

Some commentators suggested that if the manufacturer or importer is able to determine that a particular taxable medical device is sold to consumers at retail, no tax should be imposed on any sale of that device, even if the device is not of a type that is generally purchased by the general public at retail for individual use. Such an approach would be contrary to the language of the statute. Therefore, the proposed regulations do not adopt this approach.

III. Veterinary Devices

The definition of ''device'' in section 201(h) of the FFDCA includes devices used in veterinary medicine. However, the definition of ''taxable medical device'' under section 4191 limits taxable medical devices to devices described in section 201(h) of the FFDCA that are ''intended for humans.'' The proposed regulations further limit the definition of ''taxable medical device'' to devices that are listed with the FDA. Under existing FDA regulations, a device intended for use exclusively in veterinary medicine must be labeled as such and is not subject to several pre-market and post-market provisions of the FFDCA, including the listing requirement. Therefore, under the proposed regulations, devices intended for use exclusively in veterinary medicine are not ''taxable medical devices.''

A commentator has noted, however, that many medical devices used in veterinary practices are also used in human medicine. The commentator suggested that if the manufacturer can demonstrate that a device is sold for use in veterinary medicine, the excise tax should not be imposed on that sale. The proposed regulations do not adopt this suggestion because the statutory language does not limit the definition of ''taxable medical device'' to devices intended exclusively for humans. Therefore, a device that is intended for humans but that is also intended for use or used in veterinary medicine is a ''taxable medical device'' if it is listed as a device with the FDA pursuant to FDA requirements, and does not fall within an exemption under section 4191(b)(2), such as the retail exemption.

IV. Dual Use Devices

Devices That Have Medical and Non-Medical Uses

Many commentators expressed concern over the potential taxation of devices that have both medical and non-medical uses, such as latex gloves, and requested that the excise tax not be imposed on the sale of devices for non-medical uses.

Section 4191 imposes a tax upon the sale of a taxable medical device by the manufacturer, unless the sale is for export or further manufacture. In most instances, the manufacturer does not sell directly to the end user of the device. Therefore, the manufacturer does not typically know the identity of the end user at the time of sale. Further, commentators suggest that manufacturers would have difficulty tracking their products through the supply chain and determining the ultimate destination of their products once they are sold to a distributor. Commentators also stated that, in some cases, after the manufacturer sells a device to a distributor, the distributor may package and label the device for sale for non-medical uses.

Under the proposed regulations, the definition of ''taxable medical device'' is tied to the FDA's listing requirements for devices. Therefore, a device that is listed with the FDA pursuant to FDA requirements is a ''taxable medical device,'' unless it falls within an exemption under section 4191(b)(2), such as the retail exemption.

''Research Use Only'' Devices

Several commentators stated that they manufacture devices that are used in clinical medicine to diagnose disease in humans, as well as in industrial laboratory work and laboratory research. Those commentators further stated that when sold for non-medical purposes, such devices are labeled ''Research Use Only.'' The comments suggest that, although the devices labeled ''Research Use Only'' are physically suitable for clinical use, FDA regulations prohibit the use of devices with this label in a clinical setting for human medical purposes. The commentators requested that sales of devices that are labeled ''Research Use Only'' be exempt from the medical device excise tax because of the intended use of such devices.

The proposed regulations define ''taxable medical device'' as any device that is listed as a device with the FDA pursuant to FDA requirements. Under 21 CFR 807.65(f) of the FDA regulations, persons that ''manufacture, prepare, propagate, compound, or process devices solely for use in research, teaching, or analysis and do not introduce such devices into commercial distribution'' are exempt from the FDA's registration and listing requirements. See section 510(g) of the FFDCA. Accordingly, a device that is sold for use in research that is not listed because it satisfies the requirements of 21 CFR 807.65(f) is not a ''taxable medical device'' under the proposed regulations. In contrast, a device that is sold for use in research that is listed with the FDA pursuant to FDA requirements, such as a device not solely used in research or one that is introduced into commercial distribution, is a ''taxable medical device'' under the proposed regulations, unless it falls within an exemption under section 4191(b)(2), such as the retail exemption.

V. Devices Approved by the FDA for Limited Use—Investigational Devices

Several commentators requested an exemption for devices that are subject to an Investigational Device Exemption (IDE). The FDA permits the distribution of certain devices that the FDA has not yet approved for marketing under an IDE. See 21 CFR part 812 for the FDA's regulatory provisions regarding the IDE. Devices under an IDE are exempt from the FDA's listing requirements. Accordingly, a device subject to an IDE is not a ''taxable medical device'' under the proposed regulations.

VI. Dental Instruments and Equipment

A commentator requested that the proposed regulations provide a blanket exclusion for dental instruments and equipment. The proposed regulations do not adopt this suggestion. There is no statutory basis for treating dental devices differently from other taxable medical devices. Many dental instruments and equipment items are subject to the FDA's listing requirement. Accordingly, those devices that are listed as devices with the FDA pursuant to FDA requirements are ''taxable medical devices'' under the proposed regulations, unless they fall within an exemption under section 4191(b)(2), such as the retail exemption.

VII. Manufacturers Excise Tax Rules Generally; Application to Taxable Medical Devices

The ACA added section 4191 to chapter 32; therefore, the existing rules governing chapter 32 apply to the medical device excise tax. Those rules are longstanding. They are contained in statutory and regulatory provisions, and have been developed further through

revenue rulings, other published guidance, and case law.

Several commentators requested clarification on the existing manufacturers excise tax rules. This section provides an overview of the rules and addresses some of the manufacturers excise tax issues raised by commentators.

Liability for Tax; Definition of ''Manufacturer'' and ''Importer''

In general, the manufacturer or importer of a taxable article is liable for the tax upon the sale of the article. Under chapter 32, the lease or use of a taxable article by the manufacturer is generally treated as a sale.

The term ''manufacturer'' means any person who produces a taxable article from scrap, salvage, or junk material, or from new or raw material, by processing, manipulating, or changing the form of an article or by combining or assembling two or more articles. A manufacturer that sells a taxable article in knockdown (that is, unassembled) condition is considered the manufacturer and is liable for tax on the sale of the article. For chapter 32 purposes, the term ''manufacturer'' also includes an ''importer.'' The importer of a taxable article is any person who brings the article into the United States from a source outside the United States, or withdraws an article from a customs bonded warehouse for sale or use in the United States. See § 48.0–2(a)(4) for the definitions of the terms ''manufacturer'' and ''importer.''

If more than one person is involved in the manufacture or importation of an item, such as a contract manufacturing arrangement, the determination of which person is the manufacturer or the importer is based on the facts and circumstances of the arrangement. The substance rather than the form of the transaction is determinative. See Rev. Rul. 58–134 (1958–1 CB 395), Rev. Rul. 60–42 (1960–1 CB 474), and *Polaroid* v. *U.S.,* 235 F2d. 276 (1st Cir. 1956), for rules regarding the determination of which party is the manufacturer for chapter 32 purposes. See Rev. Rul. 68–197 (1968–1 CB 455) and Rev. Rul. 82–40 (1982–1 CB 175) for rules regarding the determination of which party is the importer for chapter 32 purposes.

Some commentators suggested that, in determining who is liable for the tax, the IRS and the Treasury Department should apply either the section 954 contract manufacturing rules or the FDA's registration and listing rules under 21 CFR part 807. The proposed regulations do not adopt these suggestions. As noted above, the existing chapter 32 framework includes definitions of ''manufacturer'' and ''importer.'' Section 4191 does not provide alternate definitions for those terms. Accordingly, the definitions of ''manufacturer'' and ''importer'' under chapter 32 apply to section 4191.

Taxable Event

Generally, the manufacturers excise tax attaches when the title to the taxable article passes from the manufacturer to a purchaser. When title passes is dependent upon the intention of the parties as gathered from the contract of sale and the attendant circumstances. In the case of a sale on credit, the tax attaches whether or not the purchase price is actually paid. In the case of conditional or installment sales of a taxable article, the tax attaches to each partial payment. See § 48.0–2(b) for the general rules regarding the attachment of tax.

Section 4218 imposes tax on certain uses of an article by the article's manufacturer. The tax attaches at the time the use begins. Under § 48.4218–1(b), generally, if the manufacturer of a taxable article uses the article for any purpose other than in the manufacture of another taxable article, then the manufacturer is liable for tax on the article as if the manufacturer had sold it. However, if a manufacturer uses a taxable article in the testing of another article of its own manufacture, the use of the taxable article by the manufacturer is not a taxable use. See Rev. Rul. 76–119 (1976–1 CB 345). Section 48.4218–5 provides rules on how to calculate the price on which the tax is imposed in cases of the taxable use of an article by the manufacturer.

Several commentators requested guidance on whether taxable medical devices that are used as demonstration products are subject to the medical device excise tax. The provision or use of a taxable medical device as a demonstration product may constitute a taxable sale or use, depending on the facts and circumstances of the arrangement. For example, Rev. Rul. 72–563 (1972–2 CB 568) holds that a manufacturer has sold an article when it provides the article ''free of charge'' to another person for promotional purposes. In addition, Rev. Rul. 60–290 (1960–2 CB 331) holds that the use of a taxable article by its manufacturer for demonstration purposes is a taxable use for purposes of section 4218.

Leases

Under section 4217(a), the lease of a taxable article by the manufacturer is considered a sale. If, at the time of making the lease, the manufacturer is in the business of selling the same type and model of article in arm's length transactions, the tax attaches to each lease payment until the cumulative total of the tax payments equals the total tax. If, however, at the time of making the lease, the manufacturer is not engaged in the business of selling the same type and model of article in arm's length transactions, the tax attaches to each lease payment if the article is leased by the manufacturer. See section 4216(c), section 4217(b), § 48.4216(c)–1, and § 48.4217–2 for the rules regarding the attachment and payment of tax in the context of leases.

Under § 48.4217–1, the term ''lease'' means a contract or agreement, written or verbal, that gives the lessee an exclusive, continuous right to the possession or use of a particular article for a period of time. The term includes any renewal or extension of a lease, or any subsequent lease of the article.

Sale Price

The tax imposed under section 4191 is based on the price for which a taxable medical device is sold. Under section 48.4216(a)–1(a), the price for which a taxable article is sold includes the total consideration paid for the device, whether that consideration is in the form of money, services, or other things.

The taxable sale price of a taxable article also includes, among other things, any charge for coverings or containers (regardless of their nature), and any charge incident to placing the article in a condition to be packed and ready for shipment. However, the taxable sale price excludes (i) the manufacturers excise tax, whether or not it is stated as a separate charge; (ii) the actual cost of transportation, delivery, insurance, installation, and other expenses incurred by the manufacturer or importer in placing the article in the hands of the purchaser pursuant to a bona fide sale (the costs of transportation of goods to a warehouse before their bona fide sale are not excludable); (iii) discounts, rebates, and similar allowances actually granted to the purchaser; (iv) local advertising charges; and (v) charges for warranty paid at the purchaser's option. See section 4216(a) and § 48.4216(a)–1 for the rules regarding the charges included in sale price. See sections 4216(a) and (e), § 48.4216(a)–2, § 48.4216(e)–1, § 48.4216(e)–2, and § 48.4216(e)–3 for the rules regarding exclusions from sale price.

The basic sale price rules assume that the manufacturer sells the taxable article in an arm's length transaction (that is, in a transaction between two unrelated parties) to a wholesale distributor that then sells the taxable article to a retailer

that resells to consumers. However, if a manufacturer sells a taxable article other than to a wholesale distributor or at less than a fair market arm's length price, the taxable sale price is determined on a constructive sale price rather than the actual sale price. The constructive sale price rules are set forth in section 4216(b), in § 48.4216(b)–1, § 48.4216(b)–2, § 48.4216(b)–3, and § 48.4216(b)–4 of the regulations, and in numerous revenue rulings.

If a purchaser of a taxable article returns the article to the manufacturer under a warranty as to its quality or service and the manufacturer replaces the article with a new taxable article free of charge or at a reduced price, the tax on the new article is computed on the actual amount, if any, paid to the manufacturer for the new article. See § 48.4216(a)–3(b) for the rules regarding replacements under warranty.

Several commentators requested clarification on how the sale price rules work in the context of taxable medical devices, particularly with regard to ''bonus'' goods and rebates. These commentators indicated that rebates are a common practice in the medical device industry. Under existing manufacturers tax rules, if a manufacturer sells taxable articles at the regular price and includes some of the same articles as a bonus, the tax imposed under section 4191 applies to the total price charged for the entire order. With regard to rebates, § 48.4216(a)–3(c) provides that the tax must be based on the original price of the taxable article, unless the rebate has been made prior to the close of the period for which the tax is returned. However, if a manufacturer subsequently allows a rebate for taxable articles on which tax has been paid, the manufacturer is entitled to a credit or refund for that portion of the tax that is proportionate to the part of the price that is rebated. See Rev. Rul. 68–659 (1968–2 CB 511) and Rev. Rul. 69–73 (1969–1 CB 284) for applications of the rules regarding bonus goods, free goods, and rebates. See § 48.4216(a)–3(c) for rules regarding readjustments in sale price for discounts, rebates, and bonuses.

Sales by Persons Other Than the Manufacturer

If title to, or ownership of, a taxable article passes from the manufacturer to a transferee by operation of law (such as through an inheritance or as part of the sale of a business) or as a result of any transaction not taxable under chapter 32, tax attaches to the sale of the article by the transferee to the same extent and in the same manner as if the transferee were the manufacturer of the article. See section 4219 and § 48.4219–1 for the rules regarding transfers of title to taxable articles by operation of law.

Tax-Free Sales for Further Manufacture and Export

Under section 4221(a), the tax imposed by section 4191 does not apply to the sale of taxable medical devices for use by the purchaser for further manufacture (or for resale by the purchaser to a second purchaser for further manufacture) or for export (or for resale for export).

Under § 48.4221–2(b), an article is sold for use in further manufacture if the article is sold for use by the purchaser as material in the production of, or as a component part of, another article taxable under chapter 32. Section 48.4221–2 sets forth rules governing tax-free sales of articles to be used or resold for further manufacture.

Under § 48.0–2(a)(10), an article is exported if the article is severed from the mass of things belonging within the United States with the intention of uniting it with the mass of things belonging within some foreign country or within a possession of the United States. Section 48.4221–3 sets forth rules regarding tax-free sales of articles for export.

To make a tax-free sale for further manufacture or export, the manufacturer, the first purchaser, and in some cases the second purchaser must be registered by the IRS. A manufacturer or purchaser applies for registration by filing a Form 637, ''Application for Registration (For Certain Excise Tax Activities),'' in accordance with the instructions on the form. See § 48.4222(a)–1 for the registration requirements for tax-free sales. Foreign purchasers of articles sold or resold for export are exempt from the registration requirement. See § 48.4222(b)–1(b).

Generally, the purchaser of a taxable article must provide the purchaser's registration number to the manufacturer and certify the exempt purpose for which the article will be used. The information must be in writing and may be noted on the purchase order or other document furnished by the purchaser to the manufacturer in connection with the sale. See § 48.4221–1(c).

A credit or refund of the manufacturers excise tax may be available if a tax-paid article is exported or used for an exempt purpose, such as further manufacture. See 6416 and the corresponding regulations for the conditions to allowance of a claim for credit or refund of tax and for the documentation required to support a claim for credit or refund.

Procedural Rules

Part 40 of 26 CFR contains the procedural rules applicable to manufacturers excise taxes with regard to returns, deposits, and payments.

Subtitle F of the Code contains the procedural rules applicable to ''internal revenue taxes'' (including manufacturers excise taxes) with regard to assessment, collection, penalties, overpayments, refunds, and statutes of limitations.

VIII. Other Issues Raised in Comments on Notice 2010–89

Kits

Several commentators requested clarification on the taxation of kits, often referred to as ''convenience kits.'' In general, a convenience kit is two or more different medical devices, or a combination of medical devices and other items, packaged together for the convenience of the user.

According to commentators, a number of different types of businesses, including device manufacturers and distributors, engage in the practice of creating such convenience kits. A manufacturer may assemble a kit containing a combination of items that it manufactures and items that it purchases from other manufacturers, importers, or distributors. A kit may also be assembled by a distributor that purchases the items contained in the kit from one or more manufacturers or importers. Some kits are designed to be used by medical or health care professionals for the performance of a particular medical procedure. Other kits are available to the general public at retail, such as first aid kits and home pregnancy test kits.

Several commentators expressed concern over the potential for double taxation when one or more taxable medical devices are included in a kit. Some commentators suggested that tax should not be imposed on both the taxable medical devices used as components of the kit and the kit itself. Other commentators recommended imposing tax on the taxable medical devices included in the kit, but not on the assembled kit. Other commentators suggested that the assembly of a kit does not constitute manufacture because the items included in the kit are not transformed.

Under the proposed regulations, a kit is a ''taxable medical device'' if the kit is listed as a device with the FDA pursuant to FDA requirements. The proposed regulations define ''kit'' as a set of two or more articles packaged in a single bag, tray, or box for the convenience of the end user.

Moreover, the existing manufacturers excise tax rules apply to kits in determining who is liable for the tax and which sale is subject to tax. Under these existing rules, if a manufacturer sells a taxable medical device to a distributor that uses the device to produce a kit that is a distinct taxable medical device, the distributor's assembly of the kit constitutes further manufacture because the distributor has created a new taxable article. The proposed regulations clarify that if a kit is a taxable medical device, then the use of other taxable medical devices in the assembly of the kit constitutes further manufacture by the person who assembles the kit.

In some circumstances, the manufacturer may make a tax-free sale of a taxable medical device to the distributor for use in the production or assembly of a kit; tax will attach, however, upon the sale of the kit by the distributor. If the manufacturer sells a taxable medical device to the distributor for use in the production or assembly of a kit at a tax-included price, the distributor may be eligible to claim a credit or refund for the overpayment of tax pursuant to section 6416(b)(3). The rules regarding tax-free sales for further manufacture and the credit and refund provisions of section 6416(b)(3) provide a mechanism for avoiding double taxation when a taxable medical device is included in a kit that is also a taxable medical device. See § 48.4221–2(b) for the circumstances under which a taxable article is sold for use in further manufacture. See section 4221 and § 48.4221–1, § 48.4221–2, § 48.4222(a)–1, and § 48.4223–1 for the rules regarding tax-free sales for further manufacture.

Generally, under § 48.4216(a)–1(e), if a taxable and nontaxable article are sold by the manufacturer as a unit, the tax attaches to that portion of the unit that is properly allocable to the taxable article. In the case of a kit that is a separate taxable medical device, the taxable and nontaxable articles used in the kit's production or assembly have lost their identity as separate articles. Accordingly, the proposed regulations clarify that the provisions of § 48.4216(a)–1(e) do not apply to the sale of kits that are separate taxable medical devices. The proposed regulations further clarify that under such circumstances, the entire sale price of the kit is subject to tax under section 4191.

Associated Devices and Components of Devices

Several commentators requested clarification on the tax treatment of an associated or secondary device that is sold with a primary device, such as a monitor that is sold as part of an x-ray system. Commentators also requested information on the tax treatment of components of a device.

Under the proposed regulations, the definition of ''taxable medical device'' is tied to the FDA's listing requirements for devices. Therefore, associated devices or components that are listed as devices with the FDA pursuant to FDA requirements are ''taxable medical devices'' for purposes of section 4191, unless they fall within an exemption under section 4191(b)(2), such as the retail exemption. However, if a manufacturer uses an associated device or component in creating a new device that must be listed with the FDA, then the rules under section 4221 and the corresponding regulations regarding further manufacture apply.

Combination Products

Combination products are therapeutic and diagnostic products that combine drugs, devices, and/or biological products. See 21 CFR 3.2(e). The IRS and the Treasury Department received a comment regarding combination products consisting of a device component and a drug component, such as prefilled syringes and inhalers. The commentator suggested that the sale of a combination product should not be subject to the medical device tax if its drug component is taken into account in computing the branded prescription drug (BPD) fee enacted under section 9008 of the ACA. The commentator suggested that the combination product be subject to either the BPD fee or the medical device tax, but not both, based on the FDA's determination of a combination product's primary mode of action.

The ACA enacted both the medical device excise tax and the BPD fee, but provided no coordination between the provisions. Under the proposed regulations, the definition of ''taxable medical device'' is tied to the FDA's listing requirements for devices. In general, the annual BPD fee is allocated among covered entities engaged in the business of manufacturing or importing branded prescription drugs with aggregate branded prescription drug sales of over $5 million to specified government programs. See section 9008 of the ACA and 26 CFR part 51. For this purpose, each branded prescription drug is identified based on its National Drug Code (NDC). Based on consultation with the FDA, the IRS and the Treasury Department anticipate that few, if any, combination products will be subject to both the medical device excise tax and the BPD fee. The IRS and the Treasury Department request comments on the extent to which combination products may be subject to the medical device excise tax and taken into account in computing the BPD fee, and the mechanisms by which any such impact could be avoided.

Contracts for Medical Software and IT Systems

A commentator requested transition relief for sales contracts for medical software and IT systems. According to the commentator, sellers of software and IT systems frequently provide medical devices, such as medical device data systems, under long-term, multi-year contracts. Under these contracts, the manufacturer often delivers software and IT systems in stages, with partial payments due at various times during the contract term. The commentator requested that contracts, leases, and other agreements entered into before January 1, 2013, not be subject to the medical device excise tax, even if payments on the contract are received after December 31, 2012.

The proposed regulations apply the existing manufacturers excise tax rules for sales contracts. Under section 4216 and § 48.4216(c)–1(b), generally, when a taxable article is sold under an installment payment contract with title reserved in the seller, or under another arrangement that creates a security interest and under which payments are to be made in installments, tax is computed and paid on each payment made by the purchaser. The tax payable with each payment is a percentage of each payment based on the rate of the tax, if any, in effect on the date the payment is due.

The proposed regulations do not adopt the request for transition relief. The statute was enacted on March 30, 2010, with an effective date of January 1, 2013. The statute did not provide an exception or special rule for sales pursuant to contracts in existence prior to the effective date of the tax. The proposed regulations track the statute.

Availability of IRS Documents

The IRS notice and revenue rulings cited in this preamble are published in the Internal Revenue Cumulative Bulletin and are available from the Superintendent of Documents, P.O. Box 979050, St. Louis, MO 63197–9000.

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 these regulations, and because these regulations do 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 notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for May 16, 2012, at 10 a.m., in the IRS Auditorium, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by *May 7, 2012* and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by May 7, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the schedule of speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

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 48

Excise taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 48 is proposed to be amended as follows:

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Paragraph 1. The authority citation for part 48 is amended by adding entries in numerical order to read in part as follows:

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

Section 48.4191–1 also issued under 26 U.S.C. 4191. Section 48.4191–2 also issued under 26 U.S.C. 4191(b)(2).

§ 48.0–1 [Amended]

Par. 2. The fourth sentence of § 48.0–1 is amended by removing the language ''and sporting goods'' and adding ''sporting goods, and taxable medical devices'' in its place.

Par. 3. Subpart L, consisting of §§ 48.4191–1 and 48.4191–2, is added to read as follows:

Subpart L—Taxable Medical Devices

Sec.

48.4191–1 Imposition and rate of tax.
48.4191–2 Taxable medical device.

§ 48.4191–1 Imposition and rate of tax.

(a) *Imposition of tax.* Under section 4191(a), tax is imposed on the sale of any taxable medical device by the manufacturer, producer, or importer of the device. For the definition of the term *taxable medical device,* see § 48.4191–2.

(b) *Rate of tax.* Tax is imposed on the sale of a taxable medical device at the rate of 2.3 percent of the price for which the device is sold. For the definition of the term *price,* see section 4216 and §§ 48.4216(a)–1 through 48.4216(e)–3.

(c) *Liability for tax.* The manufacturer, producer, or importer making the sale of a taxable medical device is liable for the tax imposed by section 4191(a). For rules relating to the determination of who the manufacturer, producer, or importer is for purposes of section 4191, see § 48.0–2(a)(4). For the definition of the term *sale,* see § 48.0–2(a)(5). For rules relating to the lease of an article by the manufacturer, producer, or importer, see section 4217 and § 48.4217–1 through § 48.4217–2. For rules relating to the use of an article by the manufacturer, producer, or importer, see section 4218 and § 48.4218–1 through § 48.4218–5.

(d) *Procedural rules.* For the procedural rules relating to section 4191, see part 40 of this chapter.

(e) *Tax-free sales for further manufacture or export.* For rules relating to tax-free sales of taxable medical devices for further manufacture or export, see section 4221 and § 48.4221–1 through § 48.4221–3.

(f) *Effective/applicability date.* This section applies to sales of taxable medical devices on and after January 1, 2013.

§ 48.4191–2 Taxable medical device.

(a) *Taxable medical device*—(1) *In general.* A taxable medical device is any device, as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act, that is intended for humans. For purposes of this section, a device defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act that is intended for humans means a device that is listed as a device with the Food and Drug Administration (FDA) under section 510(j) of the Federal Food, Drug, and Cosmetic Act and 21 CFR part 807, pursuant to FDA requirements.

(2) *Devices that should have been listed with the FDA.* If a device is not listed as a device with the FDA but the FDA determines that the device should have been listed as a device, the device will be deemed to be listed as a device with the FDA as of the date the FDA notifies the manufacturer or importer in writing that corrective action with respect to listing is required.

(b) *Exemptions*—(1) *In general.* The term *taxable medical device* does not include eyeglasses, contact lenses, hearing aids, and any other device of a type that is generally purchased by the general public at retail for individual use (the retail exception).

(2) *Retail exemption.* A device will be considered to be of a type generally purchased by the general public at retail for individual use if it is regularly available for purchase and use by individual consumers who are not medical professionals, and if the design of the device demonstrates that it is not primarily intended for use in a medical institution or office or by a medical professional. Whether a device is of a type described in the preceding sentence is evaluated based on all the relevant facts and circumstances. Factors relevant to this evaluation are listed in paragraphs (b)(2)(i) and (ii) of this section. There may be facts and circumstances that are relevant in evaluating whether a device is of a type generally purchased by the general public at retail for individual use in

addition to those described in paragraphs (b)(2)(i) and (ii) of this section. The fact that a device is of a type that requires a prescription is not a factor in the determination of whether or not the device falls under the retail exemption.

(i) *Regularly available for purchase and use by individual consumers.* The following factors suggest that a device is of a type that is regularly available for purchase and use by individual consumers who are not medical professionals:

(A) Consumers who are not medical professionals can purchase the device through retail businesses that also sell items other than medical devices, such as drug stores, supermarkets, and similar vendors.

(B) Consumers who are not medical professionals can use the device safely and effectively for its intended medical purpose with minimal or no training from a medical professional.

(C) The device is classified by the FDA under Subpart D of 21 CFR part 890 (Physical Medicine Devices).

(ii) *Primarily for use in a medical institution or office or by a medical professional.* The following factors suggest that the device is designed primarily for use in a medical institution or office or by a medical professional:

(A) The device generally must be implanted, inserted, operated, or otherwise administered by a medical professional.

(B) The cost to acquire, maintain, and/or use the device requires a large initial investment and/or ongoing expenditure that is not affordable for the average consumer.

(C) The device is a Class III device under the FDA system of classification.

(D) The device is classified by the FDA under—

(*1*) 21 CFR part 862 (Clinical Chemistry and Clinical Toxicology Devices), 21 CFR Part 864 (Hematology and Pathology Devices), 21 CFR part 866 (Immunology and Microbiology Devices), 21 CFR part 868 (Anesthesiology Devices), 21 CFR part 870 (Cardiovascular Devices), 21 CFR part 874 (Ear, Nose, and Throat Devices), 21 CFR part 876 (Gastroenterology—Urology Devices), 21 CFR Part 878 (General and Plastic Surgery Devices), 21 CFR part 882 (Neurological Devices), 21 CFR part 886 (Ophthalmic Devices), 21 CFR part 888 (Orthopedic Devices), or 21 CFR part 892 (Radiology Devices);

(*2*) Subpart B, Subpart D, or Subpart E of 21 CFR part 872 (Dental Devices);

(*3*) Subpart B, Subpart C, Subpart D, Subpart E, or Subpart G of 21 CFR part 884 (Obstetrical and Gynecological Devices); or

(*4*) Subpart B of 21 CFR part 890 (Physical Medicine Devices).

(E) The device qualifies as durable medical equipment, prosthetics, orthotics, and supplies for which payment is available exclusively on a rental basis under the Medicare Part B payment rules, and is an ''item requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

(iii) *Safe Harbor.* The following devices will be considered to be of a type generally purchased by the general public at retail for individual use:

(A) Devices that are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfIVD/Search.cfm.*

(B) Devices that are described as ''OTC'' or ''over the counter'' devices in the relevant FDA classification regulation heading.

(C) Devices that are described as ''OTC'' or ''over the counter'' devices in the FDA's product code name, the FDA's device classification name, or the ''classification name'' field in the FDA's device registration and listing database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfrl/rl.cfm.*

(D) Devices that qualify as durable medical equipment, prosthetics, orthotics, and supplies, as described in Subpart C of 42 CFR Part 414 (Parenteral and Enteral Nutrition) and Subpart D of 42 CFR Part 414 (Durable Medical Equipment and Prosthetic and Orthotic Devices), for which payment is available on a purchase basis under Medicare Part B payment rules, and are—

(*1*) ''Prosthetic and orthotic devices,'' as defined in 42 CFR 414.202, that do not require implantation or insertion by a medical professional;

(*2*) ''Parenteral and enteral nutrients, equipment, and supplies'' as defined in 42 CFR 411.351 and described in 42 CFR 414.102(b);

(*3*) ''Customized items'' as described in 42 CFR 414.224;

(*4*) ''Therapeutic shoes,'' as described in 42 CFR 414.228(c); or

(*5*) Supplies necessary for the effective use of DME, as described in section 110.3 of chapter 15 of the Medicare Benefit Policy Manual (Centers for Medicare and Medicaid Studies Publication 100–02).

(iv) *Examples.* The following examples illustrate the rules of this paragraph (b).

Example 1. X manufactures non-sterile absorbent tipped applicators. X sells the applicators to distributors Y and Z, which, in turn, sell the applicators to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of non-sterile absorbent tipped applicators to list the applicators as a device with the FDA. The applicators are classified by the FDA under 21 CFR part 880 (General Hospital and Personal Use Devices) and product code KXF. Absorbent tipped applicators do not fall within a retail exception safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the absorbent tipped applicators are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals can regularly purchase the absorbent tipped applicators at drug stores, supermarkets, cosmetic supply stores and other similar establishments, and can use the applicators safely and effectively for their intended medical purpose without training from a medical professional. Further, the absorbent tipped applicators do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not a Class III device, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222. Thus, the applicators have multiple factors that tend to show they are regularly available for purchase and use by individual consumers and none of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the applicators are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 2. X manufactures adhesive bandages. X sells the adhesive bandages to distributors Y and Z, which, in turn, sell the bandages to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of adhesive bandages to list the bandages as a device with the FDA. The adhesive bandages are classified by the FDA under 21 CFR part 880 (General Hospital and Personal Use Devices) and product code KGX. Adhesive bandages do not fall within a retail exception safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the adhesive bandages are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals can regularly purchase the adhesive bandages at drug stores, supermarkets and other similar establishments, and can use the adhesive bandages safely and effectively for their intended medical purpose without training from a medical professional. Further, the adhesive bandages do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing

expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222. Thus, the bandages have multiple factors that tend to show they are regularly available for purchase and use by individual consumers and none of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the adhesive bandages are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 3. X manufactures snake bite suction kits. X sells the snake bite suction kits to distributors Y and Z, which, in turn, sell the kits to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of snake bite suction kits to list the kits as a device with the FDA. The FDA classifies the snake bit suction kits under 21 CFR part 880 (General Hospital and Personal Use Devices) and product code KYP. Snake bite suction kits do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the snake bite suction kits are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals can regularly purchase the snake bite suction kits at sporting goods stores, camping stores, and other similar establishments, and can use the kits safely and effectively for their intended medical purpose without training from a medical professional. Further, the snake bite suction kits do not need to be implanted, inserted, operated or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222. Thus, the snake bite suction kits have multiple factors that tend to show they are regularly available for purchase and use by individual consumers and none of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the snake bite suction kits are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 4. X manufactures denture adhesives. X sells the denture adhesives to distributors Y and Z, which, in turn, sell the adhesives to dental offices and retail establishments. The FDA requires manufacturers and importers of denture adhesives to list the adhesive as a device with the FDA. The FDA classifies the denture adhesives under 21 CFR part 872 (Dental Devices) and product code KXX. The denture adhesives do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the denture adhesives are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals can regularly purchase the denture adhesives at drug stores, supermarkets, and other similar establishments, and can use the adhesives safely and effectively for their intended medical purpose with minimal or no training from a medical professional. Further, the denture adhesives do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222. Thus, the denture adhesives have multiple factors that tend to show they are regularly available for purchase and use by individual consumers and none of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the denture adhesives are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 5. X manufactures mobile x-ray systems. X sells the x-ray systems to distributors Y and Z, which, in turn, sell the systems generally to medical institutions and offices, and medical professionals. The FDA requires manufacturers and importers of mobile x-ray systems to list the systems as a device with the FDA. The FDA classifies the mobile x-ray systems under 21 CFR part 892 (Radiology Devices) and product code IZL. Mobile x-ray systems do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the mobile x-ray systems are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals cannot regularly purchase the mobile x-ray systems at drug stores, supermarkets, and other similar establishments, and cannot use the x-ray systems safely and effectively for their intended medical purpose without training from a medical professional. Although the mobile x-ray systems are not Class III devices and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222, they need to be operated by a medical professional, require a large investment and/or ongoing expenditure, and are of a type classified by the FDA under 21 CFR part 892 (Radiology Devices). Thus, the x-ray systems do not meet any of the factors that tend to show that they are regularly available for purchase and use by individual consumers. However, the x-ray systems do meet several of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the mobile x-ray systems are not devices that are of a type generally purchased by the general public at retail for individual use.

Example 6. X manufactures pregnancy test kits. X sells the kits to distributors Y and Z, which, in turn, sell the pregnancy test kits to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of pregnancy test kits to list the kits as a device with the FDA. The FDA classifies the kits under 21 CFR Part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code LCX. The pregnancy test kits are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database. Therefore, the over the counter pregnancy test kits fall within the safe harbor set forth in paragraph (b)(2)(iii)(A) of this section. Further, the FDA product code name for LCX is ''Kit, Test, Pregnancy, HCG, Over The Counter.'' Therefore, the pregnancy test kits also fall within the safe harbor set forth in paragraph (b)(2)(iii)(C) of this section. Accordingly, the pregnancy test kits are devices that are of a type generally purchased by the general public at retail for individual use.

Example 7. X manufactures blood glucose monitors, blood glucose test strips, and lancets. X sells the blood glucose monitors, test strips and lancets to distributors Y and Z, which, in turn, sell the monitors, test strips, and lancets to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of blood glucose monitors, test strips, and lancets to list the items as devices with the FDA. The FDA classifies the blood glucose monitors under 21 CFR part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code NBW. The FDA classifies the test strips under 21 CFR part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code NBW. The FDA classifies the lancets under 21 CFR part 878 (General and Plastic Surgery Devices) and product code FMK. The blood glucose monitors and test strips are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database. Therefore, the blood glucose monitors and test strips fall within the safe harbor set forth in paragraph (b)(2)(iii)(A) of this section. Further, the FDA product code name for NBW is ''System, Test, Blood Glucose, Over the Counter.'' Therefore, the blood glucose monitors and test strips also fall within the safe harbor set forth in paragraph (b)(2)(iii)(C) of this section. In addition, the lancets are supplies necessary for the effective use of DME as described in chapter 15 of the Medicare Policy Benefit Manual. Therefore, the lancets fall within the safe harbor set forth in paragraph (b)(2)(iii)(D)(*5*) of this section. Accordingly, the blood glucose monitors, test strips, and lancets are devices that are of a type generally purchased by the general public at retail for individual use.

(c) *Effective/applicability date.* This section applies to sales of taxable medical devices on and after January 1, 2013.

Par. 4. Section 48.4221–1 is amended by adding paragraph (a)(2)(vii) to read as follows:

§ 48.4221–1 Tax-free sales; general rule.

(a) * * *

(2) * * *

(vii) The exemptions under section 4221(a)(3) through (a)(6) do not apply to the tax imposed by section 4191 (medical device tax).

* * * * *

Par. 5. Section 48.4221–2 is amended by adding headings to paragraphs (b)(1) and (b)(2) and adding paragraph (b)(3).

The additions read as follows:

(b) * * *

(1) *In general.* * * *

(2) *Material in the manufacture or production of another article.* * * *

(3) *Kits*—(i) The process of producing or assembling a kit that is a taxable medical device (as defined in § 48.4191–2) constitutes further manufacture. Under such circumstances, the taxable and nontaxable articles used in the production or assembly of the kit lose their identity as separate articles once they are incorporated into the kit because the kit is a new taxable article. Accordingly, the provisions of § 48.4216(a)–1(e) do not apply upon the sale of a kit that is a taxable medical device, and the entire sale price of the kit is subject to tax under section 4191.

(ii) For purposes of this section, the term *kit* means a set of two or more articles that is enclosed in a single package, such as a bag, tray, or box, for the convenience of a medical or health care professional or the end user. A kit may contain a combination of one or more taxable medical devices and other articles.

(iii) The following example illustrates the rule of this paragraph (b)(3).

Example. X is a manufacturer of scalpels. X is registered with the IRS as a manufacturer of taxable medical devices in accordance with § 48.4222(a)–1. Y is a distributor of taxable medical devices. Y is registered with the IRS as a manufacturer of taxable medical devices and as a buyer of taxable medical devices for use in further manufacture in accordance with § 48.4222(a)–1. Y purchases scalpels from X for inclusion in surgical kits that Y produces. Both the scalpels and the kits are ''taxable medical devices'' as defined in § 48.4191–2. Accordingly, X may sell the scalpels to Y tax free, provided Y furnishes its registration number to X and certifies in writing that the scalpels will be used in further manufacture.

(iv) This paragraph (b)(3) applies to sales of taxable medical devices on and after January 1, 2013.

* * * * *

Par. 6. Section 48.6416(b)(2)–2 is amended by adding paragraph (a)(4) to read as follows:

§ 48.6416(b)(2)–2 Exportations, uses, sales and resales included.

(a) * * *

(4) Beginning on January 1, 2013, sections 6416(b)(2)(B), (C), (D), and (E) do not apply to any tax paid under section 4191 (medical device tax).

* * * * *

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–2493 Filed 2–3–12; 11:15 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 19

[Docket No. TTB–2011–0010; Notice No. 124A; Re: Notice No. 124]

RIN 1513–AB89

Revisions to Distilled Spirits Plant Operations Reports and Regulations; Comment Period Extension

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau is extending the comment period for Notice No. 124, Revisions to Distilled Spirits Plant Operations Reports and Regulations, a notice of proposed rulemaking published in the **Federal Register** on December 5, 2011. TTB is taking this action in response to a request from a distilled spirits industry association.

DATES: Written comments on Notice No. 124 are now due on or before March 5, 2012.

ADDRESSES: You may send comments on Notice No. 124 to one of the following addresses:

- *http://www.regulations.gov:* To submit comments via the Internet, use the comment form for Notice No. 124 as posted within Docket No. TTB–2011–0010 on ''Regulations.gov,'' the Federal e-rulemaking portal;
- *U.S. Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier in Lieu of Mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of all published notices, the proposed two new report forms, and any public comments associated with the proposal outlined in Notice No. 124 within Docket No. TTB–2011–0010 at *http://www.regulations.gov.* A link to the Regulations.gov comment form for proposal is posted on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml* under Notice No. 124. You also may view copies of all documents and comments associated with Notice No. 124 by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20220. Please call (202) 453–2270 to make an appointment.

FOR FURTHER INFORMATION CONTACT: Rita D. Butler, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, at (202) 453–1039, extension 101, or *rita.butler@ttb.gov.*

SUPPLEMENTARY INFORMATION: In Notice No. 124, the Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to replace the current four report forms used by distilled spirits plants to report their operations with two new report forms that would be submitted on a monthly or quarterly basis. The proposal would streamline the reporting process and would result in savings for the industry and for TTB by significantly reducing the number of reports that must be completed and filed by industry members and processed by TTB.

On February 2, 2012, TTB received an email from the Distilled Spirits Council of the United States (DISCUS) requesting additional time to prepare its comment on Notice No. 124. The email stated:

> This additional time will allow us to further collate comments about the technical aspects for the data entries pertaining to the proposed reporting forms. Similarly, this additional time also will afford a better opportunity to respond to TTB's request about the length of time needed by industry members to transition their business procedures so as to comply with the proposed reporting requirements.

In response to that request, TTB is extending the comment period for Notice No. 124 for an additional 30 days. Therefore, comments on Notice No. 124 are now due on or before March 5, 2012.

Drafting Information

Michael D. Hoover of the Regulations and Rulings Division drafted this notice.

Signed: February 2, 2012.

John J. Manfreda,

Administrator.

[FR Doc. 2012–2809 Filed 2–3–12; 11:15 am]

BILLING CODE 4810–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2012–0039]

RIN 1625–AA08

Special Local Regulations; Savannah Tall Ships Challenge, Savannah River, Savannah, GA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish special local regulations on the Savannah River in Savannah, Georgia during the Savannah Tall Ships Challenge. The Savannah Tall Ships Challenge will take place from Thursday, May 3, 2012 through Monday, May 7, 2012. Approximately 15 vessels are anticipated to participate in the event. These special local regulations are necessary to provide for the safety of life and property on navigable waters of the United States during the event. The special local regulations would establish the following three areas: (1) Mooring zones; (2) buffer zones; and (3) a staging area. First, mooring zones would be established around vessels participating in the Savannah Tall Ships Challenge while the vessels are moored at their mooring locations along the right and left descending banks of the Savannah River in Savannah, Georgia. Second, buffer zones would be established around vessels participating in the Savannah Tall Ships Challenge as they transit from their mooring locations on the Savannah River to the staging area. Third, a staging area would be established, where vessels participating in the Savannah Tall Ships Challenge will congregate before commencing their voyage to the next port as part of the 2012 Tall Ships Challenge. Persons and vessels that are not participating in the Savannah Tall Ships Challenge would be prohibited from entering, transiting through, anchoring in, or remaining within the mooring zones, buffer zones, or staging area unless authorized by the Captain of the Port Savannah or a designated representative.

DATES: Comments and related material must be received by the Coast Guard on or before March 9, 2012. Requests for public meetings must be received by the Coast Guard on or before February 16, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2012–0039 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 email Chief Petty Officer Benjamin Mercado, Marine Safety Unit Savannah Office of Waterways Management, Coast Guard; telephone (912) 652–4353, email *Benjamin.Mercado@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–2012–0039), 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 (via *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 *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 email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''USCG–2012–0039'' 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 comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period 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–2012–0039'' 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 plan to hold a public meeting, but you may submit a request for one on or before February 16, 2012 using one of the four methods specified

under **ADDRESSES**. Please explain why you believe a public meeting 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

The legal basis for the proposed rule is the Coast Guard's authority to establish special local regulations: 33 U.S.C. 1233. The purpose of the proposed rule is to insure safety of life and property on navigable waters of the United States during the Savannah Tall Ships Challenge.

Discussion of Proposed Rule

From Thursday, May 3, 2012 through Monday, May 7, 2012, the Savannah Tall Ships Challenge is scheduled to take place on the Savannah River in Savannah, Georgia. Beginning on May 3, 2012, participating vessels will moor at the downtown Savannah River waterfront, along the right and left descending banks of the Savannah River. The vessels will remain moored at these locations until May 7, 2012. On May 7, 2012 between 11:40 a.m. and 3 p.m., vessels participating in the Savannah Tall Ships Challenge will transit the Savannah River from their mooring locations to a staging area, where they will congregate before heading to the next port in the 2012 Tall Ships Challenge. The vessels are scheduled to depart the staging area on May 7, 2012 between 3 p.m. and 4:30 p.m.

The proposed rule would establish special local regulations on the Savannah River in Savannah, Georgia during the Savannah Tall Ships Challenge. The special local regulations would establish the following three regulated areas.

(1) *Mooring Zones.* All waters of the Savannah River within 25 yards of vessels participating in the Savannah Tall Ships Challenge while such vessels are moored. The mooring zones would be enforced from 10:30 a.m. on May 3, 2012 until 3 p.m. on May 7, 2012.

(2) *Buffer Zones.* All waters of the Savannah River within 200 yards of vessels participating in the Savannah Tall Ships Challenge as they transit from their mooring locations to the staging area. The buffer zones would be enforced from 11:30 a.m. until 3 p.m. on May 7, 2012.

(3) *Staging Area.* All waters within a one nautical mile radius of position 31°57′47″ N, 80°40′24″ W. The staging area would be enforced from 11:30 a.m. until 4:30 p.m. on May 7, 2012.

Notice of the special local regulations, including the names and mooring locations of the vessels participating in the Savannah Tall Ships Challenge and the identities of the lead safety vessel and the last safety vessel as the vessels transit to the staging area, would be provided prior to the event by Local Notice to Mariners and Broadcast Notice to Mariners.

Persons and vessels would be prohibited from entering, transiting through, anchoring in, or remaining within any of the regulated areas unless authorized by the Captain of the Port Savannah or a designated representative. Persons and vessels would be able to request authorization to enter, transit through, anchor in, or remain within the regulated areas by contacting the Captain of the Port Savannah by telephone at (912) 652–4353, or a designated representative via VHF radio on channel 16. If authorization to enter, transit through, anchor in, or remain within any of the regulated areas is granted by the Captain of the Port Savannah or a designated representative, all persons and vessels receiving such authorization would be required to comply with the instructions of the Captain of the Port Savannah or a designated representative.

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

Executive Orders 13563, Improving Regulation and Regulatory Review, and 12866, Regulatory Planning and Review, direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has not been designated a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget has not reviewed this proposed rule under Executive Order 12866.

The economic impact of this proposed rule is not significant for the following reasons: (1) The special local regulations would be enforced for a total of 102 hours; (2) although persons and vessels would not be able to enter, transit through, anchor in, or remain within the regulated areas without authorization from the Captain of the Port Savannah or a designated representative, they would be able to operate in the surrounding area during the enforcement periods; (3) persons and vessels would still be able to enter, transit through, anchor in, or remain within the regulated areas if authorized by the Captain of the Port Savannah or a designated representative; and (4) the Coast Guard would provide advance notification of the safety zones to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

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 may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of the Savannah River encompassed within the special local regulations from 10:30 a.m. on May 3, 2012 through 4:30 p.m. on May 7, 2012. For the reasons discussed in the Regulatory Planning and Review section above, this proposed rule would not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed 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 proposed 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 proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Chief Petty Officer Benjamin Mercado, Marine Safety Unit Savannah Office of Waterways Management, Coast Guard; telephone (912) 652–4353, email *Benjamin.Mercado@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 would call 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 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 or more in any one year. Though this proposed rule would not result in such expenditure, we do discuss the effects of this proposed 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 proposed 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 guide 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 that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishing special local regulations issued in conjunction with a marine parade, as described in figure 2–1, paragraph (34)(h), of the Instruction. Under figure 2–1, paragraph (34)(h), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this proposed rule. 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 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 165—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

2. Add temporary § 100.35T07–0039 to read as follows:

§ 100.35T07–0039 Special Local Regulations; Savannah Tall Ships Challenge, Savannah River, Savannah, GA.

(a) *Regulated Areas.* The following regulated areas are established as special local regulations during the Savannah Tall Ships Challenge, with the specific enforcement period for each of the regulated areas. All coordinates are North American Datum 1983.

(1) *Mooring Zones.* All waters of the Savannah River within 25 yards of vessels participating in the Savannah Tall Ships Challenge while such vessels are moored. These regulated areas will be enforced from 10:30 a.m. on May 3, 2012 until 3 p.m. on May 7, 2012.

(2) *Buffer Zones.* All waters of the Savannah River within 200 yards of vessels participating in the Savannah Tall Ships Challenge as they transit from their mooring locations to the staging area. These regulated areas will be enforced from 11:30 a.m. until 3 p.m. on May 7, 2012.

(3) *Staging Area.* All waters within a one nautical mile radius of position 31°57′47″ N 80°40′24 W. This regulated area will be enforced from 11:30 a.m. until 4:30 p.m. on May 7, 2012.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port Savannah in the enforcement of the regulated areas.

(c) *Regulations.*

(1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated areas unless authorized by the Captain of the Port Savannah or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated areas may contact the Captain of the Port Savannah by telephone at (912) 652–4353, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the regulated areas is granted by the Captain of the Port Savannah or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Savannah or a designated representative.

(3) The Coast Guard will provide notice of the regulated areas, including the names and mooring locations of the vessels participating in the Savannah Tall Ships Challenge and the identities of the lead safety vessel and the last safety vessel as the vessels transit to the staging area, prior to the event by Local Notice to Mariners and Broadcast Notice to Mariners. Notice will also be provided by on-scene designated representatives.

(d) *Enforcement Date.* This rule will be enforced from 10:30 a.m. on May 3, 2012 through 4:30 p.m. on May 7, 2012.

Dated: January 25, 2012.

J.B. Loring,

Commander, U.S. Coast Guard, Captain of the Port Savannah.

[FR Doc. 2012–2739 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–1136]

RIN 1625–AA09

Drawbridge Operation Regulation; Christina River, Wilmington, DE

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulations that govern the operation of the Norfolk Southern Railroad Bridges over the Christina River at miles 4.1 and 4.2, both in Wilmington, DE. Since there have been no recorded requests for vessel openings in more than 20 years for either bridge, this proposal would change the current regulations by allowing the drawbridge, at mile 4.1, to be maintained in the closed position to navigation and the drawbridge, at mile 4.2, to be left in the open-to-navigation position.

DATES: Comments and related material must reach the Coast Guard on or before March 23, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2011–1136 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 email Terrance Knowles, Coast Guard; telephone (757) 398–6587, email *Terrance.A.Knowles@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–2011–1136), 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 email 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–2011–1136'' 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–2011–1136'' 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

Norfolk Southern Corporation (NS), who owns and operates both swing-type bridges, has requested changes in the operating regulations of their railroad drawbridges across Christina River, at miles 4.1 and 4.2, in Wilmington, DE, set out in 33 CFR 117.237(d).

The NS drawbridges at miles 4.1 and 4.2 have vertical clearances in the closed position to vessels of six and three feet above mean high water, respectively.

Under the regular operating schedule, the drawbridges shall open on signal from 6 a.m. to 8 p.m., if at least 24 hours notice is given; and from 8 p.m. to 6 a.m., the draws need not be opened for the passage of vessels.

There had been no request to open either drawbridge for a vessel for more than 20 years. Approximately two trains per day traverse the NS drawbridge at mile 4.1, and there is no train service at the NS drawbridge at mile 4.2, where the bridge is currently placed in the open-to-navigation position. In accordance with 33 CFR 117.39 and 117.41, the Coast Guard proposes to allow the NS drawbridge at mile 4.1 to be maintained in the closed-to-navigation position; and allow the NS drawbridge at mile 4.2 to be maintained in the open-to-navigation position and discontinue draw tender service for both drawbridges. The 24-hour advance notice in the current regulation is no longer necessary due to the lack of openings.

Discussion of Proposed Rule

The Coast Guard proposes to revise 33 CFR 117.237(d). This proposed change would divide the current paragraph into paragraphs (d)(1) and (d)(2).

Paragraph (d)(1) would contain the proposed rule for the Norfolk Southern Railroad Bridge at mile 4.1. The rule would allow the draw of the bridge to remain in the closed-to-navigation position and would not require openings for the passage of vessels.

Paragraph (d)(2) would contain the proposed rule for the Norfolk Southern Railroad Bridge at mile 4.2. The rule would allow the draw of the bridge to be maintained in the open-to-navigation position and would allow for unobstructed passage of vessels.

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 proposed 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. The Office of Management and Budget has not reviewed it under that Order. The proposed change is expected to have minimal impact on mariners since there have been no requests for vessel openings for more than 20 years for either drawbridge with no anticipated change to vessel traffic.

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 action will not have a significant economic impact on a substantial number of small entities for the following reasons. There have been no requests to open either drawbridge for the passage of vessels for more than 20 years and there is no anticipated change to vessel traffic.

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 contact Terrance Knowles, Environmental Protection Specialist, Fifth Coast Guard District, (757) 398–6587 or email *Terrance.A.Knowles@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 would call 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 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 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. Revise paragraph § 117.237(d) to read as follows:

§ 117.237 Christina River

* * * * *

(d) The following drawbridges at Wilmington shall operate as follows:

(1) The Norfolk Southern Railroad Bridge, mile 4.1, shall be maintained in the closed-to-navigation position;

(2) The Norfolk Southern Railroad Bridge, mile 4.2, shall be maintained in the open-to-navigation position.

* * * * *

Dated: January 12, 2012.

William D. Lee,

Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 2012–2789 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2011–0716, FRL–9628–1]

Approval and Promulgation of Implementation Plans; Oregon: Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State Implementation Plan (SIP) submittal from the State of Oregon to demonstrate that the SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. EPA is proposing to find that the current Oregon SIP meets the following 110(a)(2) infrastructure elements for the 1997 8-hour ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

DATES: Comments must be received on or before March 8, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2011–0716, by any of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: R10–Public_Comments@epa.gov*
- *Mail:* Kristin Hall, EPA Region 10, Office of Air, Waste and Toxics (AWT–107), 1200 Sixth Avenue, Suite 900, Seattle, WA 98101.
- *Hand Delivery/Courier:* EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101. Attention: Kristin Hall, Office of Air, Waste and Toxics, AWT—107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2011–

0716. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic coment, 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 *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, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101.

FOR FURTHER INFORMATION CONTACT: Kristin Hall at telephone number: (206) 553–6357, email address: *hall.kristin@epa.gov,* or the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'', ''us'' or ''our'' are used, we mean EPA. Information is organized as follows:

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I. What action is EPA proposing?
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IV. What is the scope of action on infrastructure submittals?
V. What is EPA's analysis of Oregon's submittal?
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VII. Proposed Action
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I. What action is EPA proposing?

EPA is proposing to approve the State Implementation Plan (SIP) submittal from the State of Oregon to demonstrate that the SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. EPA is proposing to find that the current Oregon SIP meets the following 110(a)(2) infrastructure elements for the 1997 8-hour ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

Section 110(a)(1) of the CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet the requirements of the ''infrastructure'' elements of section 110(a)(2). The State of Oregon submitted a certification to EPA on September 25, 2008, certifying that Oregon's SIP meets the infrastructure obligations for the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS. The certification included an analysis of Oregon's SIP as it relates to each section of the infrastructure requirements with regard to the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS.

At this time, EPA is acting on the infrastructure SIP submittal for the 110(a)(2) required elements as they relate to the 1997 8-hour ozone NAAQS. This action does not address infrastructure requirements with respect to the 1997 $PM_{2.5}$ NAAQS which EPA intends to act on at a later time. This action also does not address the requirements of 110(a)(2)(D(i) for the 1997 8-hour ozone NAAQS which were previously approved by EPA in three separate actions on June 9, 2011 (76 FR 33650), July 5, 2011 (76 FR 38997), and November 9, 2011 (76 FR 80747).

II. What is the background for the action that EPA is proposing?

On July 18, 1997, EPA promulgated a new NAAQS for ozone. EPA revised the ozone NAAQS to provide an 8-hour averaging period which replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856).

The CAA requires SIPs meeting the requirements of sections 110(a)(1) and (2) be submitted by states within 3 years after promulgation of a new or revised standard. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards, so-called ''infrastructure'' requirements. States were required to submit such SIPs for the 1997 8-hour ozone NAAQS to EPA no later than June 2000. However, intervening litigation over the 1997 8-hour ozone standard created uncertainty about how to proceed, and many states did not provide the required infrastructure SIP submissions for the newly promulgated standard.

To help states meet this statutory requirement for the 1997 8-hour ozone NAAQS, EPA issued guidance to address infrastructure SIP elements under section 110(a)(1) and (2).[1] This guidance provides that to the extent an existing SIP already meets the section 110(a)(2) requirements, states need only to certify that fact via a letter to EPA. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA 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 affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's federally approved SIP already contains. In the case of the 1997 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous ozone standards.

III. What infrastructure elements are required under sections 110(a)(1) and (2)?

Section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. These requirements include SIP infrastructure elements such as modeling, monitoring,

[1] 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 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards.'' Memorandum to EPA Air Division Directors, Regions I–X, October 2, 2007.

and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements, with their corresponding CAA subsection, are listed below:

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D): Interstate transport.
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.
- 110(a)(2)(J): Consultation with government officials; public notification; and Prevention of Significant Deterioration (PSD) and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

EPA's October 2, 2007 guidance clarified that two elements identified in section 110(a)(2) are not governed by the 3 year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within 3 years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to CAA section 172. These requirements are: (i) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D, Title I of the CAA, and (ii) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. As a result, this action does not address infrastructure elements related to section 110(a)(2)(C) with respect to nonattainment new source review (NSR) or 110(a)(2)(I).

This action also does not address the requirements of 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS which have been addressed by three separate actions issued by EPA. On June 9, 2011, EPA approved the SIP revision submitted by the Oregon Department of Environmental Quality (ODEQ) to address specific provisions of Clean Air Act section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS including two of the four prongs of 110(a)(2)(D)(i): significant contribution to nonattainment of these NAAQS in any other state (prong 1) and interference with maintenance of these NAAQS by any other state (prong 2) (76 FR 33650). Subsequently, on July 5, 2011, EPA approved portions of a SIP revision submitted by ODEQ as meeting the requirements of the fourth prong of Clean Air Act section 110(a)(2)(D)(i) as it applies to visibility for the 1997 8-hour ozone NAAQS (prong 4) (76 FR 38997). Finally, on November 9, 2011, EPA approved an Oregon SIP revision that addressed among other things, interference with any other state's required measures to prevent significant deterioration (PSD) of its air quality with respect to the 1997 8-hour ozone NAAQS (prong 3) (76 FR 80747).

Furthermore, EPA interprets the section 110(a)(2)(J) provision on visibility as not being triggered by a new NAAQS because the visibility requirements in part C are not changed by a new NAAQS.

IV. What is the scope of action on infrastructure submittals?

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and $PM_{2.5}$ NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on those infrastructure SIP submissions.[2] The commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements in other proposals that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources that may be contrary to the CAA and EPA's policies addressing such excess emissions (''SSM'') and (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (''director's discretion''). EPA notes that there are two other substantive issues for which EPA likewise stated in other proposals that it would address the issues separately: (i) Existing provisions for minor source new source review programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (''minor source NSR'') and (ii) existing provisions for Prevention of Significant Deterioration programs that may be inconsistent with current requirements of EPA's ''Final NSR Improvement Rule,'' 67 FR 80,186 (December 31, 2002), as amended by 72 FR 32,526 (June 13, 2007) (''NSR Reform''). In light of the comments, EPA believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth. It is important to emphasize that EPA is taking the same position with respect to these four substantive issues in this action on the infrastructure SIP for the 1997 8-hour ozone NAAQS submittal from Oregon.

EPA intended the statements in the other proposals concerning these four issues merely to be informational, and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that ''in this rulemaking, EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during SSM of operations at facilities.'' EPA further explained, for informational purposes, that ''EPA plans to address such State regulations in the future.'' EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and $PM_{2.5}$ NAAQS should not be construed as explicit or implicit reapproval of any existing provisions that relate to these four substantive issues. EPA is reiterating that position in this action on the 1997 8-hour ozone infrastructure SIP for Oregon.

Unfortunately, the commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the

[2] See, Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA–R05–OAR–2007–1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply.

other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issues in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs, and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements in those other proposals, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately from actions on infrastructure SIP submissions.

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission ''within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)'' and that these SIPS are to provide for the ''implementation, maintenance, and enforcement'' of such NAAQS. Section 110(a)(2) includes a list of specific elements that ''[e]ach such plan'' submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as ''infrastructure SIPs.'' This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as ''nonattainment SIP'' submissions required to address the nonattainment planning requirements of part D, ''regional haze SIP'' submissions required to address the visibility protection requirements of CAA section 169A, new source review permitting program submissions required to address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.[3] Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.[4]

Notwithstanding that section 110(a)(2) provides that ''each'' SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).[5] This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission.

Similarly, EPA has previously decided that it could take action on different parts of the larger, general ''infrastructure SIP'' for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter ''interstate transport'' provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.[6] This illustrates that EPA may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state's SIP. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.[7]

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, *i.e.,* the PSD requirements applicable in attainment areas. Nonattainment SIPs

[3] For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

[4] For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See, e.g., ''Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call; Final Rule,'' 70 FR 25,162 (May 12, 2005) (defining, among other things, the phrase ''contribute significantly to nonattainment'').

[5] See, e.g., Id., 70 FR 25,162, at 63–65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

[6] EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. See, ''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I–X, dated August 15, 2006.

[7] For example, implementation of the 1997$PM_{2.5}$ NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

required by part D also would not need to address the requirements of section 110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements ''as applicable.'' In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these ozone and $PM_{2.5}$ NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS.[8] Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the ''infrastructure'' elements for SIPs, which it further described as the ''basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.'' [9] As further identification of these basic structural SIP requirements, ''attachment A'' to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended ''to constitute an interpretation of'' the requirements, and was merely a ''brief description of the required elements.'' [10] EPA also stated its belief that with one exception, these requirements were ''relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with assistance from EPA Regions.'' [11] For the one exception to that general assumption, however, *i.e.,* how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS, EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 $PM_{2.5}$ NAAQS, EPA assumed that each State would work with its corresponding EPA regional office to refine the scope of a State's submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the State's SIP for the NAAQS in question.

On September 25, 2009, EPA issued guidance to make recommendations to states with respect to the infrastructure SIPs for the 2006 $PM_{2.5}$ NAAQS.[12] In the 2009 Guidance, EPA addressed a number of additional issues that were not germane to the infrastructure SIPs for the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS, but were germane to these SIP submissions for the 2006 $PM_{2.5}$ NAAQS, e.g., the requirements of section 110(a)(2)(D)(i) that EPA had bifurcated from the other infrastructure elements for those specific 1997 ozone and $PM_{2.5}$ NAAQS. Significantly, neither the 2007 Guidance nor the 2009 Guidance explicitly referred to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance and the 2009 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in existing SIP provisions in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA's proposals for other states mentioned these issues not because the Agency considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions. The same holds true for this action on the 1997 8-hour ozone infrastructure SIP for Oregon.

EPA believes that this approach to the infrastructure SIP requirement is reasonable, because it would not be feasible to read section 110(a)(1) and (2) to require a top to bottom, stem to stern, review of each and every provision of an existing SIP merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts that, while not fully up to date, nevertheless may not pose a significant problem for the purposes of ''implementation, maintenance, and enforcement'' of a new or revised NAAQS when EPA considers the overall effectiveness of the SIP. To the contrary, EPA believes that a better approach is for EPA to determine which specific SIP elements from section 110(a)(2) are applicable to an infrastructure SIP for a given NAAQS, and to focus attention on those elements that are most likely to need a specific SIP revision in light of the new or revised NAAQS. Thus, for example, EPA's 2007 Guidance specifically directed states to focus on the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS because of the absence of underlying EPA regulations for emergency episodes for this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific

[8] See, ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I–X, dated October 2, 2007 (the ''2007 Guidance'').

[9] Id., at page 2.

[10] Id., at attachment A, page 1.

[11] Id., at page 4. In retrospect, the concerns raised by commenters with respect to EPA's approach to some substantive issues indicates that the statute is not so ''self explanatory,'' and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

[12] See, ''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),'' from William T, Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the ''2009 Guidance'').

substantive deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a ''SIP call'' whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.[13] Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.[14] Significantly, EPA's determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude the Agency's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.[15]

V. What is EPA's analysis of Oregon's submittal?

The Oregon SIP submittal lists specific provisions of the Oregon Revised Statutes (ORS) Chapter 468 Environmental Quality, Public Health and Safety, General Administration; ORS Chapter 468A Air Quality, Public Health and Safety, Air Quality Control; Oregon Administrative Rules (OAR) Chapter 340, and the Oregon SIP. The specific sections are listed below, with an analysis of how the Oregon submittal by ODEQ meets the requirements.

110(a)(2)(A): Emission limits and other control measures:

Section 110(a)(2)(A) requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance and other related matters. EPA notes that the specific nonattainment area plan requirements of Section 110(a)(2)(I) are subject to the timing requirement of Section 172, not the timing requirement of Section 110(a)(1).

Oregon's submittal: The Oregon SIP submittal cites multiple Oregon air quality laws and regulations to address this element. ORS 468A.035 ''General Comprehensive Plan'' provides authority to ODEQ to develop a general comprehensive plan for the control or abatement of air pollution. ORS 468A.020 ''Rules and Standards'' gives the Environmental Quality Commission (EQC) authority to adopt rules and standards to perform function vested by law. ORS 468A.025 ''Air Purity Standards'' provides the EQC with authority to set air quality standards, emission standards, and emission treatment and control provisions. The Oregon submittal goes on to cite the following listing of Oregon laws and regulations that establish emission limits and pollution controls. For a detailed description, please refer to the Technical Support Document (TSD) in the docket for this action:

- ORS 468A.085 Residential Open Burning of Vegetative Debris
- ORS 468A.350–.455 Motor Vehicle Pollution Control
- ORS 468A.460–.520 Woodstove Emissions Control
- ORS 468A.550–.620 Field Burning and Propane Flaming
- ORS 468A.625–.645 Chlorofluorocarbons and Halon Control
- ORS 468A.650–.660 Aerosol Spray Control
- OAR 340–202 Ambient Air Quality Standards and PSD Increments
- OAR 340–204 Designation of Air Quality Areas
- OAR 340–222 Stationary Source Plant Site Emission Limits
- OAR 340–256 Motor Vehicles
- OAR 340–226 General Emission Standards
- OAR 340–228 Requirements for Fuel Burning Equipment and Fuel Sulfur Content
- OAR 340–232 Emission Standards for VOC Point Sources
- OAR 340–234 Emission Standards for Wood Products Industries
- OAR 340–236 Emission Standards for Specific Industries
- OAR 340–240 Rules for Areas with Unique Air Quality Needs
- OAR 340–242 Rules Applicable to the Portland Area
- OAR 340–258 Motor Vehicle Fuel Specifications
- OAR 340–262 Residential Woodheating
- OAR 340–266 Field Burning Rules (Willamette Valley)

EPA analysis: EPA finds that Oregon's rules define and reference emissions limits and significant emissions rates for air pollutants including NO_X and VOCs, as precursors to ozone. Oregon has no areas designated nonattainment for the 1997 8-hour ozone NAAQS.

Some of the rules listed above were approved into the SIP under part D because certain areas in Oregon were historically nonattainment under the 1-hour ozone standard and required maintenance plans to ensure on-going compliance with the 1997 8-hour ozone standard. As a result, Oregon regulates ozone and its precursors through its SIP-approved major and minor source permitting programs and ozone maintenance plans. EPA does not consider SIP requirements triggered by the nonattainment area mandates in part D of Title I of the CAA to be governed by the submission deadline of section 110(a)(1). Nevertheless, Oregon has referenced some SIP provisions originally submitted in response to part D in its submittal documenting its compliance with the infrastructure requirements of section 110(a)(1) and (2). Oregon has over time continually updated the elements of its SIP addressing the ozone NAAQS, and the provisions reviewed here are a weave of SIP revisions submitted in response to the infrastructure requirements of section 110(a)(2) and the nonattainment requirements of part D.

For the purposes of this action, EPA is reviewing any rules originally submitted in response to part D solely for the purposes of determining whether they support a finding that the state has met the basic infrastructure requirements under section 110(a)(2). EPA is proposing to approve Oregon's SIP as meeting the requirements of section 110(a)(2)(A) for the 1997 8-hour ozone NAAQS.

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during startup, shutdown, or malfunction (SSM) of operations at a facility. EPA believes that a number of

[13] EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 74 FR 21,639 (April 18, 2011).

[14] EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See, ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,'' 75 FR 82,536 (Dec. 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38,664 (July 25, 1996) and 62 FR 34,641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67,062 (November 16, 2004) (corrections to California SIP); and 74 FR 57,051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

[15] EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42,342 at 42,344 (July 21,2010) (proposed disapproval of director's discretion provisions); 76 FR 4,540 (Jan. 26, 2011) (final disapproval of such provisions).

states may have SSM provisions that are contrary to the Clean Air Act and existing EPA guidance [16] and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

In this action, EPA is not proposing to approve or disapprove any existing state rules relating to director's discretion or variance provisions. EPA believes that a number of states may have such provisions that are contrary to the Clean Air Act and existing EPA guidance (52 FR 45109), November 24, 1987, and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision that is contrary to the Clean Air Act and EPA guidance to take steps to correct the deficiency as soon as possible.

110(a)(2)(B): Ambient air quality monitoring/data system:

Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collecting and analyzing ambient air quality data, and making these data available to EPA upon request.

Oregon's submittal: Oregon references ORS 468.035(a–e, m) ''Functions of the Department'' which provide authority to conduct and supervise inquiries and programs to assess and communicate air conditions and to obtain necessary resources (assistance, materials, supplies, etc) to meet these responsibilities.

EPA analysis: A comprehensive air quality monitoring plan, intended to meet requirements of 40 CFR part 58 was submitted by Oregon to EPA on December 27, 1979 (40 CFR 52.1970) and approved by EPA on March 4, 1981 (46 FR 15136). This air quality monitoring plan has been subsequently updated, with the most recent submittal dated July 1, 2011. EPA approved the plan on January 6, 2012. This plan includes, among other things, the locations for the ozone monitoring network. Oregon provides an annual air quality data report to the public on the ODEQ Web site at *http://www.deq.state.or.us/aq/forms/annrpt.htm*. In addition, Oregon sends real time air monitoring information for ozone, particulate matter, and carbon monoxide to EPA's AIRNow Web page at *http://www.airnow.gov* and also provides the information on the ODEQ Air Quality Index (AQI) Web site at *http://www.deq.state.or.us/aqi*. Based on the foregoing, EPA proposes to approve the Oregon's SIP as meeting the requirements of CAA Section 110(a)(2)(B) for the 1997 8-hour ozone NAAQS.

110(a)(2)(C): Program for enforcement of control measures:

Section 110(a)(2)(C) requires states to include a program providing for enforcement of all SIP measures and the regulation of construction of new or modified stationary sources, including a program to meet PSD and nonattainment NSR requirements.

Oregon's submittal: Oregon's SIP submittal refers to ORS 468.090–.140 ''Enforcement'' which provides ODEQ with authority to investigate complaints, investigate and inspect sources for compliance, access records, commence enforcement procedures, and impose civil penalties. In addition, ORS 468.035 (j, k) ''Functions of the Department'' provides ODEQ with the authority to enforce state air pollution laws and compel compliance with any rule, standard, order, permit or condition. The Oregon submittal goes on to cite the following listing of Oregon laws and regulations related to enforcement and permitting. For a detailed description, please refer to the TSD in the docket for this action:

- ORS 468.920–.963 Environmental Crimes
- ORS 468.996–.997 Civil Penalties
- ORS 468.065 Issuance of Permits; Content: Fees: Use
- ORS 468.070 Denial, Modification, Suspension or Revocation of Permits
- ORS 468A.040 Permits; Rules
- ORS 468A.045 Activities Prohibited without Permit
- ORS 468A.055 Notice Prior to Construction of New Sources
- ORS 468A.990 Penalties for air pollution offenses
- OAR 340–012 Enforcement Procedure and Civil Penalties
- OAR 340–216 Air Contaminant Discharge Permits (ADCP)
- OAR 340–210 Stationary Source Notification Requirements
- OAR 340–214 Stationary Source Reporting Requirements
- OAR 340–224 Major New Source Review

EPA analysis: To generally meet the requirements of section 110(a)(2)(C), the state is required to have PSD, nonattainment NSR, and minor NSR permitting programs adequate to implement the 1997 8-hour ozone NAAQS. As explained above, in this action EPA is not evaluating nonattainment related provisions, such as the nonattainment NSR program required by part D of the CAA. In addition, Oregon has no nonattainment areas for the 1997 8-hour ozone NAAQS.

EPA believes Oregon code provides ODEQ with the authority to enforce the air quality laws, regulations, permits, and orders promulgated pursuant to ORS Chapters 468 and 468A. ODEQ staffs and maintains an enforcement program to ensure compliance with SIP requirements. The ODEQ Director, at the direction of the Governor, may enter a cease and desist order for polluting activities that present an imminent and substantial danger to public health (ORS 468–115). Enforcement cases may be referred to the state Attorney General's Office for civil or criminal enforcement. Therefore, EPA is proposing to approve the Oregon SIP as meeting the requirements of 110(a)(2)(C) related to enforcement for the 1997 8-hour ozone NAAQS.

EPA is proposing to approve Oregon's SIP as generally meeting the requirements related to PSD under section 110(a)(2)(C) for the 1997 8-hour ozone standard. EPA most recently approved revisions to Oregon's major NSR rules (which encompass PSD and Part D NSR) to include NO_X as a precursor for ozone for PSD purposes and PSD permitting of GHGs on November 9, 2011 (76 FR 80747).

EPA is proposing to approve Oregon's infrastructure certification for the 1997 8-hour ozone NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA most recently approved revisions to Oregon's NSR program, including NSR Reform on November 9, 2011 (76 FR 80747). EPA has determined that Oregon's minor NSR program adopted pursuant to section 110(a)(2)(C) of the Act regulates emissions of ozone and its' precursors.

Oregon's NSR program includes requirements for major source permitting in nonattainment areas, maintenance areas, and attainment and unclassifiable areas (OAR 340–224). Oregon's federally-enforceable state operating permit program is found at OAR 340–216 ''Air Contaminant Discharge Permits'' and is also the administrative permit mechanism used to implement the notice of construction and major new source review programs. ODEQ delegates authority to Lane

[16] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. ''State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown.'' Memorandum to EPA Air Division Directors, August 11, 1999.

Regional Air Protection Agency (LRAPA) to implement the source permitting programs within its area of jurisdiction. The requirements and procedures contained in OAR 340–216, OAR 340–222 and OAR 340–224 are used by LRAPA to implement its permitting programs until it adopts rules which are at least as restrictive as state rules. In this action, EPA is not proposing to approve or disapprove any state rules with regard to NSR reform requirements for major sources.

In addition, EPA is not proposing to approve or disapprove the state's existing minor NSR program in this action; we are not evaluating this program for consistency with EPA's regulations governing minor NSR herein. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

110(a)(2)(D): Interstate transport:

Section 110(a)(2)(D) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance of the NAAQS in another state, or from interfering with measures required to prevent significant deterioration of air quality or to protect visibility in another state.

As noted above, this action does not address the requirements of 110(a)(2)(D)(i) for the 8-hour ozone NAAQS which have been addressed by three separate actions issued by EPA. On June 9, 2011, EPA approved the ODEQ SIP submittal to address specific provisions of Clean Air Act section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS including two of the four prongs of 110(a)(2)(D)(i): Significant contribution to nonattainment of these NAAQS in any other state (prong 1); and interference with maintenance of these NAAQS by any other state (prong 2) (76 FR 33650). Subsequently, on July 5, 2011, EPA approved portions of a SIP revision submitted by ODEQ as meeting the requirements of the fourth prong of Clean Air Act section 110(a)(2)(D)(i) as it applies to visibility for the 1997 8-hour ozone NAAQS (prong 4) (76 FR 38997). Finally, on November 9, 2011, EPA approved an Oregon SIP revision that addressed among other things, interference with any other state's required measures to prevent significant deterioration (PSD) of its air quality with respect to the 1997 8-hour ozone NAAQS (prong 3) (76 FR 80747).

Interstate and International transport provisions:

Section 110(a)(2)(D)(ii) requires SIPs to include provisions ensuring compliance with the applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement). Specifically, section 126(a) requires new or modified major sources to notify neighboring states of potential impacts from the source.

EPA analysis: EPA most recently approved revisions to Oregon's NSR regulations on November 9, 2011 (76 FR 80747). Oregon's public notice requirements at OAR 340–209–0060 require that for major NSR actions ODEQ will provide notice to neighboring states, among other officials and agencies. The state has no pending obligations under section 115 or 126(b) of the Act. EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA Section 110(a)(2)(D)(ii) for the 1997 8-hour ozone NAAQS.

110(a)(2)(E): Adequate resources:

Section 110(a)(2)(E) requires states to provide (i) necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out the SIP (and is not prohibited by any provision of Federal or state law from carrying out the SIP or portion thereof), (ii) requires that the state comply with the requirements respecting state boards under section 128 and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any SIP provision, the state has responsibility for ensuring adequate implementation of such SIP provision.

Oregon's submittal: Oregon cites ORS 468.035 which provides ODEQ authority to employ personnel, purchase supplies, enter into contracts, and to receive appropriate and expend federal and other funds for purposes of air pollution research and control. In addition, ORS 468.045 provides the ODEQ director with the power to hire, assign, reassign, and coordinate personnel of the department; authority to administer and enforce the laws of the state concerning environmental quality. ORS 468.035(c) provides authority to advise, consult, and cooperate with other states, state and federal agencies, or political subdivisions on all air quality control matters. ORS 468A.010 calls for a coordinated statewide program of air quality control with responsibility allocated between the state and the units of local government and ORS 468A.100–180 describes the establishment, role and function of regional air quality control authorities and includes the provision that regional rules may not be less strict than state rules. The statute also provides the state Environmental Quality Commission with authority to require corrective measures by the regional agency or to remove the regional agency's administrative and enforcement functions if they fail to meet the specified requirements of state law. Oregon regulations at OAR 340–200 specify Lane Regional Air Protection Agency (LRAPA) has authority in Lane County and defines the term ''Regional Agency.''

EPA analysis: Regarding adequate personnel, funding and authority, EPA believes the Oregon SIP meets the requirements of this element. Oregon receives sections 103 and 105 grant funds from EPA and provides state matching funds necessary to carry out SIP requirements. Regarding the state board requirements under section 128, EPA approved OAR 340–200–0100 through OAR 340–200–0120 as meeting the requirements of CAA section 128 on January 22, 2003 (68 FR 2891). Finally, regarding state responsibility and oversight of local and regional entities, Oregon law and regulation listed above provide ODEQ with adequate authority to carry out SIP obligations with respect to the 1997 8-hour ozone NAAQS. Therefore EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA Section 110(a)(2)(E) for the 1997 8-hour ozone NAAQS.

110(a)(2)(F): Stationary source monitoring system:

Section 110(a)(2)(F) requires (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the CAA, which

reports shall be available at reasonable times for public inspection.

Oregon's submittal: Oregon's SIP submittal refers to statute and regulation which provides authority and requirements for source emissions monitoring, reporting, and correlation with emission limits or standards. For a detailed description, please refer to the TSD in the docket for this action:

- ORS 468.035 (b, d) Functions of Department
- ORS 468A.025(4) Air Purity Standards; Air Quality Standards; Treatment and Control of Emissions; Rules
- ORS 468A.070 Measurement and Testing of Contamination Sources; Rules
- ORS 468A.365 Certification of Motor Vehicle Pollution Control Systems and Inspection of Motor Vehicles; Rules
- OAR 340–212 Stationary Source Testing and Monitoring
- OAR 340–214 Stationary Source Reporting Requirements
- OAR 340–222 Stationary Source Plant Site Emission Limits
- OAR 340–225 Air Quality Analysis Requirements
- OAR 340–234 Emission Standards for Wood Products Industries: Monitoring and Reporting
- OAR 340–236 Emission Standards for Specific Industries: Emissions Monitoring and Reporting
- OAR 340–240 Rules for Areas with Unique Air Quality Needs

EPA analysis: The provisions cited by the Oregon SIP submittal provide for monitoring, recordkeeping and reporting requirements for sources subject to major and minor source permitting. EPA proposes to approve the Oregon SIP as meeting the requirements of CAA Section 110(a)(2)(F) for the 1997 8-hour ozone NAAQS.

110(a)(2)(G): Emergency episodes:

Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

Oregon's submittal: The Oregon submittal cites ORS 468–115 ''Enforcement in Cases of Emergency'' which authorizes the ODEQ Director, at the direction of the Governor, to enter a cease and desist order for polluting activities that present an imminent and substantial danger to public health. In addition, OAR 340–206 ''Air Pollution Emergencies'' authorizes the ODEQ Director to declare an air pollution alert or warning or to issue an ozone advisory to notify the public. OAR 340–214 ''Stationary Source Reporting Requirements'' requires reporting of emergencies and excess emissions and reporting requirements.

EPA analysis: As noted in EPA's October 2, 2007 guidance, the significant harm level for the 8-hour ozone NAAQS shall remain unchanged at 0.60 ppm ozone, 2 hour average, as indicated in 40 CFR 51.151. EPA believes that the existing ozone-related provisions of 40 CFR part 51 subpart H remain appropriate. Oregon's regulations discussed above, which have previously been approved by EPA into the SIP on January 22, 2003 (68 FR 2891) continue to be consistent with the requirements of 40 CFR 51.151. Accordingly, EPA proposes to find that the Oregon SIP is adequate for purposes of CAA section 110(a)(2)(G) for the 1997 8-hour ozone NAAQS.

110(a)(2)(H): Future SIP Revisions:

Section 110(a)(2)(H) requires that SIPs provide for revision of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) except as provided in paragraph 110(a)(3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the SIP is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements under the CAA.

Oregon's submittal: Oregon's SIP submittal refers to OAR 340–200 ''General Air Pollution Procedures and Definitions: -0040 State of Oregon Clean Air Act Implementation Plan'' which provides for revisions to Oregon's SIP and submittal of revisions to the EPA, including standards submitted by a regional authority and adopted verbatim in ODEQ rules.

EPA analysis: Oregon regularly submits SIP revisions to EPA. On November, 9, 2011, EPA most recently approved a number of Oregon SIP revisions, including updates to Oregon's rules to reflect federal changes to the NAAQS for $PM_{2.5,}$ ozone and lead (76 FR 80747). EPA proposes to approve the Oregon SIP as meeting the requirements of section 110(a)(2)(H) for the 1997 8-hour ozone NAAQS.

110(a)(2)(I): Nonattainment area plan revision under part D:

EPA analysis: There are two elements identified in section 110(a)(2) not governed by the 3 year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within 3 years after promulgation of a new or revised NAAQS, but rather due at the time of the nonattainment area plan requirements pursuant to section 172. These requirements are: (i) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (ii) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. As a result, this action does not address infrastructure elements related to section 110(a)(2)(C) with respect to nonattainment NSR or section 110(a)(2)(I).

110(a)(2)(J): Consultation with government officials:

Section 110(a)(2)(J) requires states to provide a process for consultation with local governments and Federal Land Managers carrying out NAAQS implementation requirements pursuant to Section 121 relating to consultation. Section 110(a)(2)(J) further requires states to notify the public if NAAQS are exceeded in an area and to enhance public awareness of measures that can be taken to prevent exceedances. Lastly, Section 110(a)(2)(J) requires states to meet applicable requirements of Part C related to prevention of significant deterioration and visibility protection.

Oregon's submittal: Oregon's SIP submittal refers to a number of laws and regulations relating to consultation, public notification, and PSD and visibility protection. For a detailed description, please refer to the TSD in the docket for this action:

- ORS 468.020 Rules and Standards
- ORS 468.035 (a, c, f–g) Functions of Department
- ORS 468A.010 Policy (1) (b, c)
- ORS 468A.025 Air Purity Standards; Air Quality Standards; Treatment and Control of Emissions; Rules (c)
- OAR 340–202 Ambient Air Quality Standards and PSD Increments
- OAR 340–204 Designation of Air Quality Areas
- OAR 340–206 Air Pollution Emergencies
- OAR 340–209 Public Participation
- OAR 340–224 Major New Source Review
- OAR 340–225 Air Quality Analysis Requirements

EPA analysis: EPA finds that Oregon's SIP includes specific provisions for consulting with local governments and Federal Land Managers relating to CAA section 121. ODEQ routinely coordinates with local governments, states, federal land managers and other

stakeholders on air quality issues and provides notice to appropriate agencies related to permitting actions. Oregon regularly participates in regional planning processes including the Western Regional Air Partnership which is a voluntary partnership of states, tribes, federal land managers, local air agencies and the U.S. EPA whose purpose is to understand current and evolving regional air quality issues in the West. Therefore EPA proposes to approve the Oregon SIP as meeting the requirements of CAA Section 110(a)(2)(J) for consultation with government officials.

Oregon sends real time air monitoring information for ozone, particulate matter, and carbon monoxide to EPA's AIRNow Web page at *http://www.airnow.gov* and also provides the information on the ODEQ Air Quality Index (AQI) Web site at *http://www.deq.state.or.us/aqi* including measures that can be taken to improve air quality. Therefore, EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA Section 110(a)(2)(J) for public notification.

Turning to the requirement in section 110(a)(2)(J) that the SIP meet the applicable requirements of part C of title I of the CAA, EPA has evaluated this requirement in the context of section 110(a)(2)(C) with respect to permitting. EPA most recently approved revisions to Oregon's PSD program on November 9, 2011 (76 FR 80747). Oregon's PSD program regulates NO_X as a precursor for ozone. Oregon has no nonattainment areas for the 1997 8-hour ozone standard. Therefore, EPA is proposing to approve Oregon's SIP as meeting the requirements of CAA Section 110(a)(2)(J) related to PSD.

With regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the CAA. In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus we find that there is no new visibility obligation triggered under section 110(a)(2)(J) when a new NAAQS becomes effective.

110(a)(2)(K): Air quality and modeling/data:

Section 110(a)(2)(K) requires that SIPs provide for (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

Oregon's submittal: Oregon's SIP submittal refers to ORS 468.035 ''Functions of Department'' (b) which provides ODEQ authority to conduct studies and investigations to determine air quality. Oregon's SIP submittal also refers to OAR 340–225 ''Air Quality Analysis Requirements'' which includes modeling requirements for analysis and demonstration of compliance with standards and increments in specified areas.

EPA analysis: EPA previously approved Oregon's regulations on air quality modeling into the SIP on January 22, 2003 (68 FR 2891). Oregon's rules above require all modeled estimates of ambient concentrations be based on 40 CFR Part 51, Appendix W (Guidelines on Air Quality Models). Any change or substitution from models specified in 40 CFR Part 51, Appendix W is subject to notice and opportunity for public comment and must receive prior written approval from ODEQ and the EPA. While Oregon has no nonattainment areas for the 1997 8-hour ozone NAAQS, Oregon has submitted a recent SIP revision supported by modeling for ozone. The Portland and Salem areas were historically nonattainment under the 1-hour ozone standard and require maintenance plans that ensure on-going compliance with the 1997 8-hour ozone standard. On May 22, 2007, Oregon submitted these maintenance plans to EPA, supported by extensive modeling. EPA approved the SIP revision on December 19, 2011 (76 FR 78571). Based on the foregoing, EPA is proposing to approve Oregon's SIP as meeting the requirements of CAA Section 110(a)(2)(K) for the 1997 8-hour ozone NAAQS.

110(a)(2)(L): Permitting fees:

Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to cover the cost of reviewing, approving, implementing and enforcing a permit, until such time as the SIP fee requirement is superseded by EPA's approval of the state's title V operating permit program.

Oregon's submittal: Oregon's SIP submittal refers to ORS 468.065 ''Issuance of Permits: Content; Fees; Use'' which provides the EQC authority to establish a schedule of fees for permits based upon the costs of filing and investigating applications, issuing or denying permits, carrying out Title V requirements and determining compliance. Oregon's submittal also refers to OAR 340–216 ''Air Contaminant Discharge Permits'' which requires payment of permit fees based on a specified table of sources and fee schedule.

EPA analysis: On September 28, 1995, EPA fully approved Oregon's Title V program (60 FR 50106) (effective November 27, 1995). While Oregon's operating permit program is not formally approved into the state's SIP, it is a legal mechanism the state can use to ensure that ODEQ has sufficient resources to support the air program, consistent with the requirements of the SIP. Before EPA can grant full approval, a state must demonstrate the ability to collect adequate fees. Oregon's title V program included a demonstration the state will collect a fee from title V sources above the presumptive minimum in accordance with 40 CFR 70.9(b)(2)(i). Oregon collects sufficient fees to administer the title V permit program. Therefore, EPA proposes to conclude that Oregon's SIP demonstrates the state has satisfied the requirements of CAA Section 110(a)(2)(L) for the 1997 8-hour ozone NAAQS.

110(a)(2)(M): Consultation/participation by affected local entities:

Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

Oregon's submittal: Oregon's SIP submittal refers to the following laws and regulations. For a detailed description, please refer to the TSD that can be found in the docket for this proposed action:

- ORS 468.035 (a, c, f–g) Functions of Department
- ORS 468A.010 Policy (1) (b, c)
- ORS 468A.100–180 Regional Air Quality Control Authorities
- OAR 340–200 General Air Pollution Procedures and Definitions
- OAR 340–204 Designation of Air Quality Areas
- OAR 340–216 Air Contaminant Discharge Permits

EPA analysis: The regulations cited by Oregon's submittal were previously approved on November 9, 2011 (76 FR 80747) and provide for authority and procedures for local and regional authorities to participate and consult in the SIP development process. Therefore EPA proposes to find that Oregon's SIP meets the requirements of CAA Section 110(a)(2)(M) for the 1997 8-hour ozone NAAQS.

VI. Scope of Proposed Action

Oregon has not demonstrated authority to implement and enforce the Oregon Administrative Rules within ''Indian Country'' as defined in 18

U.S.C. 1151.[17] Therefore, this SIP approval does not extend to ''Indian Country'' in Oregon. See CAA sections 110(a)(2)(A) (SIP shall include enforceable emission limits), 110(a)(2)(E)(i) (State must have adequate authority under State law to carry out SIP), and 172(c)(6) (nonattainment SIPs shall include enforceable emission limits). This is consistent with EPA's previous approval of Oregon's PSD program, in which EPA specifically disapproved the program for sources within Indian Reservations in Oregon because the State had not shown it had authority to regulate such sources. See 40 CFR 52.1987(c). It is also consistent with EPA's approval of Oregon's title V operating permits program. See 59 FR 61820, 61827 (December 2, 1994) (interim approval does not extend to Indian Country); 60 FR 50106, 50106 (September 28, 1995) (full approval does not extend to Indian Country).

VII. Proposed Action

EPA is proposing to approve the SIP submittal from the State of Oregon to demonstrate that the SIP meets the requirements of section 110(a)(1) and (2) of the CAA for the NAAQS promulgated for ozone on July 18, 1997. EPA is proposing to approve in full the following section 110(a)(2) infrastructure elements for Oregon for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), (M). EPA is taking no action on infrastructure elements (D)(i) and (I) for the 1997 ozone NAAQS. This action is being taken under section 110 of the CAA.

VIII. 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 approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves the state's law as meeting Federal requirements and does not impose additional requirements beyond those imposed by the state's law. For that reason, this proposed action:

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate Matter, and Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: January 27, 2012.

Dennis J. McLerran,

Regional Administrator, Region 10.

[FR Doc. 2012–2779 Filed 2–6–12; 8:45 am]

BILLING CODE 6560–50–P

[17] ''Indian country'' is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe even if the trust lands have not been formally designated as a reservation.

Notices

Federal Register
Vol. 77, No. 25
Tuesday, February 7, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–TM–11–0083; TM–11–03]

Notice of Funds Availability (NOFA) Inviting Applications for the Federal-State Marketing Improvement Program (FSMIP)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS) announces the availability of approximately $1.2 million in competitive grant funds for fiscal year (FY) 2012, subject to final appropriation action by Congress, which would enable States to explore new market opportunities for U.S. food and agricultural products and to encourage research and innovation aimed at improving the efficiency and performance of the U.S. marketing system. Eligible applicants include State departments of agriculture, State agricultural experiment stations, and other appropriate State Agencies. Applicants are encouraged to involve industry groups, academia, community-based organizations, and other stakeholders in developing proposals and conducting projects. In accordance with the Paperwork Reduction Act of 1995, the information collection requirements have been previously approved by OMB under 0581–0240, Federal-State Marketing Improvement Program (FSMIP).

DATES: Proposals must be received on or before March 23, 2012.

ADDRESSES: Submit proposals and other required documents to: FSMIP Staff Officer, Transportation and Marketing Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, 1400 Independence Avenue SW., Room 4945–South, Washington, DC 20250; telephone (202) 720–5024; email *janise.zygmont@ams.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Janise Zygmont, FSMIP Staff Officer; telephone (202) 720–5024; fax (202) 690–1144; or email *janise.zygmont@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: FSMIP is authorized under Section 204(b) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627). FSMIP provides matching grants on a competitive basis to enable States to explore new market opportunities for U.S. food and agricultural products and to encourage research and innovation aimed at improving the efficiency and performance of the U.S. marketing system. Eligible applicants include State departments of agriculture, State agricultural experiment stations, and other appropriate State Agencies. Other organizations interested in participating in this program should contact their State Department of Agriculture's Marketing Division. State agencies specifically named under the authorizing legislation should assume the lead role in FSMIP projects, and use cooperative or contractual linkages with other agencies, universities, institutions, and producer, industry or community-based organizations as appropriate. Multi-State projects are encouraged. In such projects, one State assumes the coordinating role, using appropriate cooperative arrangements with the other State agencies and entities involved in the project.

Proposals must be accompanied by completed Standard Forms (SF) 424, 424A and 424B. AMS will not approve the use of FSMIP funds for advertising or, with limited exceptions, for the purchase of equipment. Detailed program guidelines may be obtained from the contact listed above, and are available at the FSMIP Web site: *http://www.ams.usda.gov/FSMIP*.

Background

FSMIP funds a wide range of applied research projects that address barriers, challenges, and opportunities in marketing, transportation, and distribution of U.S. food and agricultural products domestically and internationally.

Eligible agricultural categories include livestock, livestock products, food and feed crops, fish and shellfish, horticulture, viticulture, apiary, and forest products and processed or manufactured products derived from such commodities. Reflecting the growing diversity of U.S. agriculture, in recent years, FSMIP has funded projects dealing with nutraceuticals, bioenergy, compost and products made from agricultural residue.

Proposals may deal with barriers, challenges, or opportunities manifesting at any stage of the marketing chain including direct, wholesale, and retail. Proposals may involve small, medium, or large scale agricultural entities but should potentially benefit multiple producers or agribusinesses. Proprietary proposals that benefit one business or individual will not be considered.

Proposals that address issues of importance at the State, Multi-State or national level are appropriate for FSMIP. FSMIP also seeks unique proposals on a smaller scale that may serve as pilot projects or case studies useful as a model for other States. Of particular interest are proposals that reflect a collaborative approach among the States, academia, the farm sector and other appropriate entities and stakeholders. FSMIP's enabling legislation authorizes projects to:

- Determine the best methods for processing, preparing for market, packing, handling, transporting, storing, distributing, and marketing agricultural products.
- Determine the costs of marketing agricultural products in their various forms and through various channels.
- Assist in the development of more efficient marketing methods, practices, and facilities to bring about more efficient and orderly marketing, and reduce the price spread between the producer and the consumer.
- Develop and improve standards of quality, condition, quantity, grade, and packaging in order to encourage uniformity and consistency in commercial practices.
- Eliminate artificial barriers to the free movement of agricultural products in commercial channels.
- Foster new/expanded domestic/foreign markets and new/expanded uses of agricultural products.
- Collect and disseminate marketing information to anticipate and meet consumer requirements, maintain farm income, and balance production and utilization.

All proposals which fall within the FSMIP guidelines will be considered.

FSMIP encourages States to submit proposals that address the following objectives:

- Creating wealth in rural communities through the development of local and regional food systems and value-added agriculture.
- Developing direct marketing opportunities for producers, or producer groups.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the FSMIP information collection requirements were previously approved by the Office of Management and Budget (OMB) and were assigned OMB control number 0581–0240.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public with the option of submitted information or transacting business electronically to the maximum extent possible.

How To Submit Proposals and Applications

Applicants have two options for submitting FSMIP applications. Applications may be submitted electronically through the Federal grants Web site, *http://www.grants.gov,* or applications may be emailed to the FSMIP Staff Officer at *janise.zygmont@ams.usda.gov*. Applicants who choose to submit their application via the Federal grants Web site are strongly urged to familiarize themselves with the Federal grants Web site well before the application deadline and to begin the application process before the deadline. Applicants who choose to email their applications to the FSMIP Staff Officer must also express mail the original-signature SF 424 to the address provided in this Notice in time to meet the application deadline. Additional details about the FSMIP application process for all applicants are available at the FSMIP Web site: *http://www.ams.usda.gov/FSMIP*.

FSMIP is listed in the ''Catalog of Federal Domestic Assistance'' under number 10.156 and subject agencies must adhere to Title VI of the Civil Rights Act of 1964, which bars discrimination in all Federally assisted programs.

Authority: 7 U.S.C. 1621–1627.

Dated: February 1, 2012.

Robert C. Keeney,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2012–2706 Filed 2–6–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2011–0121]

Notice of Request for Extension of Approval of an Information Collection; Requirements for Recognizing the Animal Health Status of Foreign Regions

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's (APHIS) intention to request an extension of approval of an information collection associated with regulations for recognizing the animal health status of foreign regions.

DATES: We will consider all comments that we receive on or before April 9, 2012.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0121-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0121, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0121* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

FOR FURTHER INFORMATION CONTACT: For information on regulations for recognizing the animal health status of foreign regions, contact Dr. Kelly Rhodes, Senior Staff Officer, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 851–3300. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Requirements for Recognizing the Animal Health Status of Foreign Regions.

OMB Number: 0579–0219.

Type of Request: Extension of approval of an information collection.

Abstract: The Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) authorizes the Secretary of Agriculture, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of animal diseases and pests. Regulations governing the importation of animals and animal products into the United States are contained in 9 CFR parts 92 through 98.

The regulations in 9 CFR part 92, ''Importation of Animals and Animal Products: Procedures for Requesting Recognition of Regions,'' set out the process by which a foreign government may request recognition of the animal health status of a region or approval to export animals or animal products to the United States based on the risk associated with animals or animal products from that region. Each request must include information about the region, including information on the veterinary services organization of the region; the extent to which movement of animals and animal products is controlled from regions of higher risk and the level of biosecurity for such movements; livestock demographics and marketing practices in the region; diagnostic laboratory capabilities in the region; and the region's policies and infrastructure for animal disease control. Additionally, we require regions that have been granted status under the regulations to provide information, or allow us to access information, to confirm the regions' animal health status when we request it. The types of information collected will vary based on the information required to adequately assess a region's animal health status.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(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 our 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 40 hours per response.

Respondents: Foreign animal health officials.

Estimated annual number of respondents: 3.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 3.

Estimated total annual burden on respondents: 120 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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.

Done in Washington, DC, this 1st day of February 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–2709 Filed 2–6–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Economic Analysis (BEA).

Title: Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate with Foreign Parent.

OMB Control Number: 0608–0009.

Form Number(s): BE–605.

Type of Request: Regular submission.

Number of Responses: 16,000 annually.

Average Hours per Response: One hour is the average, but may vary considerably among respondents because of differences in company size and complexity.

Estimated Total Annual Burden Hours: 16,000.

Needs and Uses: The Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate with Foreign Parent (BE–605) is a sample survey that collects data on transactions and positions between foreign-owned U.S. business enterprises and their ''affiliated foreign groups'' (i.e., their foreign parents and foreign affiliates of their foreign parents). The sample data are used to derive universe estimates in nonbenchmark years from similar data reported in the BE–12, Benchmark Survey of Foreign Direct Investment in the United States, which is conducted every five years. The data are used in the preparation of the U.S. international transactions, national income and product, and input-output accounts and the net international investment position of the United States. The data are needed to measure the size and economic significance of foreign direct investment in the United States, measure changes in such investment, and assess its impact on the U.S. economy.

The Bureau of Economic Analysis (BEA) proposes the following changes to the survey: (1) The deletion of a check-box question that asks respondents whether they plan to expand their operation with a new facility (this information is no longer needed); and (2) design improvements to the survey form.

Form BE–605 is a quarterly report that must be filed within 30 days after the end of each quarter (45 days after the final quarter of the respondent's fiscal year) by every U.S. business enterprise that is owned 10 percent or more by a foreign investor and that has total assets, sales or gross operating revenues, or net income (positive or negative) of over $60 million.

As an alternative to filing paper forms, BEA will offer an electronic filing option, its eFile system, for use in reporting on Form BE–605. For more information about eFile, go to *www.bea.gov/efile.*

Potential respondents are those U.S. business enterprises that were required to report in the BE–12, Benchmark Survey of Foreign Direct Investment in the United States—2007, along with those U.S. business enterprises that subsequently entered the direct investment universe. The data collected are sample data covering transactions and positions between foreign-owned U.S. business enterprises and their affiliated foreign groups. Universe estimates are developed from the reported sample data.

Affected Public: Business or other for-profit organizations.

Frequency: Quarterly.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Paul Bugg, (202) 395–3093.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230, or via email at *jjessup@doc.gov.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Paul Bugg, OMB Desk Officer, FAX number (202) 395–7245, or via email at *pbugg@omb.eop.gov.*

Dated: February 2, 2012.

Glenna Mickelson,

Management Analyst, Office of Chief Information Officer.

[FR Doc. 2012–2684 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1810]

Approval for Manufacturing Authority, Foreign-Trade Zone 22, Baxter Healthcare Corporation, (Pharmaceutical and Biological Intravenous Product Manufacturing), Chicago, IL

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Illinois International Port District, grantee of Foreign-Trade Zone 22, has requested manufacturing authority on behalf of Baxter Healthcare Corporation, within FTZ 22 in Round Lake, Illinois (FTZ Docket 60–2010, filed 10/15/2010);

Whereas, notice inviting public comment has been given in the **Federal Register** (75 FR 65448, 10/25/2010) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application for manufacturing authority under zone procedures within FTZ 22 on behalf of Baxter Healthcare Corporation, as described in the application and **Federal Register** notice, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 31st day of January 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–2788 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1808]

Expansion/Reorganization of Foreign-Trade Zone 29, Louisville, KY

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Louisville & Jefferson County Riverport Authority, grantee of Foreign-Trade Zone 29, submitted an application to the Board for authority to expand FTZ 29 in Henderson County, Kentucky, adjacent to the Owensboro/Evansville Customs and Border Protection port of entry (FTZ Docket 45–2011, filed 6–28–2011);

Whereas, notice inviting public comment has been given in the **Federal Register** (76 FR 39069–39070, 7/5/11) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 29 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, and to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and further subject to a sunset provision that would terminate authority on January 31, 2017 for Sites 2, 3, 7 and 10 where no activity has occurred under FTZ procedures before that date.

Signed at Washington, DC, this 31st day of January 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–2799 Filed 2–6–12; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1812]

Reorganization and Expansion of Foreign-Trade Zone 272 Under Alternative Site Framework; Counties of Lehigh and Northampton, PA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170, 01/12/2009; correction 74 FR 3987, 01/22/2009; 75 FR 71069–71070, 11/22/2010) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the Lehigh Valley Economic Development Corporation, grantee of Foreign-Trade Zone 272, submitted an application to the Board (FTZ Docket 64–2011, filed 10/13/2011) for authority to reorganize and expand under the ASF with a service area of Lehigh and Northampton Counties, Pennsylvania, within and adjacent to the Lehigh Valley U.S. Customs and Border Protection port of entry, FTZ 272's existing Sites 1, 5, 6, 7, 8 and 9 would be categorized as magnet sites, existing Sites 2, 3 and 4 would be removed, and the grantee proposes one initial usage-driven site (Site 10);

Whereas, notice inviting public comment was given in the **Federal Register** (76 FR 65171–65172, 10/20/2011) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize and expand FTZ 272 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, to a five-year ASF sunset provision for magnet sites that would terminate authority for Sites 5 through 9 if not activated by January 31, 2017, and to a three-year ASF sunset provision for usage-driven sites that would terminate authority for Site 10 if no foreign-status merchandise is admitted for a *bona fide* customs purpose by January 31, 2015.

Signed at Washington, DC, this 31 day of January 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–2781 Filed 2–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1811]

Reorganization of Foreign-Trade Zone 118 Under Alternative Site Framework, Ogdensburg, NY

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170, 01/12/2009; correction 74 FR 3987, 01/22/2009; 75 FR 71069–71070, 11/22/2010) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the Ogdensburg Bridge and Port Authority, grantee of Foreign-Trade Zone 118, submitted an application to the Board (FTZ Docket 56–2011, filed 09/20/2011) for authority to reorganize under the ASF with a service area of St. Lawrence County, New York, within and adjacent to the Ogdensburg U.S. Customs and Border Protection port of entry, and FTZ 118's existing Site 1 and Site 2 would be categorized as magnet sites;

Whereas, notice inviting public comment was given in the **Federal Register** (76 FR 60801, 09/30/2011) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, Therefore, the Board hereby orders:

The application to reorganize FTZ 118 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and to a five-year ASF sunset provision for magnet sites that would terminate authority for Site 1 if not activated by January 31, 2017.

Signed at Washington, DC, this 31st day of January 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–2786 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1814]

Reorganization of Foreign-Trade Zone 124 Under Alternative Site Framework; Gramercy, Louisiana

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170–1173, 01/12/09; correction 74 FR 3987, 01/22/09; 75 FR 71069–71070, 11/22/10) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the Port of South Louisiana, grantee of Foreign-Trade Zone 124, submitted an application to the Board (FTZ Docket 44–2011, filed 6/24/2011) for authority to reorganize under the ASF with a service area of St. Charles, St. John the Baptist, St. James, La Fourche and St. Mary Parishes in Louisiana, within and adjacent to the Gramercy Customs and Border Protection port of entry, FTZ 124's existing Site 1 would be removed from the zone project and Sites 2, 3 and 4 would be categorized as magnet sites;

Whereas, notice inviting public comment was given in the **Federal Register** (76 FR 38356–38357, 6/30/2011) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 124 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and to a five-year ASF sunset provision for magnet sites that would terminate authority for Sites 3 and 4 if not activated by January 31, 2017.

Signed at Washington, DC, this 31st day of January 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–2776 Filed 2–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1813]

Reorganization of Foreign-Trade Zone 275 Under Alternative Site Framework; Lansing, MI

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09; 75 FR 71069–71070, 11/22/10) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the Capital Region Airport Authority, grantee of Foreign-Trade Zone 275, submitted an application to the Board (FTZ Docket 58–2011, filed 9/27/2011) for authority to reorganize under the ASF with a service area of Clinton, Eaton, Gratiot, Ingham, Isabella (portion), Jackson, Livingston and Shiawassee Counties, Michigan, adjacent to the user fee airport designated by U.S. Customs and Border Protection at the Capital Regional International Airport, Lansing, and FTZ 275's existing Site 1 would be categorized as a magnet site;

Whereas, notice inviting public comment was given in the **Federal Register** (76 FR 61075, 10/3/2011) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 275 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, and to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project.

Signed at Washington, DC, this 31st day of January 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–2773 Filed 2–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1809]

Termination of Foreign-Trade Subzone 176A Dundee, IL

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board has adopted the following order:

Whereas, on April 1, 1992, the Foreign-Trade Zones Board issued a grant of authority to the Greater Rockford Airport Authority (grantee of FTZ 176), authorizing the establishment of Foreign-Trade Subzone 176A at the Milk Specialties Company facility in Dundee, Illinois (Board Order 570, 57 FR 12292; 4–9–1992);

Whereas, the grantee has advised that zone procedures are no longer needed at the facility and requested voluntary

termination of Subzone 176A (FTZ Docket 2–2012);

Whereas, the request has been reviewed by the FTZ Staff and U.S. Customs and Border Protection officials, and approval has been recommended;

Now, therefore, the Foreign-Trade Zones Board terminates the subzone status of Subzone 176A, effective this date.

Signed at Washington, DC, this 31 day of January 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–2794 Filed 2–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–908]

Second Administrative Review of Sodium Hexametaphosphate From the People's Republic of China: Extension of Preliminary Results

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 administrative review of sodium hexametaphosphate (''sodium hex'') from the People's Republic of China (''PRC''). The review covers the period March 1, 2010, through February 28, 2011.

DATES: *Effective Date:* February 7, 2012.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office IX, 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 April 27, 2011, the Department published in the **Federal Register** a notice of initiation of the administrative review of the antidumping duty order on sodium hex from the PRC.[1] On November 29, 2011 the Department extended the deadline for the preliminary results of this review to January 30, 2012.[2]

Statutory Time Limits

In antidumping duty administrative reviews, section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the ''Act''), requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary results are published. However, 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 determination to a maximum of 365 days after the last day of the anniversary month.

Extension of Time Limit for Preliminary Results of Review

We determine that it is not practicable to complete the preliminary results of this administrative review within the original time limit because the Department requires additional time to analyze questionnaire responses and to evaluate surrogate value submissions.

Therefore, the Department is extending the time limit for completion of the preliminary results of the administrative review by 30 days. The preliminary results will now be due no later than March 15, 2012. The final results continue to be due 120 days after the publication of the preliminary results.

We are issuing and publishing this notice in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: January 25, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–2750 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–929]

Small Diameter Graphite Electrodes 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:* February 7, 2012.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov, AD/CVD Operations, Office 1, 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 March 31, 2011, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on small diameter graphite electrodes from the People's Republic of China (PRC) for the period February 1, 2010, through January 31, 2011. See *Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Review,* 76 FR 17825 (March 31, 2011) (*Initiation Notice*). We initiated an administrative review of 160 companies.[1] On November 1, 2011, we extended the time period for issuing the preliminary results of this review by 95 days until February 3, 2012. See *Small Diameter Graphite Electrodes from the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 67411 (November 1, 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 comments submitted by SGL Carbon LLC and Superior Graphite, Co., the domestic interested parties in this review, in connection with the forthcoming preliminary results.

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 76 FR 23545 (April 27, 2011).

[2] *See Second Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Extension of Preliminary Results,* 76 FR 73599 (November 29, 2011).

[1] In the *Initiation Notice,* we listed names by which certain companies are also known, or were formerly known, as reflected in the February 25, 2011, request for an administrative review submitted by the petitioners, SGL Carbon LLC and Superior Graphite, Co.

Therefore, we are extending the time period for issuing the preliminary results of this review by an additional 25 days until February 28, 2012.

This notice is published in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).

Dated: January 31, 2012,

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–2770 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–853]

Citric Acid and Certain Citrate Salts From Canada: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a timely request by one manufacturer/exporter, Jungbunzlauer Canada Inc. (JBL Canada), the Department of Commerce (the Department) is conducting the second administrative review of the antidumping duty order on citric acid and certain citrate salts (citric acid) from Canada with respect to JBL Canada. The review covers the period May 1, 2010, through April 30, 2011. We preliminarily determine that JBL Canada made sales below normal value (NV).

If the preliminary results are adopted in the final results of the administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on the preliminary results.

FOR FURTHER INFORMATION CONTACT: Rebecca Trainor or Kate Johnson, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–4007 or (202) 482–4929, respectively.

SUPPLEMENTARY INFORMATION:

Background

In response to a timely request by JBL Canada, on June 28, 2011, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on citric acid from Canada with respect to JBL Canada covering the period May 1, 2010, through April 30, 2011. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 76 FR 37781 (June 28, 2011) (*Initiation Notice*).

On June 29, 2011, we issued the antidumping duty questionnaire to JBL Canada. In August 2011, we received responses to sections A (*i.e.,* the section covering general information about the company), B (*i.e.,* the section covering comparison-market sales), and C (*i.e.,* the section covering U.S. sales).[1] On September 22, 2011, we issued to JBL Canada a supplemental questionnaire with respect to sections A, B, and C of the original questionnaire and we received a response on October 6, 2011.

Scope of the Order

The scope of this order includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend. The scope of this order also includes all forms of crude calcium citrate, including dicalcium citrate monohydrate, and tricalcium citrate tetrahydrate, which are intermediate products in the production of citric acid, sodium citrate, and potassium citrate. The scope of this order does not include calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient, such as dextrose or starch, where the excipient constitutes at least 2 percent, by weight, of the product. The scope of this order includes the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate. Sodium citrate also includes both trisodium citrate and monosodium citrate, which are also known as citric acid trisodium salt and citric acid monosodium salt, respectively. Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and 3824.90.9290 of the HTSUS, respectively. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Period of Review

The period of review (POR) is May 1, 2010, through April 30, 2011.

Duty Absorption

On July 28, 2011, the petitioners[2] requested that the Department determine whether antidumping duties had been absorbed during the POR. Section 751(a)(4) of the Tariff Act of 1930, as amended (the Act), provides for the Department, if requested, to determine during an administrative review initiated two or four years after the publication of the order, whether antidumping duties have been absorbed by a foreign producer or exporter, if the subject merchandise is sold in the United States through an affiliated importer. This review was initiated two years after the publication of the order. *See Initiation Notice; Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Antidumping Duty Orders,* 74 FR 25703 (May 29, 2009) (*Citric Acid Duty Orders*).

In determining whether the antidumping duties have been absorbed by JBL Canada, we presume the duties will be absorbed for constructed export price (CEP) sales that have been made at less than NV. This presumption can be rebutted with evidence (*e.g.,* an agreement between the affiliated importer and unaffiliated purchaser) that the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise. *See, e.g., Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part,* 70 FR 39735, 39737 (July 11, 2005), unchanged in *Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan,* 70 FR 73727 (December 13, 2005). On August 9, 2011, we requested proof that JBL Canada's unaffiliated purchasers would ultimately pay the antidumping duties to be assessed on entries during the POR. On September 20, 2011, JBL

[1] No responses to sections D or E of the questionnaire (*i.e.,* cost of production information and further manufacturing information, respectively).

[2] Archer Daniels Midland Company, Incorporated, and Tate & Lyle Americas LLC.

Canada responded to our request for information and stated that the sales documentation provided in its questionnaire response shows that antidumping duties are not being absorbed by JBL Canada through its affiliated U.S. importer. Based on our review of the documentation contained in JBL Canada's questionnaire response (*see* Exhibit A–12 of the August 4, 2011, questionnaire response), we preliminarily determine that antidumping duties were not absorbed during the POR. *See, e.g., Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review,* 75 FR 12206, 12207–12208 (March 15, 2010), unchanged in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 75 FR 47771 (August 9, 2010). Because much of the information contained in JBL Canada's September 20, 2011, duty absorption response is business proprietary, additional analysis of this issue is contained in the memorandum entitled ''Preliminary Results Margin Calculation for Jungbunzlauer Canada Inc.,'' dated contemporaneously with this notice.

Comparisons to Normal Value

To determine whether JBL Canada's sales of citric acid from Canada to the United States were made at less than NV, we compared the CEP to the NV, as described in the ''Constructed Export Price'' and ''Normal Value'' sections of this notice.

Pursuant to section 777A(d)(2) of the Act, for JBL Canada we compared the CEPs of individual U.S. transactions to the weighted-average NV of the foreign like product where there were sales made in the ordinary course of trade. *See* discussion below.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by JBL Canada covered by the description in the ''Scope of the Order'' section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Pursuant to 19 CFR 351.414(e)(2), we compared JBL Canada's U.S. sales of citric acid to its sales of citric acid made in the home market. Where there were no contemporaneous sales within the definition of 19 CFR 351.414(e)(2)(i), pursuant to 19 CFR 351.414(e)(2)(ii) and (iii), we compared sales within the contemporaneous window period, which extends from three months prior to the month of the U.S. sale until two months after the sale.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by JBL Canada in the following order: type, form, grade, and particle size.

Constructed Export Price

For all U.S. sales made by JBL Canada, we calculated CEP in accordance with section 772(b) of the Act because the subject merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

We based CEP on packed prices to unaffiliated purchasers in the United States. Where appropriate, we adjusted the starting prices for billing adjustments and rebates, in accordance with 19 CFR 351.401(c). We made deductions for movement expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, foreign inland insurance expenses, U.S. brokerage and handling expenses, U.S. inland freight expenses, U.S. warehousing expenses, and U.S. inland insurance expenses. In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*e.g.,* imputed credit expenses), and indirect selling expenses (including inventory carrying costs).

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by JBL Canada and its U.S. affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales. *See* memorandum entitled ''Preliminary Results Margin Calculation for Jungbunzlauer Canada Inc.,'' dated contemporaneously with this notice.

Normal Value

A. Home Market Viability and Selection of Comparison Market

To determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act. Based on this comparison, we determined that, pursuant to 19 CFR 351.404(b), JBL Canada had a viable home market during the POR. Consequently, pursuant to section 773(a)(1)(B)(i) of the Act and 19 CFR 351.404(c)(i), we based NV on home market sales.

B. Level of Trade

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales of foreign like products at the same level of trade (LOT) as the export price or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. *See id.; see also, Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa,* 62 FR 61731, 61732 (November 19, 1997) (*Plate from South Africa*). In order to determine whether the comparison-market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.,* the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison-market sales (*i.e.,* where NV is based on either home market or third country prices),[3] we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. *See Micron Technology, Inc.* v. *United States,* 243 F.3d 1301, 1314 (Fed. Cir. 2001). When the Department is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sales to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it practicable, we make an LOT adjustment under section

[3] Where NV is based on constructed value (CV), we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative expenses, and profit for CV, where possible.

773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.,* no LOT adjustment was practicable), the Department shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See Plate from South Africa,* 62 FR at 61732–33.

In this administrative review, we obtained information from JBL Canada regarding the marketing stages involved in making its reported home market and U.S. sales, including a description of the selling activities performed by the respondent and its affiliates for each channel of distribution.

During the POR, JBL Canada reported that it sold citric acid to end-users and distributors through two channels of distribution in both the U.S. and home markets. JBL Canada stated that its selling process was essentially the same for both channels of distribution. Because the details of JBL Canada's reported selling functions for each channel of distribution are business proprietary, our analysis of these selling functions for purposes of determining whether different LOTs exist is contained in a separate memorandum entitled ''Preliminary Level-of-Trade Analysis,'' dated contemporaneously with this notice.

Based on our analysis, we found that the selling functions JBL Canada performed for each of its channels of distribution in the U.S. market were essentially the same, with the exception of one selling function which we determined was not sufficient to warrant an LOT distinction between these channels. Therefore, we determined preliminarily that there is only one LOT (for CEP sales) in the U.S. market. Similarly, we found that the selling functions that JBL Canada (and its affiliates) performed for each of the channels of distribution in the home market were essentially the same, with the exception of certain selling activities which we determined were not sufficient to warrant an LOT distinction between these channels. Therefore, we preliminarily determined that there is only one LOT in the home market.

In comparing the home market LOT to the CEP LOT, we found that the selling activities performed by JBL Canada (and its affiliates) for its CEP sales were significantly fewer than the selling activities that it performed for its home market sales, and that the home-market LOT was more remote from the factory than the CEP LOT. Accordingly, we considered the CEP LOT to be different from the home-market LOT and to be at a less advanced stage of distribution than the home-market LOT.

Therefore, we could not match CEP sales to sales at the same LOT in the home market, nor could we determine an LOT adjustment based on JBL Canada's home market sales because there is only one LOT in the home market, and it is not possible to determine if there is a pattern of consistent price differences between the sales on which NV is based and the home market sales at the LOT of the export transaction. *See* section 773(a)(7)(A) of the Act. Furthermore, we have no other information that provides an appropriate basis for determining an LOT adjustment. Consequently, because the available data do not form an appropriate basis for making an LOT adjustment but the home market LOT is at a more advanced stage of distribution than the CEP LOT, we find it is appropriate to make a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act. The CEP offset is calculated as the lesser of: (1) The indirect selling expenses incurred on the home market sales, or (2) the indirect selling expenses deducted from the starting price in calculating CEP.

Calculation of Normal Value Based on Comparison-Market Prices

We based NV for JBL Canada on packed prices to unaffiliated customers in the home market. Where appropriate, we adjusted the starting prices for billing adjustments and rebates, in accordance with 19 CFR 351.401(c). We made deductions, where appropriate, from the starting price for movement expenses, including inland freight and inland insurance, under section 773(a)(6)(B)(ii) of the Act.

We made adjustments under section 773(a)(6)(C) of the Act for differences in circumstances-of-sale for imputed credit expenses, where appropriate. We also deducted home market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act. Finally, as discussed in the ''Level of Trade'' section above, we made a CEP offset pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412(f). We calculated the CEP offset as the lesser of the indirect selling expenses incurred on the home-market sales or the indirect selling expenses deducted from the starting price in calculating CEP.

Currency Conversion

It is our normal practice to make currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of the Review

We preliminarily determine that a weighted-average dumping margin exists for JBL Canada for the period May 1, 2010, through April 30, 2011, as follows:

Manufacturer/exporter	Percent margin
Jungbunzlauer Canada Inc.	2.34

Disclosure and Public Hearing

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b). Pursuant to 19 CFR 351.309, interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Interested parties who wish to request a hearing or to participate if one is requested must submit a written request to the Assistant Secretary for Import Administration within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in the respective case briefs.

The Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212. The Department intends to issue appropriate appraisement instructions for the company subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

For those sales where JBL Canada reported the entered value of its U.S.

sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales to that importer. For those sales where the respondent did not report the entered value of its U.S. sales, we calculated importer-specific or customer-specific per-unit duty assessment rates by aggregating the total amount of antidumping duties calculated for the examined sales and dividing this amount by the total quantity of those sales. To determine whether the duty assessment rates are *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer-specific *ad valorem* ratios based on the estimated entered value.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer-specific assessment rate calculated in the final results of this review is above *de minimis* (*i.e.,* at or above 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.,* less than 0.50 percent). The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*). This clarification will apply to entries of subject merchandise during the POR produced by the company included in these final results of review for which the reviewed company did not know that the merchandise it sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate effective during the POR if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a previous review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and 4) the cash deposit rate for all other manufacturers or exporters will continue to be 23.21 percent, the all-others rate made effective by the LTFV investigation. *See Citric Acid Duty Orders.* These deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant 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.

This administrative review and notice are published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221.

Dated: January 31, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–2802 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Environmental Technologies Trade Advisory Committee Public Meeting

AGENCY: International Trade Administration, DOC.

ACTION: Notice of Federal Advisory Committee Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a meeting of the Environmental Technologies Trade Advisory Committee (ETTAC).

DATES: The teleconference meeting is scheduled for Friday, February 24, 2012, at 2 p.m. Eastern Standard Time (EST). Please register by 5 p.m. EST on Friday, February 17, 2012 to listen in on the teleconference meeting.

ADDRESSES: The meeting will take place via teleconference. For logistical reasons, all participants are required to register in advance by the date specified above. Please contact Mr. Todd DeLelle at the contact information below to register and obtain call-in information.

FOR FURTHER INFORMATION CONTACT: Mr. Todd DeLelle, Office of Energy & Environmental Industries, International Trade Administration, Room 4053, 1401 Constitution Avenue NW., Washington, DC 20230. Phone: (202) 482–4877; Fax: (202) 482–5665; email: *todd.delelle@trade.gov*.

SUPPLEMENTARY INFORMATION: The meeting will take place from 2 p.m. to 3 p.m. This meeting is open to the public. Written comments concerning ETTAC affairs are welcome any time before or after the meeting. Minutes will be available within 30 days of this meeting.

Topics to be considered: The agenda for the February 24, 2012 ETTAC meeting has only one item: 2 p.m.—3 p.m.: Presentation of, and deliberation on, a list of harmonized tariff schedule codes the ETTAC considers relevant to the U.S. environmental industry.

Background: The ETTAC is mandated by Section 2313(c) of the Export Enhancement Act of 1988, as amended, 15 U.S.C. 4728(c), to advise the Environmental Trade Working Group (ETWG) of the Trade Promotion Coordinating Committee, through the Secretary of Commerce, on the development and administration of programs to expand U.S. exports of environmental technologies, goods, services, and products. The ETTAC was originally chartered in May of 1994. It was most recently re-chartered until October 2012.

The teleconference will be accessible to people with disabilities. Please specify any requests for reasonable accommodation when registering to participate in the teleconference. Last minute requests will be accepted, but may be impossible to fill.

No time will be available for oral comments from members of the public

during this meeting. As noted above, any member of the public may submit pertinent written comments concerning the Committee's affairs at any time before or after the meeting. Comments may be submitted to Mr. Todd DeLelle at the contact information indicated above. To be considered during the meeting, comments must be received no later than 5 p.m. Eastern Standard Time on Friday, February 17, 2012, to ensure transmission to the Committee prior to the meeting. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Dated: January 27, 2012.

Catherine P. Vial,

Team Leader, Environmental Industries, Office of Energy and Environmental Industries.

[FR Doc. 2012–2719 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Cook Inlet Beluga Whale Economic Survey

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

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 April 9, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Dr. Dan Lew, (530) 752–1746 or *Dan.Lew@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The population of Cook Inlet beluga whales found in the Cook Inlet of Alaska is one of five distinct population segments in United States (U.S.) waters. It was listed as endangered under the Endangered Species Act on October 22, 2008 (73 FR 62919). The public benefits associated with the results of protection actions on the Cook Inlet beluga whale, such as population increases, are primarily the result of the non-consumptive value people attribute to such protection (e.g., active use values associated with being able to view beluga whales and passive use values unrelated to direct human use). Little is known about these values, yet such information is needed for decision makers to more fully understand the trade-offs involved in choosing among potential protection alternatives and to complement other information available about the costs, benefits, and impacts of protection alternatives.

The National Marine Fisheries Service (NMFS) plans to conduct a survey to collect data for measuring the economic benefits the public receives for providing additional protection, beyond current levels, to the Cook Inlet beluga whale. These preferences are currently not known, but are needed to assist in the evaluation of alternative measures to further protect and recover the species' population, such as in the evaluation of critical habitat designations. The survey consists of conducting a mail-telephone survey of U.S. households to collect data that will be used to measure these public preferences and values.

During 2011, NMFS fielded a pilot version of the survey to a small number of U.S. households, primarily to evaluate the survey administration procedures prior to sending the survey out to a larger and more representative sample. The results of this pretest indicated the need to make minor adjustments to the survey administration (e.g., timing of mailings and telephone calls), which will be incorporated in the data collection to which this notice pertains.

II. Method of Collection

Data will be collected primarily through a mail survey of a random sample of U.S. households with an oversampling of Alaska households. Additional data will be collected in telephone interviews with individuals who do not respond to the mail survey.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 4,200.

Estimated Time per Response: 25 minutes.

Estimated Total Annual Burden Hours: 1,750.

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: February 1, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–2671 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT57

Takes of Marine Mammals Incidental to Specified Activities; Marine Geophysical Survey in the Commonwealth of the Northern Mariana Islands, February to March, 2012

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

ACTION: Notice; issuance of an incidental take authorization (ITA).

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the Lamont-Doherty Earth Observatory of Columbia University (L–DEO) to take marine mammals, by Level B harassment, incidental to conducting a marine geophysical (seismic) survey in the Commonwealth of the Northern Mariana Islands (CNMI), a

commonwealth in a political union with the U.S., February to March, 2012.

DATES: Effective February 2 to May 2, 2012.

ADDRESSES: A copy of the IHA and application are available by writing to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910 or by telephoning the contacts listed here.

A copy of the application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**) or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

The National Science Foundation (NSF), which is providing funding to L–DEO to conduct the survey, has prepared an ''Environmental Assessment and Finding of No Significant Impact Determination Pursuant to the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* and Executive Order 12114 Marine Seismic Survey in the Commonwealth of the Northern Mariana Islands, February–March 2012'' (EA). NSF's EA incorporates an ''Environmental Assessment of a Marine Geophysical Survey by the R/V *Marcus G. Langseth* in the Commonwealth of the Northern Mariana Islands, February–March 2012,'' prepared by LGL Ltd., Environmental Research Associates (LGL), on behalf of NSF and L–DEO, which is also available at the same internet address. The associated documents cited in this notice are also available at the same internet address. The NMFS Biological Opinion will be available online at: *http://www.nmfs.noaa.gov/pr/consultation/opinions.htm.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1371 (a)(5)(D)) directs the Secretary of Commerce (Secretary) to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for the incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring, and reporting of such takings. 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 United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS's review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].
>
> 16 U.S.C. 1362(18).

Summary of Request

On December 16, 2009, NMFS received an application from the L–DEO requesting NMFS to issue an IHA for the take, by Level B harassment only, of small numbers of marine mammals incidental to conducting a marine seismic survey in the CNMI during June to July, 2010. NMFS published a notice in the **Federal Register** (75 FR 8652) with preliminary determinations and a proposed IHA. Ship maintenance issues resulted in schedule challenges that forced the survey into an inclement weather period and after further consideration by the principal investigator and ship operator, the seismic survey was postponed until a more suitable operational period could be achieved.

NMFS received a revised application on September 29, 2011, from L–DEO for the taking by harassment, of marine mammals, incidental to conducting a marine seismic survey in the CNMI within the U.S. Exclusive Economic Zone (EEZ) in depths from approximately 2,000 meters (m) (6,561.7 feet [ft]) to greater than 8,000 m (26,246.7 ft). L–DEO will conduct the survey from approximately February 2 to March 21, 2012. On December 14, 2011, NMFS published a notice in the **Federal Register** (76 FR 77782) disclosing the effects on marine mammals, making preliminary determinations and including a proposed IHA. The notice initiated a 30 day public comment period.

L–DEO plans to use one source vessel, the R/V *Marcus G. Langseth* (*Langseth*) and a seismic airgun array to collect seismic data over the Mariana outer forearc, the trench and the outer rise of the subducting and bending Pacific plate. In addition to the operation of the seismic airgun array, L–DEO intends to operate a multibeam echosounder (MBES) and a sub-bottom profiler (SBP) continuously throughout the survey.

Acoustic stimuli (*i.e.,* increased underwater sound) generated during the operation of the seismic airgun array may have the potential to cause a short-term behavioral disturbance for marine mammals in the survey area. This is the principal means of marine mammal taking associated with these activities and L–DEO has requested an authorization to take 22 species of marine mammals by Level B harassment. Take is not expected to result from the use of the MBES or SBP, for reasons discussed in this notice; nor is take expected to result from collision with the vessel because it is a single vessel moving at a relatively slow speed during seismic acquisition within the survey, for a relatively short period of time (approximately 46 days). It is likely that any marine mammal would be able to avoid the vessel.

Description of the Specified Activity

L–DEO's planned seismic survey in the CNMI will take place during February to March, 2012, in the area 16.5° to 19° North, 146.5° to 150.5° East

(*see* Figure 1 of the IHA application). The seismic survey will take place in water depths ranging from 2,000 m to greater than 8,000 m and consists of approximately 2,800 kilometers (km) 1,511.9 nautical miles [nmi]) of transect lines (including turns) in the study area. The seismic survey will be conducted in the U.S. Exclusive Economic Zone (EEZ) and in International Waters. The closest that the vessel will approach to any island is approximately 50 km (27 nmi) from Alamagan. The project is scheduled to occur from approximately February 2 to March 21, 2012. Some minor deviation from these dates is possible, depending on logistics and weather.

The seismic survey will be conducted over the Mariana outer forearc, the trench, and the outer rise of the subducting and bending Pacific plate. The objective is to understand the water cycle within subduction-zone systems. Subduction systems are where the basic building blocks of continental crust are made and where Earth's great earthquakes occur. Little is known about either of these processes, but water cycling through the system is thought to be the primary controlling factor in both arc-crust generation and megathrust seismicity.

The survey will involve one source vessel, the *Langseth.* The *Langseth* will deploy an array of 36 airguns as an energy source at a tow depth of 9 m (29.5 ft). The acoustic receiving system will consist of a single 6 km (3.2 nmi) long hydrophone streamer and 85 ocean bottom seismometers (OBSs). As the airgun is towed along the survey lines, the hydrophone streamer will receive the returning acoustic signals and transfer the data to the on-board processing system. The OBSs record the returning acoustic signals internally for later analysis. The OBSs to be used for the 2012 program will be deployed and most (approximately 60) will be retrieved during the cruise, whereas 25 will be left in place for one year.

The planned seismic survey (*e.g.,* equipment testing, startup, line changes, repeat coverage of any areas, and equipment recovery) will consist of approximately 2,800 km of transect lines (including turns) in the CNMI survey area (*see* Figure 1 of the IHA application). This includes one line and parts of three lines shown in Figure 1 of the IHA application that are shot twice at different shot intervals: The westernmost north-south line and the western portions of the east-west lines. In addition to the operations of the airgun array, a Kongsberg EM 122 MBES and Knudsen Chirp 3260 SBP will also be operated from the *Langseth* continuously throughout the cruise. There will be additional seismic operations associated with equipment testing, ramp-up, and possible line changes or repeat coverage of any areas where initial data quality is sub-standard. In L–DEO's calculations, 25% has been added for those additional operations.

All planned seismic data acquisition activities will be conducted by L–DEO, the *Langseth's* operator, with on-board assistance by the scientists who have planned the study. The Principal Investigators are Drs. Doug Wiens (Washington University) and Daniel Lizarralde (Woods Hole Oceanographic Institution [WHOI]). The vessel will be self-contained, and the crew will live aboard the vessel for the entire cruise.

Description of the Dates, Duration, and Specified Geographic Region

The survey will occur in the CNMI in the area 16.5° to 19° North, 146.5 to 150.5° East. The seismic survey will take place in water depths of 2,000 m to greater than 8,000 m. The *Langseth* will depart from Guam on February 2, 2012, and return to Guam on March 21, 2012. The *Langseth* will return to port from March 2 to 5, 2012. Seismic operations will be carried out for 16 days, with the balance of the cruise occupied in transit (approximately 2 days) and in deployment and retrieval of OBSs and maintenance (25 days). Some minor deviation from this schedule is possible, depending on logistics and weather (*i.e.,* the cruise may depart earlier or be extended due to poor weather; there could be additional days (up to three) of seismic operations if collected data are deemed to be of substandard quality).

NMFS outlined the purpose of the program in a previous notice for the proposed IHA (76 FR 77782, December 14, 2011). The activities to be conducted have not changed between the proposed IHA notice and this final notice announcing the issuance of the IHA. For a more detailed description of the authorized action, including vessel and acoustic source specifications, the reader should refer to the proposed IHA notice (76 FR 77782, December 14, 2011), the IHA application, EA, and associated documents referenced above this section.

Comments and Responses

A notice of preliminary determinations and proposed IHA for L–DEO's proposed seismic survey was published in the **Federal Register** on December 14, 2011 (76 FR 77782). During the 30-day public comment period NMFS received comments from the Marine Mammal Commission (Commission) only. The Commission's comments are online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Following are their comments and NMFS's responses:

Comment 1: The Commission recommends that, before issuing the requested IHA, NMFS require L–DEO to re-estimate the proposed exclusion zones (EZ) and buffer zones and associated takes of marine mammals using site-specific information—if the EZs and buffer zones and numbers of takes are not re-estimated, require L–DEO to provide a detailed justification (1) for basing the EZs and buffer zones for the proposed survey in the CNMI on empirical data collected in the Gulf of Mexico (GOM) or on modeling that relies on measurements from the GOM, and (2) that explains why simple ratios were used to adjust for tow depth.

Response: The *Langseth* will conduct the survey in water depths where site-specific source signature requirements are neither warranted nor practical. Site signature measurements are normally conducted commercially by shooting a test pattern over an ocean bottom instrument in shallow water. This method is neither practical nor valid in water depths as great at 3,000 m (9,842.5 ft). The alternative method of conducting site-specific attenuation measurements would require a second vessel, which is impractical both logistically and financially. Sound propagation varies noticeably less between deep water sites than between shallow water sites (because of the reduced signature of bottom interaction), thus decreasing the importance of site-specific estimates.

Based on these reasons, and the information provided by L–DEO in their application and environmental analysis, NMFS is satisfied that the data supplied are sufficient for NMFS to conduct its analysis and support its determinations and therefore no further effort is needed by the applicant. While exposures of marine mammals to acoustic stimuli are difficult to estimate, NMFS is confident that the levels of take provided by L–DEO in their IHA application and EA, and authorized herein are estimated based upon the best available scientific information and estimation methodology. The 160 dB zone used to estimate exposure is appropriate and sufficient for purposes of supporting NMFS's analysis and determinations required under section 101(a)(5)(D) of the MMPA and its implementing regulations.

Appendix A in the environmental analysis includes information from the calibration study conducted on the

Langseth in 2007 and 2008. This information is available in the EA on NSF's Web site at *http://www.nsf.gov/geo/oce/envcomp/index.jsp.* The Appendix A describes the modeling process and compares the model results with empirical results of the 2007 to 2008 *Langseth* calibration experiment in shallow, intermediate, and deep water. The conclusions identified in Appendix A show that the model represents the actual produced levels, particularly within the first few kilometers, where the predicted exclusion zones (EZs, i.e., safety radii) lie. At greater distances, local oceanographic variations begin to take effect, and the model tends to over predict. Further, since the modeling matches the observed measurement data, the authors have concluded that the models can continue to be used for defining EZs, including for predicting mitigation radii for various tow depths. The data results from the studies were peer reviewed, and calibration results, although viewed as conservative, were used to determine the cruise-specific EZs.

At present, the L–DEO model does not account for site-specific environmental conditions. The calibration study of the L–DEO model predicted that using site-specific information may actually provide less conservative EZ radii at greater distances. The Final Programmatic Environmental Impact Statement for Marine Seismic Research Funded by the National Science Foundation or Conducted by the U.S. Geological Survey (FPEIS) prepared pursuant to the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 *et seq.*) did incorporate various site-specific environmental conditions in the modeling of the Detailed Analysis Areas.

The IHA issued to L–DEO, under section 101(a)(5)(D) of the MMPA provides monitoring and mitigation requirements that will protect marine mammals from injury, serious injury, or mortality. L–DEO is required to comply with the IHA's requirements. These analyses are supported by extensive scientific research and data. NMFS is confident in the peer-reviewed results of the L–DEO scientific calibration studies which, although viewed as conservative, are used to determine cruise-specific EZs and which factor into exposure estimates. NMFS determined that these reviews are the best scientific data available for review of the IHA application and to support the necessary analyses and determinations under the MMPA, Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*) and NEPA.

Based on NMFS's analysis of the likely effects of the specified activity on marine mammals and their habitat, NMFS determined that the EZs identified in the IHA are appropriate for the survey and that additional field measurement is not necessary at this time. While exposures of marine mammals to acoustic stimuli are difficult to estimate, NMFS is confident that the levels of take authorized have been estimated based upon the best scientific information and estimation methodology. The 160 dB zone used to estimate exposure is appropriate and sufficient for purposes of supporting NMFS's analysis and determinations required under section 101(a)(5)(D) of the MMPA and its implementing regulations.

Comment 2: The Commission recommends that, before issuing the requested IHA, NMFS use species-specific maximum densities estimated by multiplying the existing density estimates by a precautionary correction factor (*i.e.*, 1.5), and then re-estimate the anticipated number of takes.

Response: For purposes of this IHA, NMFS is using the best (*i.e.*, average or mean) densities to estimate the number of authorized takes for L–DEO's seismic survey in the CNMI as NMFS is confident in the assumptions and calculations used to estimate density for this survey area. NMFS makes a decision on whether to use maximum or best densities on a case-by-case basis, depending on the nature and robustness of existing data. NMFS has used best densities to estimate the number of incidental takes in IHAs for several seismic surveys in the past. The results of the associated monitoring reports show that the use of the best estimates is appropriate for and does not refute NMFS's determinations.

Comment 3: The Commission recommends that, before issuing the requested IHA, NMFS condition the authorization to prohibit the use of a shortened pause before ramping-up after a power-down or shut-down of the airguns based on the presence of a marine mammal in the EZ and the *Langseth's* movement (speed and direction).

Response: The IHA specifies the conditions under which the *Langseth* will resume full-power operations of the airguns. During periods of active seismic operations, there are occasions when the airguns need to be temporarily shut down (for example due to equipment failure, maintenance, or shut-down) or a power down is necessary (for example when a marine mammal is seen to either enter or about to enter the EZ). In these instances, should the airguns be inactive or powered down for more than eight min, then L–DEO would follow the ramp-up procedures identified in the ''Mitigation'' section (see below) where airguns will be re-started beginning with the smallest airgun in the array and increase in steps not to exceed 6 dB per 5 min over a total duration of approximately 30 min. NMFS and NSF believe that the eight min period in question is an appropriate minimum amount of time to pass after which a ramp-up process should be followed. In these instances, should it be possible for the airguns to be re-activated without exceeding the 8 min period (for example equipment is fixed or a marine mammal is visually observed to have left the EZ for the full source level), then airguns would be reactivated to the full operating source level identified for the survey (in this case, 6,600 in^3) without need for initiating ramp-up procedures. In the event a marine mammal enters the EZ and a power-down is initiated, and the marine mammal is not visually observed to have left the EZ, then L–DEO must wait 15 min (for species with shorter dive durations—small odontocetes and pinnipeds) or 30 min (for species with longer dive durations—mysticetes and large odontocetes) after the last sighting before initiating a 30 min ramp-up. However, ramp-up will not occur as long as a marine mammal is detected within the EZ, which provides more time for animals to leave the EZ, and accounts for the position, swim speed, and heading of marine mammals within the EZ.

Comment 4: The Commission recommends that, before issuing the requested IHA, NMFS extend the 30 min period following a marine mammal sighting in the EZ to cover the maximum dive times of all species likely to be encountered.

Response: NMFS recognizes that several species of deep-diving cetaceans are capable of remaining underwater for more than 30 min (*e.g.*, sperm whales and several species of beaked whales); however, for the following reasons NMFS believes that 30 min is an adequate length for the monitoring period prior to the ramp-up of airguns:

(1) Because the *Langseth* is required to monitor before ramp-up of the airgun array, the time of monitoring prior to the start-up of any but the smallest array is effectively longer than 30 min (ramp-up will begin with the smallest airgun in the array and airguns will be added in sequence such that the source level of the array will increase in steps not exceeding approximately 6 dB per 5 min period over a total duration of about 30 min;

(2) In many cases PSVOs are observing during times when L–DEO is not operating the seismic airguns and would observe the area prior to the 30 min observation period;

(3) The majority of the species that may be exposed do not stay underwater more than 30 min; and

(4) All else being equal and if deep-diving individuals happened to be in the area in the short time immediately prior to the pre-ramp-up monitoring, if an animal's maximum underwater dive time is 45 min, then there is only a one in three chance that the last random surfacing would occur prior to the beginning of the required 30 min monitoring period and that the animal would not be seen during that 30 min period.

Finally, seismic vessels are moving continuously (because of the long, towed array and streamer) and NMFS believes that unless the animal submerges and follows at the speed of the vessel (highly unlikely, especially when considering that a significant part of their movement is vertical [deep-diving]), the vessel will be far beyond the length of the EZ within 30 min, and therefore it will be safe to start the airguns again.

Under the MMPA, incidental take authorizations must include means of effecting the least practicable impact on marine mammal species and their habitat. Monitoring and mitigation measures are designed to comply with this requirement. The effectiveness of monitoring is science-based, and monitoring and mitigation measures must be ''practicable.'' NMFS believes that the framework for visual monitoring will: (1) Be effective at spotting almost all species for which take is requested; and (2) that imposing additional requirements, such as those suggested by the Commission, would not meaningfully increase the effectiveness of observing marine mammals approaching or entering the EZs and thus further minimize the potential for take.

Comment 5: The Commission recommends that, before issuing the requested IHA, NMFS provide additional justification for its preliminary determination that the proposed monitoring program will be sufficient to detect, with a high level of confidence, all marine mammals within or entering the identified EZs and buffer zones, including:

(1) Identifying those species that it believes can be detected with a high degree of confidence using visual monitoring only;

(2) Describing detection probability as a function of distance from the vessel;

(3) Describing changes in detection probability under various sea state and weather conditions and light levels; and

(4) Explaining how close to the vessel marine mammals must be for Protected Species Observers (PSOs) to achieve high nighttime detection rates.

Response: NMFS believes that the planned monitoring program will be sufficient to detect (using visual monitoring and passive acoustic monitoring [PAM]), with reasonable certainty, marine mammals within or entering identified EZs. This monitoring, along with the required mitigation measures, will result in the least practicable adverse impact on the affected species or stocks and will result in a negligible impact on the affected species or stocks of marine mammals. Also, NMFS expects some animals to avoid areas around the airgun array ensonified at the level of the EZ.

NMFS acknowledges that the detection probability for certain species of marine mammal varies depending on the animal's size and behavior as well as sea state and weather conditions and light levels. The detectability of marine mammals likely decreases in low light (*i.e.,* darkness), higher Beaufort sea states and wind conditions, and poor weather (*e.g.,* fog and/or rain). However, at present, NMFS views the combination of visual monitoring and PAM as the most effective monitoring and mitigation techniques available for detecting marine mammals within or entering the EZ. The final monitoring and mitigation measures are the most effective feasible measures and NMFS is not aware of any additional measures which could meaningfully increase the likelihood of detecting marine mammals in and around the EZ. Further, public comment has not revealed any additional monitoring and mitigation measures that could be feasibly implemented to increase the effectiveness of detection.

NSF and L–DEO are receptive to incorporating proven technologies and techniques to enhance the current monitoring and mitigation program. Until proven technological advances are made nighttime mitigation measures during operations include combinations of the use of PSVOs for ramp-ups, PAM, night vision devices (NVDs), and continuous shooting of a mitigation airgun. Should the airgun array be powered down, the operation of a single airgun would continue to serve as a sound deterrent to marine mammals. In the event of a complete shut-down of the airgun array at night for mitigation or repairs, L–DEO suspends the data collection until 30 min after nautical twilight-dawn (when PSVO's are able to clear the EZ). L–DEO will not activate the airguns until the entire EZ is visible for at least 30 min.

In cooperation with NMFS, L–DEO will be conducting efficacy experiments of NVDs during a future *Langseth* cruise. In addition, in response to a recommendation from NMFS, L–DEO is evaluating the use of forward-looking thermal imaging cameras to supplement nighttime monitoring and mitigation practices. During other low power seismic and seafloor mapping surveys, L–DEO successfully used these devices while conducting nighttime seismic operations.

Comment 6: The Commission recommends that, before issuing the requested IHA, NMFS consult with the funding agency (*i.e.*, NSF) and individual applicants (*e.g.*, L–DEO and USGS) to develop, validate, and implement a monitoring program that provides a scientifically sound, reasonably accurate assessment of the types of marine mammal taking and the number of marine mammals taken.

Response: Several studies have reported on the abundance and distribution of marine mammals inhabiting the tropical Pacific Ocean, and L–DEO has incorporated this data into their analyses used to predict marine mammal take in their application. NMFS believes that L–DEO's current approach for estimating abundance in the survey area (prior to the survey) is the best available approach.

There will be significant amounts of transit time during the cruise, and PSVOs will be on watch prior to and after the seismic portions of the survey, in addition to during the survey. The collection of this visual observational data by PSVOs may contribute to baseline data on marine mammals (presence/absence) and provide some generalized support for estimated take numbers, but it is unlikely that the information gathered from this single cruise alone would result in any statistically robust conclusions for any particular species because of the small number of animals typically observed.

NMFS acknowledges the Commission's recommendations and is open to further coordination with the Commission, NSF (the vessel owner), and L–DEO (the ship operator on behalf of NSF), to develop, validate, and implement a monitoring program that will provide or contribute towards a more scientifically sound and reasonably accurate assessment of the types of marine mammal taking and the number of marine mammals taken. However, the cruise's primary focus is marine geophysical research and the

survey may be operationally limited due to considerations such as location, time, fuel, services, and other resources.

Comment 7: The Commission recommends that, before issuing the requested IHA, NMFS require the applicant to:

(1) Report the number of marine mammals that were detected acoustically and for which a power-down or shut-down of the airguns was initiated;

(2) Specify if such animals also were detected visually;

(3) Compare the results from the two monitoring methods (visual versus acoustic) to help identify their respective strengths and weaknesses; and

(4) Use that information to improve mitigation and monitoring methods.

Response: The IHA requires that PSAOs on the *Langseth* do and record the following when a marine mammal is detected by PAM:

(i) Notify the on-duty PSO(s) immediately of a vocalizing marine mammal so a power-down or shut-down can be initiated, if required;

(ii) Enter the information regarding the vocalization into a database. The data to be entered include an acoustic encounter identification number, whether it was linked with a visual sighting, date, time when first and least heard and whenever any additional information was recorded, position, and water depth when first detected, bearing if determinable, species or species group (*e.g.*, unidentified dolphin, sperm whale), types and nature of sounds heard (*e.g.*, clicks, continuous, sporadic, whistles, creaks, burst pulses, strength of signal, *etc.*), and any other notable information.

L–DEO reports on the number of acoustic detections made by the PAM system within the post-cruise monitoring reports as required by the IHA. The report also includes a description of any acoustic detections that were concurrent with visual sightings, which allows for a comparison of acoustic and visual detection methods for each cruise. The post-cruise monitoring reports also include the following information: The total operation effort in daylight (hours), the total operation effort at night (hours), the total number of hours of visual observations conducted, the total number of sightings, and the total number of hours of acoustic detections conducted.

LGL Ltd., Environmental Research Associates (LGL), a contractor for L–DEO, has processed sighting and density data, and their publications can be viewed online at: *http://www.lgl.com/index.php?option=com_content&view=article&id=69&Itemid=162&lang=en.* Post-cruise monitoring reports are currently available on NMFS's MMPA Incidental Take Program Web site and on the NSF Web site (*http://www.nsf.gov/geo/oce/envcomp/index.jsp*) should there be interest in further analysis of this data by the public.

Comment 8: The Commission recommends that, before issuing the requested IHA, NMFS work with NSF to analyze those data to help determine the effectiveness of ramp-up procedures as a mitigation measure for seismic surveys after the data are compiled and quality control measures have been completed.

Response: The IHA requires that PSVOs on the *Langseth* make observations for 30 min prior to ramp-up, during all ramp-ups, and during all daytime seismic operations and record the following information when a marine mammal is sighted:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction of the airguns or vessel (*e.g.,* none, avoidance, approach, paralleling, etc., and including responses to ramp-up), and behavioral pace; and

(ii) Time, location, heading, speed, activity of the vessel (including number of airguns operating and whether in state of ramp-up or power-down), Beaufort sea state and wind force, visibility, and sun glare.

One of the primary purposes of monitoring is to result in ''increased knowledge of the species'' and the effectiveness of monitoring and mitigation measures; the effectiveness of ramp-up as a mitigation measure and marine mammal reaction to ramp-up would be useful information in this regard. NMFS has asked NSF and L–DEO to gather all data that could potentially provide information regarding the effectiveness of ramp-ups as a mitigation measure. However, considering the low numbers of marine mammal sightings and low numbers of ramp-ups, it is unlikely that the information will result in any statistically robust conclusions for this particular seismic survey. Over the long term, these requirements may provide information regarding the effectiveness of ramp-up as a mitigation measure, provided animals are detected during ramp-up. Description of the Marine Mammals in the Area of the Specified Activity

Twenty-seven marine mammal species (20 odontocetes [dolphins and toothed whales] and 7 mysticetes [baleen whales]) are known to or could occur in the CNMI study area. Several of these species are listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), including the North Pacific right (*Eubalaena japonica*), humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balaenoptera physalus*), blue (*Balaenoptera musculus*), and sperm (*Physeter macrocephalus*) whales.

Cetaceans are the subject of the IHA application to NMFS. There are no reported sightings of pinnipeds in the CNMI (e.g., Department of the Navy, 2005). The dugong (*Dugong dugon*) is distributed throughout most of the Indo-Pacific region between approximately 27° North and South of the equator (Marsh, 2002), but it seems unlikely that dugongs have ever inhabited the Mariana Islands (Nishiwaki *et al.*, 1979). The dugong is also listed as endangered under the ESA. There have been some extralimital sightings in Guam, including a single dugong in Cocos Lagoon in 1974 (Randall *et al.*, 1975) and several sightings of an individual in 1985 along the southeastern coast (Eldredge, 2003). The dugong is the one marine mammal species mentioned in this document that is managed by the U.S. Fish and Wildlife Service (USFWS) and is not considered further in this analysis; all others are managed by NMFS. Table 1 (below) presents information on the abundance, distribution, population, conservation status, and density of the marine mammals that may occur in the survey area during February to March, 2012.

TABLE 1—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE SEISMIC SURVEY AREA IN THE CNMI.

[See text and Tables 2 and 3 in L–DEO's application for further details]

Species	Habitat	Regional abundance [4]	ESA [1]	MMPA [2]	Density (#/1,000 km2) [3]
Mysticetes					
North Pacific right whale (*Eubalaena japonica*) ..	Pelagic and coastal	Few 100s ...	EN	D	0
Humpback whale (*Megaptera novaeangliae*)	Mainly nearshore, banks.	938 to 1,107 [5].	EN	D	0
Minke whale (*Balaenoptera acutorostrata*)	Pelagic and coastal	25,000 [6]	NL	NC	0
Bryde's whale (*Balaenoptera edeni*)	Pelagic and coastal	20,000 to 30,000.	NL	NC	0.41
Sei whale (*Balaenoptera borealis*)	Primarily offshore, pelagic.	7,260 to 12,620 [7].	EN	D	0.29
Fin whale (*Balaenoptera physalus*)	Continental slope, pelagic.	13,620 to 18,680 [8].	EN	D	0
Blue whale (*Balaneoptera musculus*)	Pelagic, shelf, coastal ..	NA	EN	D	0
Odontocetes					
.					
Sperm whale (*Physeter macrocephalus*)	Pelagic, deep sea	29,674 [9]	EN	D	1.23
Pygmy sperm whale (*Kogia breviceps*)	Deep waters off the shelf.	NA	NL	NC	3.19
Dwarf sperm whale (*Kogia sima*)	Deep waters off the shelf.	11,200 [10]	NL	NC	7.65
Cuvier's beaked whale (*Ziphius cavirostris*)	Pelagic	20,000 [10]	NL	NC	6.66
Longman's beaked whale (*Indopacetus pacificus*).	Deep water	NA	NL	NC	0.44
Blainville's beaked whale (*Mesoplodon densirostris*).	Pelagic	25,300 [11]	NL	NC	1.28
Ginkgo-toothed beaked whale (*Mesoplodon ginkgodens*).	Pelagic	NA	NL	NC	0
Rough-toothed dolphin (*Steno bredanensis*)	Deep water	146,000 [10] ..	NL	NC	0.29
Bottlenose dolphin (*Tursiops truncatus*)	Coastal, oceanic, shelf break.	243,500 [10] ..	NL	NC D—Western North Atlantic coastal.	0.21
Pantropical spotted dolphin (*Stenella attenuata*)	Coastal and pelagic	800,000 [10] ..	NL	NC D—Northeastern offshore.	22.60
Spinner dolphin (*Stenella longirostris*)	Coastal and pelagic	800,000 [10] ..	NL	NC D—Eastern	3.14
Striped dolphin (*Stenella coeruleoalba*)	Off continental shelf	1,000,000 [10]	NL	NC	6.16
Fraser's dolphin (*Lagenodelphis hosei*)	Deep water	289,000 [10] ..	NL	NC	4.47
Short-beaked common dolphin (*Delphinus delphis*).	Shelf, pelagic, seamounts.	3,000,000 [10]	NL	NC	9.63
Risso's dolphin (*Grampus griseus*)	Deep water, seamounts	175,000 [10] ..	NL	NC	0.81
Melon-headed whale (*Peponocephala electra*) ...	Oceanic	45,000 [10]	NL	NC	4.28
Pygmy killer whale (*Feresa attenuata*)	Deep, pantropical waters.	39,000 [10]	NL	NC	0.14
False killer whale (*Pseudorca crassidens*)	Pelagic	40,000 [10]	NL Proposed EN—insular Hawaiian.	NC	1.11
Killer whale (*Orcinus orca*)	Pelagic, shelf, coastal ..	8,500 [10]	NL EN—Southern resident.	NC D—Southern resident, AT1 transient.	0.15
Short-finned pilot whale (*Globicephala macrorhynchus*).	Pelagic, shelf, coastal ..	500,000 [10] ..	NL	NC	1.59

NA = Not available or not assessed.
[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, NL = Not listed.
[2] U.S. Marine Mammal Protection Act: D = Depleted, NC = Not Classified.
[3] Density estimate as listed in Table 3 of the application.
[4] North Pacific (Jefferson *et al.,* 2008) unless otherwise indicated.
[5] Western North Pacific (Calambokidis *et al.,* 2008).
[6] Northwest Pacific and Okhotsk Sea (IWC, 2010).
[7] North Pacific (Tillman, 1977).
[8] North Pacific (Ohsumi and Wada, 1974).
[9] Western North Pacific (Whitehead, 2002b).
[10] Eastern Tropical Pacific (Wade and Gerrodette, 1993).
[11] Eastern Tropical Pacific all *Mesoplodon* spp. (Wade and Gerrodette, 1993).

Refer to sections III and IV of L–DEO's application for detailed information regarding the abundance and distribution, population status, and life history and behavior of these species and their occurrence in the project area. The application also presents how L–DEO calculated the estimated densities for the marine mammals in the survey area. NMFS has reviewed these data and determined them to be the best available scientific information for the purposes of the IHA.

Potential Effects on Marine Mammals

Acoustic stimuli generated by the operation of the airguns, which introduce sound into the marine environment, may have the potential to cause Level B harassment of marine mammals in the survey area. The effects of sounds from airgun operations might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, temporary or permanent hearing impairment, or non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the project would result in any cases of temporary or permanent hearing impairment, or any significant non-auditory physical or physiological effects. Based on the available data and studies described here, some behavioral disturbance is expected, but NMFS expects the disturbance to be localized and short-term.

The notice of the proposed IHA (76 FR 77782, December 14, 2011) included a discussion of the effects of sounds from airguns on mysticetes, odontocetes, and pinnipeds including tolerance, masking, behavioral disturbance, hearing impairment, and other non-auditory physical effects. NMFS refers the reader to L–DEO's application, and EA for additional information on the behavioral reactions (or lack thereof) by all types of marine mammals to seismic vessels.

Anticipated Effects on Marine Mammal Habitat, Fish, Fisheries, and Invertebrates

NMFS included a detailed discussion of the potential effects of this action on marine mammal habitat, including physiological and behavioral effects on marine fish, fisheries, and invertebrates in the notice of the proposed IHA (76 FR 77782, December 14, 2011). While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and reversible which NMFS considered in further detail in the notice of the proposed IHA (76 FR 77782, December 14, 2011) as behavioral modification. The main impact associated with the activity would be temporarily elevated noise levels and the associated direct effects on marine mammals.

Recent work by Andre *et al.* (2011) purports to present the first morphological and ultrastructural evidence of massive acoustic trauma (*i.e.,* permanent and substantial alterations of statocyst sensory hair cells) in four cephalopod species subjected to low-frequency sound. The cephalopods, primarily cuttlefish, were exposed to continuous 40 to 400 Hz sinusoidal wave sweeps (100% duty cycle and 1 s sweep period) for two hours while captive in relatively small tanks (one 2,000 liter [L 2 m^3] and one 200 L [0.2 m^3] tank). The received SPL was reported as 175 ± 5 dB re 1 µPa, with peak levels at 175 dB re 1 µPa. As in the McCauley *et al.* (2003) paper on sensory hair cell damage in pink snapper as a result of exposure to seismic sound (described in the notice of the proposed IHA), the cephalopods were subjected to higher sound levels that they would be under natural conditions, and they were unable to swim away from the sound source.

Mitigation

In order to issue an ITA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses.

L–DEO has based the mitigation measures described herein, to be implemented for the seismic survey, on the following:

(1) Protocols used during previous L–DEO seismic research cruises as approved by NMFS;

(2) Previous IHA applications and IHAs approved and authorized by NMFS; and

(3) Recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), and Weir and Dolman, (2007).

To reduce the potential for disturbance from acoustic stimuli associated with the activities, L–DEO and/or its designees will implement the following mitigation measures for marine mammals:

(1) EZs;

(2) Power-down procedures;

(3) Shut-down procedures; and

(4) Ramp-up procedures.

Planning Phase—This seismic survey was originally proposed for 2010. A National Environmental Policy Act (NEPA) document was prepared for the survey and was posted for public comment on NSF's Web site. No public comments were received by NSF in response to the public comment period during that process. Because of ship maintenance issues, weather, and timing constraints of the IHA process, the survey was unable to be supported on the *Langseth* in 2010, and as a result the survey was deferred to a future time when the ship would be able to support the effort. An IHA application was submitted to NMFS for the 2010 survey, however it was withdrawn when it became apparent the ship would not be able to support the survey. An ESA section 7 consultation request that was also initiated with NMFS was withdrawn.

Subsequently, the PIs worked with L–DEO and NSF to identify potential time periods to carry out the survey taking into consideration key factors such as environmental conditions (i.e., the seasonal presence of marine mammals, sea turtles, and sea birds), weather conditions, equipment, and optimal timing for other proposed seismic surveys using the *Langseth.* Most marine mammal species are expected to occur in the area year-round, so altering the timing of the project likely would result in no net benefits for those species. After considering what energy source level was necessary to achieve the research goals, the PIs determined the use of the 36-airgun array with a total volume of 6,600 in^3 would be required. Given the research goals, location of the survey, and associated deep water, this energy source level was viewed appropriate. The draft NEPA documentation prepared for the 2010 survey forms the basis for this assessment; however, it has been updated to reflect current scientific information and any revisions to the survey and timing. NEPA documentation for the 2012 survey will also be open for a public comment period, and an ESA section 7 consultation has been requested and reinitiated.

EZs—Received sound levels have been predicted by L–DEO, in relation to distance and direction from the airguns, for the 36 airgun array and for the single 1900LL 40 in^3 airgun, which will be used during power-downs. Results were

recently reported for propagation measurements of pulses from the 36 airgun array in two water depths (approximately 1,600 m and 50 m [5,249 and 164 ft]) in the GOM in 2007 to 2008 (Tolstoy *et al.,* 2009). It would be prudent to use the corrected empirical values that resulted to determine EZs for the airgun array. Results of the propagation measurements (Tolstoy *et al.,* 2009) showed that radii around the airguns for various received levels varied with water depth. In addition, propagation varies with array tow depth. The empirical values that resulted from Tolstoy *et al.* (2009) are used here to determine EZs for the 36 airgun array. However, the depth of the array was different in the GOM calibration study (6 m [19.7 ft]) than in the survey (9 m); thus, correction factors have been applied to the distances reported by Tolstoy *et al.* (2009). The correction factors used were the ratios of the 160, 180, and 190 dB distances from the modeled results for the 6,600 in^3 airgun array towed at 6 m versus 9 m, from LGL (2008): 1.285, 1.338, and 1.364, respectively.

Measurements were not reported for a single airgun, so model results will be used. The L–DEO model does not allow for bottom interactions, and thus is most directly applicable to deep water and to relatively short ranges. A detailed description of the modeling effort is predicted in Appendix A of the EA.

Based on the corrected propagation measurements (airgun array) and modeling (single airgun), the distances from the source where sound levels are predicted to be 190, 180, and 160 dB re 1 μPa (rms) were determined (see Table 2 below). The 180 and 190 dB radii are shut-down criteria applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000); these levels were used to establish the EZs. If the Protected Species Visual Observer (PSVO) detects marine mammal(s) within or about to enter the appropriate EZ, the airguns will be powered-down (or shut-down, if necessary) immediately.

Table 2 summarizes the predicted distances at which sound levels (160, 180, and 190 dB [rms]) are expected to be received from the 36 airgun array and a single airgun operating in deep water depths.

TABLE 2—MEASURED (ARRAY) OR PREDICTED (SINGLE AIRGUN) DISTANCES TO WHICH SOUND LEVELS ≥190, 180, AND 160 DB RE 1 μPA (RMS) COULD BE RECEIVED IN VARIOUS WATER DEPTH CATEGORIES DURING THE SURVEY IN THE CNMI, FEBRUARY TO MARCH, 2012

Source and volume	Tow depth (m)	Water depth (m)	Predicted RMS radii distances		
			190 dB	180 dB	160 dB
Single Bolt airgun (40 in^3)	9	Deep (≤1,000)	12	40	385
4 Strings	9	Deep (≤1,000)	400	940	3,850
36 airguns (6,600 in^3)					

Power-Down Procedures—A power-down involves decreasing the number of airguns in use to one airgun, such that the radius of the 180 dB (or 190 dB) zone is decreased to the extent that marine mammals are no longer in or about to enter the EZ. A power-down of the airgun array can also occur when the vessel is moving from one seismic line to another. During a power-down for mitigation, L–DEO will operate one airgun. The continued operation of one airgun is intended to alert marine mammals to the presence of the seismic vessel in the area. In contrast, a shut-down occurs when all airgun activity is suspended.

If the PSVO detects a marine mammal outside the EZ, but it is likely to enter the EZ, L–DEO will power-down the airguns before the animal is within the EZ. Likewise, if a mammal is already within the EZ, when first detected L–DEO will power-down the airguns immediately. During a power-down of the airgun array, L–DEO will operate the single 40 in^3 airgun. If a marine mammal is detected within or near the smaller EZ around that single airgun (Table 2), L–DEO will shut-down the airgun (see next section).

Following a power-down, L–DEO will not resume airgun activity until the marine mammal has cleared the EZ. L–DEO will consider the animal to have cleared the EZ if:

- A PSVO has visually observed the animal leave the EZ, or
- A PSVO has not sighted the animal within the EZ for 15 min for species with shorter dive durations (*i.e.,* small odontocetes or pinnipeds), or 30 min for species with longer dive durations (*i.e.,* mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales).

During airgun operations following a power-down or shut-down whose duration has exceeded the time limits specified previously, L–DEO will ramp-up the airgun array gradually (see Shut-down and Ramp-up Procedures).

Shut-Down Procedures—L–DEO will shut down the operating airgun(s) if a marine mammal is seen within or approaching the EZ for the single airgun. L–DEO will implement a shut-down:

(1) If an animal enters the EZ of the single airgun after L–DEO has initiated a power-down; or

(2) If an animal is initially seen within the EZ of the single airgun when more than one airgun (typically the full airgun array) is operating.

L–DEO will not resume airgun activity until the marine mammal has cleared the EZ, or until the PSVO is confident that the animal has left the vicinity of the vessel. Criteria for judging that the animal has cleared the EZ will be as described in the preceding section.

Considering the conservation status for the North Pacific right whale, the airguns will be shut-down immediately in the unlikely event that this species is observed, regardless of the distance from the *Langseth.* Ramp-up will only begin if the right whale has not been seen for 30 min.

Ramp-Up Procedures—L–DEO will follow a ramp-up procedure when the airgun array begins operating after a specified period without airgun operations or when a power-down or shut-down has exceeded that period. L–DEO proposes that, for the present cruise, this period would be approximately 8 min. This period is based on the 180 dB radius (940 m) for the 36 airgun array towed at a depth of 9 m in relation to the minimum planned speed of the *Langseth* while shooting (7.4 km/hr). L–DEO has used similar periods (approximately 8 to 10 min) during previous L–DEO surveys.

Ramp-up will begin with the smallest airgun in the array (40 in^3). Airguns will be added in a sequence such that the source level of the array will increase in steps not exceeding six dB per five min

period over a total duration of approximately 35 min. During ramp-up, the Protected Species Observers will monitor the EZ, and if marine mammals are sighted, L–DEO will implement a power-down or shut-down as though the full airgun array were operational.

If the complete EZ has not been visible for at least 30 min prior to the start of operations in either daylight or nighttime, L–DEO will not commence the ramp-up unless at least one airgun (40 in^3 or similar) has been operating during the interruption of seismic survey operations. Given these provisions, it is likely that the airgun array will not be ramped-up from a complete shut-down at night or in thick fog, because the outer part of the EZ for that array will not be visible during those conditions. If one airgun has operated during a power-down period, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the approaching seismic vessel by the sounds from the single airgun and could move away. L–DEO will not initiate a ramp-up of the airguns if a marine mammal is sighted within or near the applicable EZs during the day or close to the vessel at night.

NMFS has carefully evaluated the applicant's mitigation measures and has 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. NMFS's evaluation of potential measures included consideration of the following factors in relation to one another:

(1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;

(2) The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

(3) The practicability of the measure for applicant implementation.

Based on NMFS's evaluation of the applicant's measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures provide the means of effecting the least practicable impacts on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs 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 action area.

Monitoring

L–DEO will sponsor marine mammal monitoring during the present project, in order to implement the mitigation measures that require real-time monitoring, and to satisfy the monitoring requirements of the IHA. L–DEO's Monitoring Plan is described below this section. The monitoring work described here has been planned as a self-contained project independent of any other related monitoring projects that may be occurring simultaneously in the same regions. L–DEO is prepared to discuss coordination of its monitoring program with any related work that might be done by other groups insofar as this is practical and desirable.

Vessel-Based Visual Monitoring

L–DEO's PSVOs will be based aboard the seismic source vessel and will watch for marine mammals near the vessel during daytime airgun operations and during any ramp-ups of the airguns at night. PSVOs will also watch for marine mammals near the seismic vessel for at least 30 min prior to the start of airgun operations after an extended shut-down (*i.e.,* greater than approximately 8 min for this cruise). When feasible, PSVOs will conduct observations during daytime periods when the seismic system is not operating for comparison of sighting rates and behavior with and without airgun operations and between acquisition periods. Based on PSVO observations, the airguns will be powered-down or shut-down when marine mammals are observed within or about to enter a designated EZ. The EZ is a region in which a possibility exists of adverse effects on animal hearing or other physical effects.

During seismic operations in the CNMI, at least four PSOs (PSVO and/or Protected Species Acoustic Observer [PSAO]) will be based aboard the *Langseth.* L–DEO will appoint the PSOs with NMFS's concurrence. Observations will take place during ongoing daytime operations and nighttime ramp-ups of the airguns. During the majority of seismic operations, two PSVOs will be on duty from the observation tower to monitor marine mammals near the seismic vessel. Use of two simultaneous PSVOs will increase the effectiveness of detecting animals near the source vessel. However, during meal times and bathroom breaks, it is sometimes difficult to have two PSVOs on effort, but at least one PSVO will be on duty. PSVO(s) will be on duty in shifts of duration no longer than 4 hrs.

Two PSVOs will also be on visual watch during all nighttime ramp-ups of the seismic airguns. A third PSAO will monitor the PAM equipment 24 hours a day to detect vocalizing marine mammals present in the action area. In summary, a typical daytime cruise would have scheduled two PSVOs on duty from the observation tower, and a third PSAO on PAM. Other crew will also be instructed to assist in detecting marine mammals and implementing mitigation requirements (if practical). Before the start of the seismic survey, the crew will be given additional instruction on how to do so.

The *Langseth* is a suitable platform for marine mammal observations. When stationed on the observation platform, the eye level will be approximately 21.5 m (70.5 ft) above sea level, and the PSVO will have a good view around the entire vessel. During daytime, the PSVOs will scan the area around the vessel systematically with reticle binoculars (*e.g.,* 7 x 50 Fujinon), Big-eye binoculars (25 x 150), and with the naked eye. During darkness, night vision devices (NVDs) will be available (ITT F500 Series Generation 3 binocular-image intensifier or equivalent), when required. Laser range-finding binoculars (Leica LRF 1200 laser rangefinder or equivalent) will be available to assist with distance estimation. Those are useful in training observers to estimate distances visually, but are generally not useful in measuring distances to animals directly; that is done primarily with the reticles in the binoculars.

When marine mammals are detected within or about to enter the designated EZ, the airguns will immediately be powered-down or shut-down if necessary. The PSVO(s) will continue to maintain watch to determine when the animal(s) are outside the EZ by visual confirmation. Airgun operations will not resume until the animal is confirmed to have left the EZ, or if not observed after 15 min for species with shorter dive durations (small odontocetes and pinnipeds) or 30 min for species with longer dive durations (mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales).

Passive Acoustic Monitoring (PAM)

PAM will complement the visual monitoring program, when practicable. Visual monitoring typically is not effective during periods of poor visibility or at night, and even with good visibility, is unable to detect marine mammals when they are below the surface or beyond visual range. Acoustical monitoring can be used in addition to visual observations to improve detection, identification, and localization of cetaceans. The acoustic monitoring will serve to alert visual observers (if on duty) when vocalizing cetaceans are detected. It is only useful when marine mammals call, but it can be effective either by day or by night, and does not depend on good visibility. It will be monitored in real time so that the PSVOs can be advised when cetaceans are detected.

The PAM system consists of hardware (*i.e.,* hydrophones) and software. The ''wet end'' of the system consists of a towed hydrophone array that is connected to the vessel by a tow cable. The tow cable is 250 m (820.2 ft) long, and the hydrophones are fitted in the last 10 m (32.8 ft) of cable. A depth gauge is attached to the free end of the cable, and the cable is typically towed at depths less than 20 m (65.6 ft). The array will be deployed from a winch located on the back deck. A deck cable will connect from the winch to the main computer laboratory where the acoustic station, signal conditioning, and processing system will be located. The acoustic signals received by the hydrophones are amplified, digitized, and then processed by the Pamguard software. The system can detect marine mammal vocalizations at frequencies up to 250 kHz.

One PSAO, an expert bioacoustician in addition to the four PSVOs, with primary responsibility for PAM, will be onboard the *Langseth.* The towed hydrophones will ideally be monitored by the PSAO 24 hours per day while at the seismic survey area during airgun operations, and during most periods when the *Langseth* is underway while the airguns are not operating. However, PAM may not be possible if damage occurs to the array or back-up systems during operations. The primary PAM streamer on the *Langseth* is a digitial hydrophone streamer. Should the digital streamer fail, back-up systems should include an analog spare streamer and a hull-mounted hydrophone. One PSAO will monitor the acoustic detection system by listening to the signals from two channels via headphones and/or speakers and watching the real-time spectrographic display for frequency ranges produced by cetaceans. The PSAO monitoring the acoustical data will be on shift for one to six hours at a time. All PSOs are expected to rotate through the PAM position, although the expert PSAO will be on PAM duty more frequently.

When a vocalization is detected while visual observations are in progress, the PSAO will contact the PSVO immediately, to alert him/her to the presence of cetaceans (if they have not already been seen), and to allow a power-down or shut-down to be initiated, if required. When bearings (primary and mirror-image) to calling cetacean(s) are determined, the bearings will be related to the PSVO(s) to help him/her sight the calling animal. The information regarding the call will be entered into a database. Data entry will include an acoustic encounter identification number, whether it was linked with a visual sighting, date, time when first and last heard and whenever any additional information was recorded, position and water depth when first detected, bearing if determinable, species or species group (*e.g.,* unidentified dolphin, sperm whale), types and nature of sounds heard (*e.g.,* clicks, continuous, sporadic, whistles, creaks, burst pulses, strength of signal, etc.), and any other notable information. The acoustic detection can also be recorded for further analysis.

PSVO Data and Documentation

PSVOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data will be used to estimate numbers of animals potentially 'taken' by harassment (as defined in the MMPA). They will also provide information needed to order a power-down or shut-down of the airguns when a marine mammal is within or near the EZ. Observations will also be made during daytime periods when the *Langseth* is underway without seismic operations. In addition to transits to, from, and through the study area, there will also be opportunities to collect baseline biological data during the deployment and recovery of OBSs.

When a sighting is made, the following information about the sighting will be recorded:

1. Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the airguns or vessel (*e.g.,* none, avoidance, approach, paralleling, etc.), and behavioral pace.

2. Time, location, heading, speed, activity of the vessel, sea state, visibility, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

All observations and power-downs or shut-downs will be recorded in a standardized format. Data will be entered into an electronic database. The accuracy of the data entry will be verified by computerized data validity checks as the data are entered and by subsequent manual checking of the database. These procedures will allow initial summaries of data to be prepared during and shortly after the field program, and will facilitate transfer of the data to statistical, graphical, and other programs for further processing and archiving.

Results from the vessel-based observations will provide:

1. The basis for real-time mitigation (airgun power-down or shut-down).

2. Information needed to estimate the number of marine mammals potentially taken by harassment, which must be reported to NMFS.

3. Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

4. Information to compare the distance and distribution of marine mammals relative to the source vessel at times with and without seismic activity.

5. Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

L–DEO will submit a report to NMFS and NSF within 90 days after the end of the cruise. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report will summarize the dates and locations of seismic operations, and all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities). The report will also include estimates of the number and nature of exposures that could result in ''takes'' of marine mammals by harassment or in other ways.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury, or mortality (e.g., ship-strike,

gear interaction, and/or entanglement), L–DEO will immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS at (301) 427–8401 and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov,* and the NMFS Pacific Islands Regional Office Stranding Coordinator at (808) 944–2269 (*David.Schofield@noaa.gov*). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with L–DEO to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. L–DEO may not resume their activities until notified by NMFS via letter or email, or telephone.

In the event that L–DEO discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), L–DEO will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401, and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov*, and the NMFS Pacific Islands Regional Office (808) 944–2269 and/or by email to the Pacific Islands Regional Stranding Coordinator (*David.Schofield@noaa.gov*). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with L–DEO to determine whether modifications in the activities are appropriate.

In the event that L–DEO discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), L–DEO will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401, and/or by email to *Michael.Payne@noaa.gov* and *Howard.Goldstein@noaa.gov*, and the NMFS Pacific Islands Regional Office (808) 944–2269, and/or by email to the Pacific Islands Regional Stranding Coordinator (*David.Schofield@noaa.gov*), within 24 hours of discovery. L–DEO will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Only take by Level B harassment is anticipated and authorized as a result of the marine seismic survey in the CNMI. Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array may have the potential to cause marine mammals in the survey area to be exposed to sounds at or greater than 160 dB or cause temporary, short-term changes in behavior. There is no evidence that the planned activities could result in injury, serious injury, or mortality within the specified geographic area for which L–DEO seeks the IHA. The required mitigation and monitoring measures will minimize any potential risk for injury, serious injury, or mortality.

The following sections describe L–DEO's methods to estimate take by incidental harassment and present the applicant's estimates of the numbers of marine mammals that could be affected during the seismic program. The estimates are based on a consideration of the number of marine mammals that could be disturbed appreciably by operations with the 36 airgun array to be used during approximately 2,800 km of survey lines in the CNMI.

L–DEO assumes that, during simultaneous operations of the airgun array and the other sources, any marine mammals close enough to be affected by the MBES and SBP would already be affected by the airguns. However, whether or not the airguns are operating simultaneously with the other sources, marine mammals are expected to exhibit no more than short-term and inconsequential responses to the MBES and SBP given their characteristics (*e.g.,* narrow, downward-directed beam) and other considerations described previously. Such reactions are not considered to constitute ''taking'' (NMFS, 2001). Therefore, L–DEO provides no additional allowance for animals that could be affected by sound sources other than airguns.

The only systematic marine mammal survey conducted in the CNMI was a ship-based survey conducted for the U.S. Navy during January to April, 2007, in four legs: January 16 to February 2, February 6 to 25, March 1 to 20, and March 24 to April 12 (SRS–Parsons *et al.,* 2007; Fulling *et al.,* 2011). The cruise area was defined by the boundaries 10 to 18° North and 142 to 148° East, encompassing an area approximately 585,000 km² (170,558.7 nmi²) including the islands of Guam and the southern CNMI almost as far north as Pagan. The systematic line-transect survey effort was conducted from the flying bridge (10.5 m [34.5 ft] above sea level) of the 56 m (183.7 ft) long M/V *Kahana* using standard line-transect protocols developed by NMFS Southwest Fisheries Science Center (SWFSC). Observers visually surveyed 11,033 km (5,957.3 nmi) of trackline, mostly in high Beaufort sea states (88% of the time in the Beaufort sea states 4 to 6).

L–DEO used the densities calculated in Fulling *et al.* (2011) for the 12 species sighted in that survey. For eight species not sighted in that survey but expected to occur in the CNMI, relevant densities are available for the ''outer EEZ stratum'' of Hawaiian waters, based on a 13,500 km (7,289.4 nmi) survey conducted by NMFS SWFSC in August to November, 2002 (Barlow, 2006). Another potential source of relevant densities are the SWFSC surveys conducted in the ETP during summer/fall 1986 to 1996 (Ferguson and Barlow, 2001, 2003). However, for five of the remaining seven species that could occur in the survey area, there were no sightings in more than 50 offshore tropical (<20° latitude) 5° x 5° strata.

The short-beaked common dolphin was sighted in a number of offshore tropical strata, so its density was calculated as the effort-weighted mean of densities in the 17 offshore 5° x 5° strata between 10° North and 20° North (Ferguson and Barlow, 2003).

Table 3 (Table 3 of the IHA application) gives the estimated densities of each marine mammal species expected to occur in the waters of the survey area. L–DEO used the densities reported by Fulling *et al.* (2011), Barlow (2006), and Ferguson and Barlow (2001, 2003), and those have been corrected, by the original authors, for detectability bias, and in two of the three areas, for availability bias. Detectability bias is associated with diminishing sightability with increasing lateral distance from the trackline (f[0]). Availability bias refers to the fact that there is less-than-100% probability of sighting an animal that is present along the survey trackline f(0), and it is measured by g(0). Fulling *et al.* (2011) did not correct the Marianas densities for g(0), which, for all but large (≤20) groups of dolphins (where g[0] = 1), resulted in underestimates of density.

There is some uncertainty about the representativeness of the density data and the assumptions used in the calculations. For example, the seasonal timing of the surveys either overlapped (Marianas) or followed (Hawaii and ETP) the survey. Also, most of the Marianas survey was in high sea states that would have presented detection of many marine mammals, especially cryptic species such as beaked whales and *Kogia* spp. However, the approach used here is believed to be the best available approach.

L–DEO's estimates of exposures to various sound levels assume that the survey will be fully completed; in fact, the ensonified areas calculated using the planned number of line-km have been increased by 25% to accommodate lines that may need to be repeated, equipment testing, etc. As is typical during offshore ship surveys, inclement weather and equipment malfunctions are likely to cause delays and may limit the number of useful line-kilometers of seismic operations that can be undertaken. Furthermore, any marine mammal sightings within or near the designated EZs will result in the power-down or shut-down of seismic operations as a mitigation measure. Thus, the following estimates of the numbers of marine mammals potentially exposed to sound levels of 160 dB re 1 μPa (rms) are precautionary, and probably overestimate the actual numbers of marine mammals that might be involved. These estimates also assume that there will be no weather, equipment, or mitigation delays, which is highly unlikely.

L–DEO estimated the number of different individuals that may be exposed to airgun sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) on one or more occasions by considering the total marine area that would be within the 160 dB radius around the operating airgun array on at least one occasion and the expected density of marine mammals. The number of possible exposures (including repeated exposures of the same individuals) can be estimated by considering the total marine area that would be within the 160 dB radius around the operating airguns, including areas of overlap. In the survey, the seismic lines are widely spaced in the survey area, so few individual marine mammals would be exposed more than once during the survey. The area including overlap is only 1.4 times the area excluding overlap, so a marine mammal that stayed in the survey area during the entire survey could be exposed approximately two times, on average. Thus, few individual marine mammals could be exposed more than once during the survey. However, it is unlikely that a particular animal would stay in the area during the entire survey.

The number of different individuals potentially exposed to received levels greater than or equal to 160 re 1 μPa (rms) was calculated by multiplying:

(1) The expected species density, times

(2) The anticipated area to be ensonified to that level during airgun operations excluding overlap.

The area expected to be ensonified was determined by entering the planned survey lines into a MapInfo GIS, using the GIS to identify the relevant areas by ''drawing'' the applicable 160 dB buffer (see Table 1 of the IHA application) around each seismic line, and then calculating the total area within the buffers. Areas of overlap (because of lines being closer together than the 160 dB radius) were included only once when estimating the number of individuals exposed.

Applying the approach described above, approximately 15,685 km^2 (4,573 nmi^2) (approximately 19,607 km^2 [5,716.5 nmi^2] including the 25% contingency) would be within the 160 dB isopleth on one or more occasions during the survey. Because this approach does not allow for turnover in the marine mammal populations in the study area during the course of the survey, the actual number of individuals exposed could be underestimated. In addition, the approach assumes that no cetaceans will move away from or toward the trackline as the *Langseth* approaches in response to increasing sound levels prior to the time the levels reach 160 dB, which will result in overestimates for those species known to avoid seismic vessels.

Table 3 (Table 4 of the IHA application) shows the estimates of the number of different individual marine mammals that potentially could be exposed to greater than or equal to 160 dB re 1 μPa (rms) during the seismic survey if no animals moved away from the survey vessel. The requested take authorization, given in Table 3 (the far right column of Table 4 of the IHA application), has been increased to the mean group size for the particular species in cases where the calculated number of individuals exposed was between one and the mean group size. Mean group sizes are from the same source as densities (see Table 3 of L–DEO's application). For the minke whale, which was not sighted during the January to April, 2007 survey in the waters of Guam and the southern CNMI, but was the baleen whale species most frequently detected acoustically, the requested take authorization (given in the far right column of Table 5 of L–DEO's application) has also been increased to the mean group size.

The estimate of the number of individual cetaceans that could be exposed to seismic sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) during the survey is 1,487 (see Table 4 of the IHA application). That total includes 14 baleen whales, of which 6 are sei whales (0.06% of the regional population). An additional 30 takes of humpback whales (3.2% of the regional population) have been included in the IHA. While humpback whales were not visually sighted during the 2007 survey, they were heard regularly during passive acoustic monitoring, indicating that they are likely present in the survey area. In addition, 24 sperm whales or 0.08% of the regional population, could be exposed during the survey, and 165 beaked whales, including Cuvier's, Longman's, and Blainville's beaked whales. Most (72.1%) of the cetaceans potentially exposed are delphinids; pantropical spotted, short-beaked common, striped, and Fraser's dolphins, and melon-headed whales are estimated to be the most common species in the area, with estimates of 443, 189, 121, 88, and 84, which would represent 0.06%, 0.01%, 0.01%, 0.03%, and 0.19% of the regional populations, respectively.

In monitoring reports for seismic surveys, NMFS sometimes receives reports of unidentified species of marine

mammals documented within areas around active airgun arrays and the animals may have been potentially exposed to received levels of greater than or equal to 160 dB (rms) (i.e., the threshold for Level B harassment). These animals may be reported as an unidentified species of marine mammal by PSOs due to poor environmental conditions (*e.g.,* high Beaufort sea state/wind force, sun glare, clouds, rain, fog, darkness, etc.), the distance of the animal(s) relative to the vessel, brevity of animal(s) presence at the surface, animal(s) avoidance behavior, and/or lack of expertise of PSOs in identifying the species of marine mammals that may occur in the study area. NMFS appreciates the difficulty of identifying marine mammals to the species level at sea. Due to these circumstances, NMFS will include the take of unidentified large whales (*i.e.,* Bryde's/sei whales) for L–DEO's planned seismic survey in the CNMI. In order to estimate the potential number of takes for unidentified Bryde's/sei-type whales, NMFS relied on the sighting data from the 2007 survey. The total estimated number of unidentified Bryde's/sei-type whales are 2, which would represent less than 0.05% and 0.11% of the regional population for each species of marine mammals expected to occur in the study area when considered in addition to the calculated number of takes for each identified species in the density estimates.

TABLE 3—ESTIMATES OF THE POSSIBLE NUMBERS OF MARINE MAMMALS EXPOSED TO DIFFERENT SOUND LEVELS ≥160 dB DURING L–DEO'S SEISMIC SURVEY IN THE CNMI DURING FEBRUARY TO MARCH, 2012

Species	Estimated No. of individuals exposed to sound levels ≥ 160 dB re 1 μ Pa	Requested or adjusted take authorization	Approximate percent of regional population [1]
Mysticetes			
North Pacific right whale	0	0	0
Humpback whale	0	30	3.2
Minke whale	0	[2]3	< 0.01
Bryde's whale	8	8	0.03
Sei whale	6	6	0.06
Fin whale	0	0	0
Blue whale	0	0	0
Unidentified Bryde's/sei-type whale	0	2	0.01 0.03
Odontocetes			
Sperm whale	24	24	0.08
Pygmy sperm whale	62	62	NA
Dwarf sperm whale	150	150	1.34
Cuvier's beaked whale	131	131	0.65
Longman's beaked whale	9	[3]18	NA
Blainville's beaked whale	25	25	0.10
Ginkgo-toothed beaked whale	0	0	0
Rough-toothed dolphin	6	[3]9	< 0.01
Bottlenose dolphin	4	[3]20	< 0.01
Pantropical spotted dolphin	443	443	0.06
Spinner dolphin	62	[3]98	0.01
Striped dolphin	121	121	0.01
Fraser's dolphin	88	[3]286	0.03
Short-beaked common dolphin	189	189	0.01
Risso's dolphin	16	16	0.01
Melon-headed whale	84	[3]95	0.19
Pygmy killer whale	3	[2]12	0.03
False killer whale	22	22	0.05
Killer whale	3	[2]5	0.03
Short-finned pilot whale	31	31	0.01

NA = Not available or not assessed.
[1] Regional population sizes are from Table 3 in L–DEO's application.
[2] Requested take authorization increased to mean group size from Jefferson *et al.* (2008).
[3] Requested take authorization increased to mean group size from density sources in Table 4 of L–DEO's application.

Encouraging and Coordinating Research

L–DEO and NSF will coordinate the planned marine mammal monitoring program associated with the seismic survey in the CNMI with other parties that may have an interest in the area and/or be conducting marine mammal studies in the same region during the seismic survey. L–DEO and NSF have coordinated, and will continue to coordinate with other applicable agencies, and will comply with their requirements. Actions of this type that are underway include (but are not limited to) the following:

- Contact the U.S. Army Corps of Engineers (ACOE), to confirm that no permits will be required by the ACOE for the survey.
- Contact CNMI historic preservation office regarding the National Historic Preservation Act.
- Contact the CNMI Coastal Resources Management office and submit a Scientific Research Permit application.
- Contact U.S. Navy Pacific Fleet Environmental and Geo-Marine, Inc. for recent information on cetacean surveys in the area.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined ''negligible impact'' 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 evaluated factors such as:

(1) The number of anticipated injuries, serious injuries, or mortalities;

(2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited); and

(3) The context in which the takes occur (*i.e.,* impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);

(4) The status of stock or species of marine mammals (*i.e.,* depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);

(5) Impacts on habitat affecting rates of recruitment/survival; and

(6) The effectiveness of monitoring and mitigation measures.

For reasons stated previously in this document, the specified activities associated with the marine seismic survey are not likely to cause PTS, or other non-auditory injury, serious injury, or death because:

(1) The likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious;

(2) The potential for temporary or permanent hearing impairment is relatively low and would likely be avoided through the incorporation of the required monitoring and mitigation measures (described above);

(3) The fact that cetaceans would have to be closer than 940 m (3,084 ft) in deep water when the 36 airgun array is in use at 9 m tow depth, and 40 m (131.2 ft) in deep water when the single airgun is in use at 9 m from the vessel to be exposed to levels of sound believed to have even a minimal chance of causing PTS; and

(4) The likelihood that marine mammal detection ability by trained PSOs is high at close proximity to the vessel.

No injuries, serious injuries, or mortalities are anticipated to occur as a result of the L–DEO's planned marine seismic survey, and none are authorized by NMFS. Only short-term behavioral disturbance is anticipated to occur due to the brief and sporadic duration of the survey activities. Table 3 of this document outlines the number of requested Level B harassment takes that are anticipated as a result of these activities. Due to the nature, degree, and context of Level B (behavioral) harassment anticipated and described (see ''Potential Effects on Marine Mammals'' section above) in this notice, the activity is not expected to impact rates of recruitment or survival for any affected species or stock. Additionally, the seismic survey will not adversely impact marine mammal habitat.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (*i.e.,* 24 hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). While seismic operations are anticipated to occur on consecutive days, the entire duration of the survey is not expected to last more than approximately 46 days (*i.e.,* 16 days of seismic operations, 2 days of transit, and 25 days of deployment and retrieval of OBSs and maintenance) and the *Langseth* will be continuously moving along planned tracklines that are geographically spread-out. Therefore, the seismic survey will be increasing sound levels in the marine environment in a relatively small area surrounding the vessel, which is constantly travelling over far distances, for a relatively short time period (*i.e.,* several weeks) in the study area.

Of the 27 marine mammal species under NMFS jurisdiction that are known to or likely to occur in the study area, six are listed as threatened or endangered under the ESA: North Pacific right, humpback, sei, fin, blue, and sperm whales. These species are also considered depleted under the MMPA. Of these ESA-listed species, incidental take has been requested to be authorized for sei and sperm whales. Additional incidental take of humpback whales has also been authorized. There is generally insufficient data to determine population trends for the other depleted species in the study area. To protect these animals (and other marine mammals in the study area), L–DEO must cease or reduce airgun operations if animals enter designated zones. No injury, serious injury, or mortality is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

As mentioned previously, NMFS estimates that 23 species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. For each species, these numbers are small (each, less than one percent, except for dwarf sperm whales [1.3%] and humpback whales [3.2%]) relative to the regional population size. The population estimates for the marine mammal species that may be taken by Level B harassment were provided in Table 2 of this document.

NMFS's practice has been to apply the 160 dB re 1 μPa (rms) received level threshold for underwater impulse sound levels to determine whether take by Level B harassment occurs. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* [2007]).

NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a marine seismic survey in the CNMI, February to March, 2012, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals. See Table 3 (above) for the requested authorized take numbers of cetaceans.

While behavioral modifications, including temporarily vacating the area during the operation of the airgun(s), may be made by these species to avoid the resultant acoustic disturbance, the availability of alternate areas within these areas and the short and sporadic duration of the research activities, have led NMFS to determine that this action will have a negligible impact on the species in the specified geographic region.

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 finds that L–DEO's planned research activities will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the marine seismic survey will have a negligible impact on the affected species or stocks of marine mammals; and that impacts to affected species or stocks of marine mammals have been mitigated to the lowest level practicable.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Section 101(a)(5)(D) also requires NMFS to determine that the authorization will not have an unmitigable adverse effect on the availability of marine mammal species or stocks for subsistence use. There are no relevant subsistence uses of marine mammals in the study area (offshore waters of the CNMI) that implicate MMPA section 101(a)(5)(D).

Endangered Species Act

Of the species of marine mammals that may occur in the survey area, several are listed as endangered under the ESA, including the North Pacific right, humpback, sei, fin, blue, and sperm whales. Under section 7 of the ESA, NSF initiated formal consultation with the NMFS, Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, on this seismic survey. NMFS's Office of Protected Resources, Permits and Conservation Division, also initiated formal consultation under section 7 of the ESA with NMFS's Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, to obtain a Biological Opinion (BiOp) evaluating the effects of issuing the IHA on threatened and endangered marine mammals and, if appropriate, authorizing incidental take. In February, 2012, NMFS issued a BiOp and concluded that the action and issuance of the IHA are not likely to jeopardize the continued existence of North Pacific right, humpback, sei, fin, blue, and sperm whales. The BiOp also concluded that designated critical habitat for these species would not be affected by the survey. NSF and L–DEO must comply with the Relevant Terms and Conditions of the Incidental Take Statement (ITS) corresponding to NMFS's BiOp issued to NSF, L–DEO, and NMFS's Office of Protected Resources. L–DEO must also comply with the mitigation and monitoring requirements included in the IHA in order to be exempt under the ITS in the BiOp from the prohibition on take of listed endangered marine mammal species otherwise prohibited by section 9 of the ESA.

National Environmental Policy Act

With L–DEO's complete application, NSF provided NMFS an ''Environmental Assessment and Finding of No Significant Impact Determination Pursuant to the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* and Executive Order 12114 Marine Seismic Survey in the Commonwealth of the Northern Mariana Islands, February–March 2012,'' which incorporates an ''Environmental Assessment of a Marine Geophysical Survey by the R/V *Marcus G. Langseth* in the Commonwealth of the Northern Mariana Islands, February–March 2012,'' prepared by LGL on behalf of NSF and L–DEO, to met NMFS's NEPA (42 U.S.C. 4321 *et seq.*) requirements for the issuance of an IHA. The EA analyzes the direct, indirect, and cumulative environmental impacts of the specified activities on marine mammals including those listed as threatened or endangered under the ESA. NMFS conducted an independent review and evaluation of the document for sufficiency and compliance with the Council of Environmental Quality (CEQ) and NOAA Administrative Order 216–6 § 5.09(d), Environmental Review Procedures for Implementing the National Environmental Policy Act, and determined that issuance of the IHA is not likely to result in significant impacts on the human environment. Consequently, NMFS has adopted NSF's EA and prepared a Finding of No Significant Impact (FONSI) for the issuance of the IHA. An Environmental Impact Statement is not required and will not be prepared for the action.

Authorization

NMFS has issued an IHA to L–DEO for the take, by Level B harassment, of small numbers of marine mammals incidental to conducting a marine seismic survey in the CNMI, February to March, 2012, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: February 1, 2012.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–2749 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA959

Taking and Importing Marine Mammals; U.S. Navy's Atlantic Fleet Active Sonar Training

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

ACTION: Notice of issuance of a Letter of Authorization

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notice is hereby given that NMFS has issued a letter of authorization (LOA) to the U.S. Navy (Navy) to take marine mammals incidental to Navy training, maintenance, and research, development, testing, and evaluation (RDT&E) activities to be conducted within the Atlantic Fleet Active Sonar Training (AFAST) Study Area for the period of January 22, 2012, through January 22, 2014.

DATES: This authorization is effective from January 22, 2012, through January 22, 2014.

ADDRESSES: Electronic copies of the LOA and supporting documentation may be obtained by writing to P. Michael Payne, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or by telephoning one of the contacts listed here.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison or Brian D. Hopper, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION: Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS to allow, upon request, the incidental taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing), if certain findings are made by NMFS and regulations are issued. Under the MMPA, the term ''take'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill marine mammals.

Regulations governing the taking of marine mammals by the Navy incidental to AFAST training, maintenance, and RDT&E became effective on January 22, 2009 (74 FR 4844, January 27, 2009), and remain in effect through January 22, 2014. The AFAST study area extends east from the Atlantic Coast of the U.S. to 45° W. long. and south from the Atlantic and Gulf of Mexico Coasts to approximately 23° N. lat., but not encompassing the Bahamas (see Figure 1–1 in the Navy's Application). For detailed information on this action, please refer to the January 2009 final rule. These regulations include mitigation, monitoring, and reporting requirements and establish a framework to authorize incidental take through the issuance of LOAs.

Summary of Request

On August 31, 2011, NMFS received a request from the Navy for a renewal of an LOA issued on January 22, 2011, for the taking of marine mammals

incidental to training and research activities conducted within the AFAST Study Area under regulations issued on January 22, 2009 (74 FR 4844, January 27, 2009). The Navy has complied with the measures required in 50 CFR 216.244 and 216.245, as well as the associated 2011 LOA, and submitted the reports and other documentation required in the final rule and the 2011 LOA.

Summary of Activity Under the 2011 LOA

As described in the Navy's exercise reports (both classified and unclassified), in 2011, the training activities conducted by the Navy were within the scope and amounts authorized by the 2011 LOA and the levels of take remain within the scope and amounts contemplated by the final rule. The Navy conducted seven major anti-submarine warfare strike group training exercises in 2011, including one Integrated Anti-Submarine Warfare Course (IAC II), two Joint Task Force Exercises (JTFEX), two Composite Training Unit Exercises (COMPTUEX) with IAC IIs, and two Southeaster Anti-Submarine Warfare Integrated Training Initiative exercises SEASWITI).

Planned Activities and Estimated Take for 2012 and 2013

In 2012 and 2013, the Navy expects to conduct the same type and amount of training identified in the 2011 LOA. Therefore, for 2012 and 2013, NMFS authorizes the same amount of take that was authorized in 2011.

Summary of Monitoring, Reporting, and Other Requirements Under the 2011 LOA

Annual Exercise Reports

The Navy submitted their classified and unclassified 2011 exercise reports within the required timeframes and the unclassified report is posted on NMFS' Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* NMFS has reviewed both reports and they contain the information required by the 2011 LOA. The reports indicate the amounts of different types of training that occurred from August 2, 2010, through August 1, 2011. As mentioned above, the Navy conducted seven major anti-submarine warfare training exercises addressed in the rule (the rule analyzed the likely impacts from 39 coordinated unit level training exercises and seven strike group training exercises).

The reports also list specific information gathered when marine mammals were detected by Navy watchstanders, such as how far an animal was from the vessel, whether sonar was in use, and whether it was powered or shut down. This information indicates that the Navy implemented the safety zone mitigation measures as required. No instances of obvious behavioral disturbance were reported by the Navy watchstanders in their 153 marine mammal sightings totaling 693 animals. Furthermore, safety zones were adhered to, and vessels and aircraft applied mitigation measures when marine mammals were observed within the requisite zones. To summarize, there were a total of 5 sightings of 24 marine mammals for all AFAST Major Training Exercises for reporting (MTERs) at ranges less than 1,000 yards (914 m) during which mid-frequency active sonar (MFAS) was in use. Of these 5 total MTER MFAS sightings, there were 4 sightings of 23 dolphins, 0 sightings of whales, 0 sightings of pinnipeds and 1 sighting of 1 sea turtle. There were a total of 4 mitigation events triggered by these sightings, which resulted in two sonar power downs (range to animal < 1,000 yards (914 m)) and two shut down (range to animal < 200 yards (183 m)). During two of these mitigation events sonar was unnecessarily shut down, once when the observed range of a whale was in excess of 1,000 yards (914 m), and once due to passively receiving mammal vocalizations where the range to the animal could not be determined.

2011 Monitoring

The Navy conducted the monitoring required by the 2011 LOA and described in the Monitoring Plan, which included aerial and vessel surveys of sonar and exercises by dedicated MMOs, as well as passive acoustic monitoring utilizing high frequency acoustic recording packages (HARPs) and pop-up buoys, and marine mammal tagging, tracking, and biopsy sampling. The Navy submitted their 2011 Monitoring Report, which is posted on NMFS' Web site (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm*), within the required timeframe. The Navy included a summary of their 2011 monitoring effort and results (beginning on page 9 of the monitoring report) and the specific reports for each individual effort are presented in the appendices. Navy-funded marine mammal monitoring accomplishments within the AFAST study area occurred from August 2, 2010 to August 1, 2011.

Visual Surveys

The majority of monitoring effort for the reporting period was conducted in two locations, Onslow Bay and the Jacksonville (JAX) Operating Area (OPAREA), with an extension of survey effort off Cape Hatteras. These locations serve as the primary study areas for longitudinal baseline monitoring efforts and are also the primary locations for coordinated Anti-Submarine Warfare (ASW) exercise monitoring events. These monitoring efforts and their findings, if available, will be discussed in greater detail below.

The baseline monitoring program consists of year-round multi-disciplinary monitoring through the use of shipboard and aerial visual surveys (24 days each annually), photo identification studies, biopsy sampling, and passive acoustic monitoring. Surveys are conducted year-round using established track lines and standard distance sampling techniques. During the reporting period, aerial surveys were planned monthly in both Onslow Bay and JAX, and monthly surveys were initiated off of Cape Hatteras. In Onslow Bay, aerial surveys were conducted on 13 days between August 2010 and April 2011, and aerial observers reported sightings of five identifiable species of marine mammals. In JAX, aerial surveys were conducted on 27 days during the reporting period, and aerial observers reported sightings of seven identifiable species of marine mammals. Aerial survey effort was shifted from Onslow Bay to Cape Hatteras in May 2011. At the Cape Hatteras, aerial surveys were conducted on 6 days between May 2011 and July 2011, and aerial observers reported 39 sightings of nine identifiable species of marine mammals.

Vessel surveys were conducted in both Onslow Bay and JAX during the reporting periods. Vessel-based surveys were also initiated off of Cape Hatteras in July 2011. Vessel-based observers in Onslow Bay reported sightings of two identifiable species of marine mammals. Over 1,300 digital images were taken for species identification and individual recognition. Vessel surveys in JAX reported sightings of two identifiable species of marine mammals. Approximately 1,260 digital images were taken for the purposes of species identification and individual recognition. Vessel surveys off Cape Hatteras reported sightings of seven identifiable species of marine mammals. Approximately 5,700 digital images were taken for the purposes of species identification and individual recognition.

2011 Behavioral Response Study and Biopsy Sampling

In conjunction with the vessel surveys off Cape Hatteras, researchers from Duke University and Woods Hole Oceanographic Institution conducted

two controlled exposure experimental playbacks on pilot whales on June 4 and June 7, 2011 as part of an ongoing behavioral response study. During the study, researchers conducted controlled exposure experimental playbacks with six pilot whales along the continental shelf break off Cape Hatteras. Each whale was equipped with a DTAG for recording data. The DTAG is a small, lightweight tag that is placed on a whale using a carbon-fiber pole and attaches to the animal via four silicon suction cups. The DTAG is equipped with a pressure sensor, three-axis magnetometer and accelerometers that measure depth, heading, pitch, and roll, at a rate of five times per second. The tag contains two hydrophones that record sound and a VHF antenna that allows radio tracking of animals while they are at the surface and facilitates re-location of the tag upon release from the animal. Data are archived on the tag during deployment and later downloaded for calibration and analysis. In general, the duration of tag deployments vary and tags can either be released by a programmed release mechanism or by the animal's actions that result in shedding the device (*i.e.,* breaching, coming into physical contact with other animals, *etc.*). For this study, the DTAG was programmed to release after a 4 hour period.

The 4-hour experimental periods consisted of: A 1-hour pre-exposure period; a 1-hour experimental or control period; a second 1-hour experimental or control period; and a 1-hour post-exposure period. During the entire 4-hours, detailed, standardized behavioral observations of the focal (tagged) whale and its group were collected from one of the small vessels using a 5-minute point sampling protocol. During the experimental periods, the R/V Volute repeatedly approached the tagged whale with the Simrad EK60 scientific echo sounder turned on. The Volute made the same series of approaches during the control period, but with the echo sounder turned off. The choice of order of the control and experimental treatments was randomized for each whale. Five additional 4-hour focal follows on pilot whales were conducted without the echo sounder or control treatments. Data from these tagging efforts will be analyzed in Matlab to generate descriptive metrics for the diving and acoustic behavior of each whale. These include time-depth profiles for the duration of the tag deployment.

In addition, over the duration of the entire field project in the Cape Hatteras survey area, the research team was able to collect 23 biopsy samples from bottlenose dolphins (13), Atlantic spotted dolphins (6), and short-finned pilot whales (4). There was one more skin sample from a short-finned pilot whale that was obtained from the suction cup of a DTAG. Researchers focus on these species to address the following: (1) Differentiating two forms of bottlenose dolphins (to date, all samples have been collected from the pelagic white-peducle form); (2) examining the taxonomic identity of the small-bodied, pelagic form of Atlantic spotted dolphins; and (3) determining the gender of tagged short-finned pilot whales. Each tissue sample was sub-sampled and a reference sample supplied to the NMFS Southeast Fisheries Science Center's Marine Mammal Molecular Genetics Laboratory in Lafayette, Louisiana.

Passive Acoustic Monitoring and Acoustic Analysis

Two passive acoustic systems were used in conjunction with the AFAST monitoring projects in Onslow Bay and JAX—a multi-element towed array used during vessel surveys and bottom-mounted high-frequency acoustic recorder packages (HARPs). Passive acoustic monitoring was not conducted off Cape Hatteras during the reporting period (August 2, 2010 through August 1, 2011). The towed array was deployed on one day of surveys during August 2010 in Onslow Bay. A total of three acoustic detections were made, one of which was identified to species. Two HARPs were deployed for over 10 months in Onslow Bay during the reporting period. In JAX, the towed array was deployed on one day of surveys during October 2010. A total of three acoustic detections were made, one of which was identified to species. Four HARP deployments were made in JAX during the reporting period. Very large datasets were collected and a thorough analysis of all acoustic data is currently underway.

Since the 2010 AFAST Annual Report, data analyses have been underway on PAM data collected in Onslow Bay and JAX. In Onslow Bay, marine mammal vocalization data collected from the towed-array during vessel-based surveys were analyzed to identify species. For whistles, 624 whistles from four species and 48 sightings were analyzed using Classification and Regression Tree (CART) analysis. Clicks from five species recorded in Onslow Bay and off Cape Hatteras were analyzed following methods similar to Soldevilla *et al.* (2008) to identify the species to which the clicks belong. Distinct clicks were only found for Risso's dolphins.

Coordinated ASW exercise monitoring studies are one of the primary components being used to address specific monitoring questions presented in the AFAST monitoring plan and LOA. Both passive acoustic and visual monitoring methods have been employed to address before/after (aerial surveys) and before/during/after (passive acoustics) monitoring requirements. During this reporting period, vessel-based monitoring that included towed passive acoustic array was conducted during December 3–5, 2010 in conjunction with an ASW exercise in the JAX OPAREA. Thirty acoustic detections of cetaceans were collected during nearly 27 hours of survey effort. Thirteen detections were classified as sperm whales; five detections were classified as sperm whales and delphinids (vocalizing simultaneously); one detection was classified as sperm whales and possible beaked whales; and 11 detections were classified as delphinids. During the previous reporting period, two focused ASW exercise passive acoustic monitoring efforts were conducted in the JAX OPAREA, each included the deployment of 9 pop-up buoys arranged in an array configuration. The goal was to establish intensive short-term (20–30 day) passive acoustic monitoring before, during, and after specific ASW exercises. Analysis of data from both deployments is still in progress.

Deployment of nine pop-up units was planned and attempted in December 2010 to coincide with an ASW training exercise in the JAX OPAREA; however, weather conditions and safety concerns prevented the deployment of the devices.

In September 2011, the Navy deployed 12 JASCO Autonomous Multi-channel Acoustic Recorders (AMARs) sampling at 96 kHz for approximately 30 days in the JAX OPAREA. The AMARs were deployed approximately 10 days prior to the planned 5-day ASW exercise and remained active for approximately 10 days following the exercise. The goal of this monitoring effort is to establish short-term (20–30 days) PAM before, during, and after a specific ASW exercise. Analysis of the collected data will be conducted once recovery has been completed.

Aerial surveys were coordinated before and after two ASW training events during the reporting period. Aerial monitoring was conducted August 9–10, 2010 in good to fair sighting conditions, for an ASW exercise in the VACAPES OPAREA. The second survey was conducted December 3–5, 2010 in poor sighting conditions in the JAX OPAREA. During the August

2010 survey, there were a total of seven sightings recorded: one group of bottlenose dolphins; two groups of short-finned pilot whales; one group of sperm whales; two groups of pantropical spotted dolphins; and one group of unidentified dolphins. During the December 2010 survey, there were two sightings of cetaceans (unidentified species).

Marine Mammal Observations and Lookout Effectiveness Study

During the reporting period, coordination of Navy marine mammal observers (MMOs) for ASW exercise was not possible because of logistic constraints and training exercise schedules. The remainder of this section will focus on the progress made to date on the Navy

Lookout Effectiveness Study

To date, the Navy has successfully completed four Lookout Effectiveness data collection trials. The primary functions of these efforts were to test and refine lookout observation methodology. Of the four studies, one was completed in Hawaii, one was completed in Southern California, and two were completed off the coast of Jacksonville, FL. Each study had four trained biologists acting as MMOs, observing from sunrise to sunset each day while underway, to assess the effectiveness of the Navy lookout team and to obtain data to characterize the possible exposure of marine species to MFAS.

On a parallel track with the field protocol development process, methods are being developed for using the data generated by these experiments to estimate the probability of animals entering the harassment zone undetected. An analysis method to allow for intermittent availability is also being developed because many marine mammal species remain at (or close to) the surface for significant periods between dives, and are ''intermittently available'' for detection. As a proof of concept, both the instantaneous and intermittent availability models to data collection will be applied and the Navy will provide results in next year's annual monitoring report.

In conclusion, the Navy's implementation of the monitoring plan accomplished several goals, which contribute to a larger body of data intended to better characterize the abundance, distribution, life history, and behaviors of the species in the AFAST study area. In general, the monitoring conducted in 2010–2011 satisfied the objectives of the monitoring plan and specifically contributed to the following: (1) A greater knowledge and understanding of the density and distribution of species within the AFAST study area; (2) the vocalizations of different species, which advances the development of automated classification software; (3) the movement patterns of individual (both vertically in the water column as well as horizontally for the duration of a DTAG deployment); and (4) observable behavioral patterns of marine mammals, before, during, and after exposure to Navy training activities.

Except as described below in the Adaptive Management section, NMFS concludes that the results of these monitoring efforts when taken together with the findings presented in the 2011 exercise report (see Annual Exercise Report section) do not warrant making changes to the current monitoring/mitigation requirements identified in the LOA. While the data collected by the Navy through monitoring and reporting builds upon the existing body of information in a valuable way, none of the new data contradict, or amend, the assumptions that underlie the findings in the 2009 rule in a manner that would suggest changing the current mitigation or monitoring.

Adaptive Management

In general, adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) if monitoring efforts should be modified if new information suggests that such modifications are appropriate. All of the 5-year rules and LOAs issued to the Navy include an adaptive management component, which includes an annual meeting between NMFS and the Navy. NMFS and the Navy conducted an adaptive management meeting in October, 2011, which representatives from the Marine Mammal Commission participated in, wherein we reviewed the Navy monitoring results through August 1, 2011, discussed other Navy research and development efforts, and discussed other new information that could potentially inform decisions regarding Navy mitigation and monitoring. Based on the implementation of the 2011 monitoring, the Navy proposed some minor modifications to their monitoring plan for 2012, which NMFS agreed were appropriate. Additional details regarding these minor modifications are provided in Section 13 of the Navy's 2011 LOA Application, which may be viewed at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Integrated Comprehensive Monitoring Report

The 2010 LOA required that the Navy update the ICMP Plan to reflect development in three areas, specifically: (1) Identifying more specific monitoring sub-goals under the major goals that have been identified; (2) characterizing Navy Range Complexes and study areas within the context of the prioritization guidelines described in the ICMP Plan; and (3) continuing to develop data management, organization and access procedures. The Navy has updated the ICMP Plan as required. Because the ICMP is an evolving Program, we posted the ICMP on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* and specifically requested input when the 2011 LOA notice published (76 FR 4637, January 26, 2011), which the Navy and NMFS have considered and applied as appropriate.

2011 Monitoring Meeting

The regulations that established the framework for authorizing the taking of marine mammals incidental to Navy training activities required the Navy, with guidance and support from NMFS, to convene a Monitoring Workshop in 2011 (50 CFR 216.245(k)). The Marine Mammal Monitoring Workshop, which included scientists, representatives from non-governmental organization, and Marine Mammal Commission staff, took place in June 2011. Pursuant to the regulations, this workshop presented a consolidated overview of monitoring activities conducted in 2009 and 2010, as well as the outcomes of selected monitoring-related research. In 2010, the Navy convened a Scientific Advisory Group (SAG), comprised of experts in the fields of marine mammals and underwater acoustics, to review the Navy's current monitoring plans and make recommendations. The results of the SAG's review were also presented at the meeting. Participants engaged in open discussion of the lessons learned, and discussed how to improve the Navy's monitoring plan moving forward.

NOAA Workshops

In a January 19, 2010, letter to the Council on Environmental Quality, NOAA identified the need for two interrelated workshops on marine mammals and sound in the ocean. To address this commitment, NOAA is convening two parallel, focused, relatively small, and product-driven working groups. One will identify and map cetacean ''hot spots'', defined as areas of known, or reasonably

predictable, biological importance (*i.e.,* for reproduction, feeding, migration) and/or high densities. The second working group will be directed toward developing a comprehensive data collection and analysis plan for describing and predicting underwater sound fields in different areas. The outcomes of these working groups will be integrated and analyzed in a broader symposium to include a larger audience of scientists, industries, federal agencies, conservation managers, and environmental non-governmental organizations (NGOs). The final products and analyses will provide a more robust, comprehensive, and context-specific biological and acoustic basis by which to inform subsequent management decisions regarding human-generated noise in our oceans. The steering committee has been convened and met for the first time in October, 2010. The working group efforts should take about a year to complete, and both working groups met twice in 2011 to plan and discuss the final products. The final symposium is planned to be held in late spring or early summer in Silver Spring, Maryland, in 2012. The results of these working groups will be analyzed by NMFS in an adaptive management context, as related to the AFAST final rule (74 FR 4844, January 27, 2009), and mitigation or monitoring measures may be modified, as appropriate.

Authorization

The Navy complied with the requirements of the 2011 LOA. Based on our review of the record, NMFS has determined that the marine mammal take resulting from the 2011 military readiness training and research activities falls within the levels previously anticipated, analyzed, and authorized. Further, the level of taking authorized in 2012 and 2013 for the Navy's AFAST activities is consistent with our previous findings made for the total taking allowed under the AFAST regulations. Finally, the record supports NMFS' conclusion that the total number of marine mammals taken by the 2012 and 2013 AFAST activities will have no more than a negligible impact on the affected species or stock of marine mammals and will not have an unmitigable adverse impact on the availability of these species or stocks for taking for subsistence uses. Accordingly, NMFS has issued a two-year LOA for Navy training exercises conducted in the AFAST Study Area from January 22, 2012, through January 22, 2014.

Dated: February 1, 2012.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA883

Taking and Importing Marine Mammals; U.S. Navy Training in the Southern California Range Complex

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

ACTION: Notice of issuance of a Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notice is hereby given that NMFS has issued a Letter of Authorization (LOA) to the U.S. Navy (Navy) to take marine mammals incidental to Navy training, maintenance, and research, development, testing, and evaluation (RDT&E) activities to be conducted within the Southern California (SOCAL) Range Complex, which extends south and southwest off the southern California coast.

DATES: This authorization is effective from February 8, 2012, through January 14, 2014.

ADDRESSES: The LOA and supporting documentation may be obtained by writing to P. Michael Payne, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or by telephoning one of the contacts listed here.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION: Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS to allow, upon request, the incidental taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing), if certain findings are made by NMFS and regulations are issued. Under the MMPA, the term ''take'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill marine mammals.

Regulations governing the taking of marine mammals by the Navy incidental to training, maintenance, and RDT&E in the SOCAL Range Complex became effective on January 14, 2009 (74 FR 3881, January 21, 2009), and remain in effect through January 14, 2014. An interim final rule was issued on February 7, 2011 (76 FR 6699, February 8, 2011) that included an amendment to allow for greater flexibility in the types and amounts of sound sources used by the Navy in SOCAL, the Hawaii Range Complex, and the Atlantic Fleet Active Sonar Training Study Area. NMFS issued the Navy a 1-year LOA on January 9, 2012, which is superseded by the 2-year LOA described in this notice. A modified final rule was issued on February 1, 2012 (77 FR 4917) that allows for multi-year LOAs. For detailed information on these documents, please refer to their respective **Federal Register** notices. The regulations include mitigation, monitoring, and reporting requirements and establish a framework to authorize incidental take through the issuance of LOAs.

Summary of Request

On August 30, 2011, NMFS received a request from the Navy for a renewal of an LOA issued on January 22, 2011, for the taking of marine mammals incidental to training and research activities conducted within the SOCAL Range Complex under regulations issued on February 8, 2011 (76 FR 6699). The Navy has complied with the measures required in 50 CFR 216.274 and 216.275 and submitted the reports and other documentation required in the final rule and the 2011 LOA. Although the Navy exceeded the average annual estimated usage of two sonar systems, they remain well within the authorized 5-year source amounts and the authorized 5-year marine mammal takes.

Summary of Activity Under the 2011 LOA

The Navy's classified 2010–2011 exercise report indicates that the Navy exceeded the average annual amount of two sonar systems during this monitoring period. However, the Navy remains well within their authorized 5-year source amounts. Sonar usage since January 22, 2009 (when the first LOA was issued) remains below 60 percent for all source types. Furthermore, the interim final rule for SOCAL (76 FR 6699, February 8, 2011) increased flexibility of sonar usage, provided it does not result in exceeding the incidental take analyzed and identified in the final rule. Based on the amount of sonar system use, the Navy's post-calculation estimates show that exposures for eight species may have exceeded the annual authorization in

the 2011 LOA. However, potential exposures for all species since January 22, 2009 (when the first LOA was issued) are still less than 50 percent of the total 5-year authorization with only 2 years remaining under the current rule.

Planned Activities and Estimated Take for 2012 and 2013

In 2012 and 2013, the Navy expects to conduct the same type and amount of training each year that was identified in the 2011 LOA. Similarly, the Navy expects to remain within the annual estimates analyzed in the final rule.

Summary of Monitoring, Reporting, and Other Requirements Under the 2011 LOA

Annual Exercise Reports

The Navy submitted their classified and unclassified 2011 exercise reports within the required timeframes and the unclassified report is posted on NMFS Web site: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. NMFS has reviewed both reports and they contain the information required by the 2011 LOA. The reports indicate the amounts of different types of training that occurred from August 2, 2010, through August 1, 2011. The Navy conducted eleven Major Training Exercises (MTEs)—one Sustainment Exercise (SUSTEX), three Integrated Anti-Submarine Warfare Courses (IAC II), five Composite Training Exercises (C2X), and two Joint Task Force Exercises (JTFEX)—for a total of 134 days.

The reports also list specific information gathered when marine mammals were detected by Navy watchstanders, such as how far an animal was from the vessel, whether sonar was in use, and whether it was powered or shut down. This information indicates that the Navy implemented the safety zone mitigation measures as required. No instances of obvious behavioral disturbance were reported by the Navy watchstanders in their 428 marine mammal sightings totaling 5,848 animals.

2010–2011 Monitoring

The Navy conducted the monitoring required by the 2011 LOA and described in the Monitoring Plan, which included aerial and vessel surveys of sonar and exercises by dedicated MMOs, passive acoustic monitoring utilizing high-frequency acoustic recording packages (HARPs), and marine mammal tagging and tracking. The Navy submitted their 2010–2011 Monitoring Report, which is posted on NMFS' Web site (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm*), within the required timeframe. The Navy included a summary of their 2010–2011 monitoring effort and results (beginning on page 341 of the monitoring report) and the specific reports for each individual effort are presented in the appendices. Because data is gathered through August 1 and the report is due in October, some of the data analysis will occur in the subsequent year's report. Navy-funded marine mammal monitoring accomplishments within SOCAL for the past year includes the following:

Visual Surveys

The Navy completed a total of 1,001 hours of compliance funded visual surveys, exceeding their 2011 commitment by over 800 hours. During this time, there were 1,225 sightings of more than 100,594 marine mammals and 30.1 hours of detailed behavioral focal follows were recorded. Results from a single aerial survey in May 2011, show that the most frequent initial behavioral state observed for dolphins and whales was resting. Sperm whales were seen for the first time since SOCAL aerial monitoring began in fall 2008. There was a Major Training Exercise (MTE) the same day of the sighting, but it was 30–50 nautical miles away and on the other side of San Clemente Island.

Marine Mammal Observations

The Navy completed 83 hours of marine mammal observer (MMO) effort out of a planned 50–100 hours. During the four-day training event with MMOs, 24 sightings were made of about 599 marine mammals. The frequency of sightings was much higher compared to other Navy range complexes and the MMOs provided input on how to account for the faster rate of sightings unique to Southern California. Of the 428 Navy marine mammal sightings during MTEs, there were 110 sightings within 1,000 yards that qualified as mitigation events. There were no reports of marine mammals behaving in any unusual manner during these events.

Passive Acoustic Monitoring

Two high-frequency acoustic recording packages (HARP) remained deployed at two sites during the 2010–2011 monitoring period. The devices detected at least 16 different marine mammal species during the monitoring period, including six baleen whale species, California sea lions, and nine odontocete species.

Tagging

A total of 14 satellite tags were deployed on seven different species of marine mammals. Highlights from the tagging results continued to show long-term movement of three out of five Cuvier's beaked whales, one of the first indications that Southern California beaked whales may engage in non-local, out of area movement. Movements of a fin whale showed that individuals spent much of their time in deep, offshore waters.

SOCAL–10

SOCAL–10 was a scientific research project conducted around important biological areas near southern California in fall 2010. The project was an extension of previous behavioral response studies in the Bahamas (2007–2008) and Mediterranean Sea (2009) and will be continued in southern California for a total of 5 years. The objective of the project is to provide a better understanding of marine mammal behavior, while providing direct scientific information for the Navy and regulatory agencies to estimate risk and minimize the effect of human sounds, particularly military sonar. Preliminary results based primarily on clearly observable behavior in the field and from initial data assessment indicate variable responses, depending on species, type of sound, and behavioral state during the experiments. Some observations in certain conditions suggest marine mammal avoidance responses, while in other cases animals seemed to not respond, at least overtly. Additional analysis and interpretation is underway of the nearly 400 hours of tag data from the project, as well as thousands of marine mammal observations, photographs, tissue samples, and acoustic measurements.

Conclusion

The Navy achieved all of its planned annual monitoring objectives during the 2010–2011 monitoring period. In conclusion, the Navy's implementation of the monitoring plan accomplished several goals, primarily through contributions to larger bodies of data intended to better characterize the abundance, distribution, life history, and behaviors of the species in the SOCAL Range Complex. The monitoring satisfied the objectives of the monitoring plan and contributed to a greater knowledge and understanding of the following: baseline marine mammal occurrence, density, and distribution of species within the SOCAL Range Complex, which will be added to a growing database of marine mammal aggregations around the world; vocalizations of different species, which contributes to the development of automated classification software;

movement patterns of individuals (both vertically in the water column on a daily basis, as well as horizontally over weeks and months); and observable behavioral patterns of marine mammals, both with and without exposure to Navy training activities.

Except as described below in the Adaptive Management section, NMFS concludes that the results of these monitoring efforts, when taken together with the findings presented in the 2010–2011 exercise report (see Annual Exercise Report section), do not warrant making changes to the current monitoring and mitigation requirements identified in the LOA. While the data collected by the Navy through monitoring and reporting builds on the existing body of information in a valuable way, none of the new data contradict, or amend, the assumptions that underlie the findings in the 2009 rule in a manner that would suggest that the mitigation or monitoring should change.

Adaptive Management

In general, adaptive management allows NMFS to consider new information and determine (with input from the Navy regarding practicability) if modifications to monitoring efforts are appropriate. All of the 5-year rules and LOAs issued to the Navy include an adaptive management component, which requires an annual meeting between NMFS and the Navy. NMFS and the Navy conducted an adaptive management meeting in October, 2011, which representatives from the Marine Mammal Commission participated in, wherein we reviewed the Navy monitoring results through August 1, 2011, discussed other Navy research and development efforts, and discussed other new information that could potentially inform decisions regarding Navy mitigation and monitoring. None of the information discussed led NMFS to recommend any modifications to the existing mitigation or monitoring measures.

Integrated Comprehensive Monitoring Report

Further, the Navy convened a monitoring meeting in June, 2011 to solicit input from NMFS, marine mammal and acoustic scientists, and interested members of the public regarding the comprehensive development and improvement of the more specific monitoring that should occur across the Navy's training areas. The Navy is currently working on a Navy-wide Strategic Plan for monitoring based on applicable input from the 2011 monitoring workshop and may propose appropriate changes to the monitoring measures in specific LOAs for the different Range Complexes and training areas. If substantive monitoring modifications are proposed for any areas, NMFS will subsequently publish proposed LOAs, with the modifications, in the **Federal Register** and solicit public input. After addressing public comments and making changes as appropriate, NMFS would, as appropriate, issue new LOAs for the different training areas that reflect the updated ICMP and associated new Strategic Plan for Navy monitoring.

Authorization

The Navy complied with the mitigation and monitoring requirements of the 2011 LOA. Although the Navy exceeded the average annual authorization for two sonar systems, they remain well within the 5-year rule for all source amounts. Similarly, although the Navy potentially exceeded the average annual take authorization for eight species, they still remain well within the 5-year rule amounts. NMFS has determined that the marine mammal take resulting from the 2011 military readiness training and research activities falls within the 5-year rule levels previously anticipated, analyzed, and authorized. Further, the level of taking authorized in 2012 and 2013 for the Navy's SOCAL Range Complex activities is consistent with our previous findings made for the total taking allowed under the SOCAL Range Complex regulations. Finally, the record supports NMFS' conclusion that the total number of marine mammals taken by the 2010–2011 monitoring period will have no more than a negligible impact on the affected species or stock of marine mammals and will not have an unmitigable adverse impact on the availability of these species or stocks for taking for subsistence uses. Accordingly, NMFS has issued a 2-year LOA for Navy training exercises conducted in the SOCAL Range Complex from February 8, 2012, through January 14, 2014.

Dated: February 1, 2012.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–2741 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA972

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Space Vehicle and Test Flight Activities from Vandenberg Air Force Base, CA

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of issuance of a Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notification is hereby given that a letter of authorization (LOA) has been issued to the 30th Space Wing, U.S. Air Force (USAF), to take four species of seals and sea lions incidental to rocket and missile launches on Vandenberg Air Force Base (VAFB), California, a military readiness activity.

DATES: Effective February 7, 2012, through February 6, 2013.

ADDRESSES: The LOA and supporting documentation are available for review by writing to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service (NMFS), 1315 East-West Highway, Silver Spring, MD 20910, by telephoning one of the contacts listed here (**FOR FURTHER INFORMATION CONTACT**) or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address and at the Southwest Regional Office, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 427–8401, or Monica DeAngelis, NMFS, (562) 980–3232.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS 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 regulations are

issued. The National Defense Authorization Act (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations for a ''military readiness activity.'' Under the MMPA, the term ''taking'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill marine mammals.

Authorization may be granted for periods up to 5 years if NMFS finds, after notification and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). In addition, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. The regulations must include requirements for monitoring and reporting of such taking.

Regulations governing the taking of Pacific harbor seals (*Phoca vitulina richardsi*), northern elephant seals (*Mirounga angustirostris*), California sea lions (*Zalophus californianus*), and northern fur seals (*Callorhinus ursinus*), by harassment, incidental to missile and rocket launches, aircraft flight test operations, and helicopter operations at VAFB, were issued on February 6, 2009 (74 FR 6236), and remain in effect until February 6, 2014. In April 2011, the USAF requested a deviation from the precise language contained in the 2009 final rule regarding the annual number of missile and rocket launches. On February 1, 2012 (77 FR 4917), NMFS issued final regulations that revised the number of missile and rocket launches that the USAF could conduct from VAFB on an annual basis. Instead of the 30 missile and 20 rocket launches authorized per year in 2009, the USAF's specified activity now includes 15 missile and 35 rocket launches per year. However, the total number of annual launches remains at 50. This regulatory amendment does not change the analyses of marine mammal impacts conducted in the original final rule. For detailed information on the USAF's activities and potential impacts, please refer to those documents. These regulations include mitigation, monitoring, and reporting requirements for the incidental take of marine mammals during missile and rocket launches at VAFB.

This LOA is effective from February 7, 2012, through February 6, 2013, and authorizes the incidental take, by Level B harassment only, of the four marine mammal species listed here that may result from the launching of up to 15 missiles and up to 35 rockets annually from VAFB, as well as from aircraft and helicopter operations. Harbor seals haul-out on several sites on VAFB, and harbor seals, California sea lions, elephant seals, and northern fur seals are found on various haul-out sites and rookeries on San Miguel Island (SMI). Currently, six space launch vehicle programs use VAFB to launch satellites into polar orbit: Delta II; Taurus; Atlas V; Delta IV; Falcon; and Minotaur. Also a variety of small missiles, several types of interceptor and target vehicles, and fixed-wing aircrafts are launched from VAFB.

The activities under these regulations create two types of noise: continuous (but short-duration) noise, due mostly to combustion effects of aircraft and launch vehicles, and impulsive noise, due to sonic boom effects. Launch operations are the major source of noise on the marine environment from VAFB. The operation of launch vehicle engines produces significant sound levels. The noise generated by VAFB activities may result in the incidental harassment of pinnipeds, both behaviorally and in terms of physiological (auditory) impacts. The noise and visual disturbances from space launch vehicle and missile launches and aircraft and helicopter operations may cause the animals to move towards or enter the water. Take of pinnipeds will be minimized through implementation of the following mitigation measures: (1) All aircraft and helicopter flight paths must maintain a minimum distance of 1,000 ft (305 m) from recognized seal haul-outs and rookeries; (2) missile and rocket launches must, whenever possible, not be conducted during the harbor seal pupping season of March through June; (3) VAFB must avoid, whenever possible, launches which are predicted to produce a sonic boom on the Northern Channel Islands during the primary pinniped pupping seasons of March through June; and (4) monitoring methods will be reviewed by NMFS if post-launch surveys determine that an injurious or lethal take of a marine mammal occurred. VAFB will also use monitoring surveys, audio-recording equipment, and time-lapse video to monitor the animals before, during, and after rocket launches, and to measure sound levels generated by the launches. Reports will be submitted to NMFS after each LOA expires, and a final comprehensive report, which will summarize all previous reports and assess cumulative impacts, will be submitted before the rule expires.

Summary of Request

On December 8, 2011, NMFS received a request for a LOA renewal pursuant to the aforementioned regulations that would authorize, for a period not to exceed 1 year, take of marine mammals, by harassment, incidental to space vehicle and test flight activities at VAFB. Summary of Activity and Monitoring Under the 2011 LOA

In compliance with the 2011 LOA, VAFB submitted an annual report on the activities at VAFB, covering the period of December 1, 2010, through November 30, 2011. In addition to launches that occurred between February 7 and November 30, 2011, the report also contained information on a December 15, 2010, missile launch and information on space vehicle launches on January 20, 2011, and February 6, 2011, that were covered under the 2010 LOA, as these launches were not described in any previous reports. A summary of the 2011 report (MMCG and SAIC, 2011) follows.

During the reporting period covered by the 2011 report, there were a total of 10 launches from VAFB: seven space vehicle launches and three missile launches. The dates, locations, and whether or not monitoring was required for the launches are summarized in Tables 1 and 2 next.

TABLE 1—SUMMARY OF SPACE VEHICLE LAUNCHES FROM VAFB IN 2011

Vehicle	Date (2011)	Launch site	Monitored
Delta IV Heavy NROL–49	20-Jan	SLC–6	Yes
Minotaur IV NROL–66	6-Feb	SLC–8	No
Taurus Glory F–01	4-Mar	LF 576E	Yes
Atlas V NROL–34	14-Apr	SLC–3E	Yes
Delta II Aquarius/SAC–D	10-Jun	SLC–2W	Yes
Minotaur HTV–2B DEMO	11-Aug	SLC–8	No

TABLE 1—SUMMARY OF SPACE VEHICLE LAUNCHES FROM VAFB IN 2011—Continued

Vehicle	Date (2011)	Launch site	Monitored
Delta II NPP	28-Oct	SLC–2W	Yes

TABLE 2—SUMMARY OF ALL OTHER LAUNCHES FROM VAFB IN 2010 AND 2011

Launch vehicle	Date	Launch site	Monitored
MDA	15-Dec–10	LF–23	No
Minuteman III GT–204GM	22-Jun–11	LF–10	Yes
Minuteman III GT–205GM	27-Jul–11	LF–04	No

Three of the space vehicle launches occurred during the harbor seal pupping season. Therefore, monitoring on VAFB was only required for these three of the seven total space vehicle launches. Additionally, acoustic modeling indicated that no sonic boom of greater than 1 lb/ft^2 (psf) would occur at SMI as a result of two of these launches; therefore, biological and acoustical monitoring was only required to be conducted for the Atlas V launch at SMI. Auditory Brainstem Response (ABR) testing and acoustical monitoring were required for the Delta IV Heavy launch.

None of the five missile launches required monitoring at SMI because the westerly trajectory of these launches. Similarly, two of the missile launches occurred outside of the VAFB harbor seal pupping season; therefore, no biological or acoustical monitoring was required or performed on VAFB for these two launches. Because the June 22, 2011, Minuteman III launch occurred during the harbor seal pupping season, monitoring was required on VAFB.

During the reporting period, approximately 1,694 fixed-wing aircraft and helicopter operations were conducted from the VAFB airfield. Most of these consisted of training exercises involving ''touch and goes''. Ten flights involved unmanned aerial vehicles. There were no observed impacts to pinnipeds from these activities.

Delta IV Heavy Launch (January 20, 2011)

Counts of harbor seals done between January 17 and 19, 2011, recorded from 0 to 142 seals of all age classes, with no dependent pups reported. Post-launch counts were lower than pre-launch counts and ranged from 0 to 55 animals. High tides and swells on the day following the launch may account for the lower numbers. In addition to the harbor seals, one male northern elephant seal was observed on the first day of monitoring.

Time-lapse video monitoring was conducted of this launch. Prior to the launch, the video showed the presence of 48 adult harbor seals at the Flat Iron Rock haul-out site. As the launch began, the seals raised their heads and started for the water. Within slightly more than one minute after the launch, all but two seals had entered the water. The last two had moved to within eight feet of the water. Within 50 minutes after the launch, 57 harbor seals had hauled out, a few at a time, in the same area (ManTech SRS, 2011a).

Acoustic measurements were required during this launch. Noise levels recorded were in a very similar frequency domain compared to noise levels from two Delta II launches in 2006. Most sound energy from the rocket launches was below 1 kHz with the highest levels below 100 Hz. Unweighted peak levels were 131.8 dB re 20 µPa (ManTech SRS, 2011a).

ABR testing was required for this launch as well. Three healthy juvenile harbor seals were captured near Pt. Conception 28 hours before the launch. ABR testing, as described in Section 4.3 of VAFB's annual report (MMCG and SAIC, 2011), was conducted the day before the launch and nearly three hours after the launch. After testing, the animals were tagged and released. The animals showed no change in hearing sensitivity as a result of the tests, although it is possible that a mild temporary hearing threshold shift, from which the seals had already recovered, could have occurred (ManTech SRS, 2011a).

In summary, based on post-launch analysis, there was no evidence of injury, mortality, or abnormal behavior in any of the monitored pinnipeds on VAFB as a result of this launch.

Taurus Glory Launch (March 4, 2011)

Pre-launch surveys conducted from February 20–23, 2011, recorded between 1 and 34 adult harbor seals and 1 to 5 juveniles. The launch was postponed on February 23, 2011, and pre-launch counts were again conducted from March 1–3, 2011. From 4 to 43 adults and 1 to 11 juveniles were seen. Once access to the site was gained a few hours after the launch, the count was from 3 to 44 adults and 1 to 9 juveniles. Post-launch counts on March 5 and 6 ranged from 1 to 24 adults and 1 to 9 juveniles. The follow-up count on March 18 totaled 1 to 17 adults and 1 to 2 juveniles. No pups were observed during any of the counts.

No northern elephant seals were observed. One juvenile California sea lion was observed offshore on March 5. Southern sea otters were noted nearshore on all monitoring days. On two occasions, coastal bottlenose dolphins were observed. Two gray whales were seen offshore on February 21, and a single gray whale was noted on March 1. In summary, there was no evidence of injury, mortality, or abnormal behavior in any of the monitored pinnipeds at VAFB as a result of the Taurus Glory launch.

Atlas V Launch (April 14, 2011)

During the pre-launch monitoring period at VAFB from April 12–14 from 128 to 138 adult harbor seals were noted. During this same period, from 11 to 19 juveniles were reported, along with between 35 to 39 pups. Post-launch monitoring was conducted from April 15–17. Total numbers of adults ranged from 137 to 183; juveniles from 33 to 59, and pups from 40 to 48, with a maximum total on any one day of 280. A follow-up count was made on April 28, in which 214 adults were reported, along with 29 juveniles and 46 pups, for a maximum total of 289 animals. One gray whale was seen on April 17 (MMCG and SAIC, 2011).

Northern elephant seals congregated in a small cove within Cuyler Harbor, on San Miguel Island. Pre-launch counts conducted from April 11–13 ranged from 81 to 259 adults and 112 to 212 ''weaners'' (newly weaned pups). Counts on launch day ranged from 220 to 239 adults and 200 to 219 weaners. Post-launch counts, performed on April 15 and 16, ranged from 240 to 273

adults and from 208 to 288 weaners (MMCG and SAIC, 2011).

Harbor seals were noted in the nearshore waters on two separate days. Numbers varied from one to four. From one to two California sea lions were also seen in the nearshore waters on April 13 and 16. A juvenile gray whale, likely the same animal, was seen between Prince Island and Cuyler Harbor on April 14 and 15 (MMCG and SAIC, 2011b).

Acoustic monitoring was also conducted for this launch. The unweighted peak was 109.4 dB re 20 µPa at 2.66 Hz. The frequency spectrum of the acoustic energy was predominantly low frequency, with unweighted peak levels exceeding 80 dB re 20 µPa below 500 Hz. The highest energy was below 100 Hz.

In summary, there was no evidence of injury, mortality, or abnormal behavior of the monitored pinnipeds on VAFB or SMI as a result of this launch.

Delta II Launch (June 10, 2011)

During the pre-launch monitoring period, from June 6–9, counts of harbor seals, near the Spur Road trailhead on VAFB, ranged from zero to six, including one pup on June 8. No seals were seen on launch day, on the post-launch survey days (June 11–12), and during the follow-up survey on June 17. Tides were relatively high during the period June 10–12, submerging the most desirable haul-out sites. Although a remote video camera was set up near the Spur Road trailhead for this launch, no seals were recorded before, during, or after the launch. In summary, there was no evidence of injury, mortality, or abnormal behavior of the monitored pinnipeds on VAFB as a result of this launch.

Minuteman III Launch (June 22, 2011)

Because this launch occurred during the harbor seal pupping season on VAFB, biological monitoring at VAFB was required. Pre-launch monitoring was conducted on June 18, 20, and 21, 2011. Between three and seven adult harbor seals were noted. From three to seven animals were noted about two hours after the launch on June 22. A post-launch count, conducted on June 23, revealed from eight to nine animals. A follow-up survey, in which two to four animals were noted, was made on July 7. No harbor seal pups were seen. In summary, there was no evidence of injury, mortality, or abnormal behavior of the monitored pinnipeds on VAFB as a result of this launch.

Delta II Launch (October 28, 2011)

Biological monitoring for this launch was required at SMI, since the sonic boom models predicted overpressures in excess of 1 psf there. Monitoring was conducted at a section of east Adam's Cove. California sea lions, northern elephant seals and northern fur seals were present. Numbers of California sea lions ranged from 211 to 1,105 animals. These numbers rose on the day of the launch and during the two days afterwards. Numbers of northern fur seals declined slightly during the same period, probably displaced by the sea lions. Their numbers ranged from 73 to 315. Elephant seal numbers ranged from 56 to 127.

No reactions were noted on the part of the sea lions and elephant seals, either from the launch, which was plainly visible during the predawn hours, or from the sonic boom, which was heard at 0253 hours. Six adult fur seals raised their heads in response to the sonic boom, but settled back down after 2–4 minutes. In summary, there was no evidence of injury, mortality, or abnormal behavior in any monitored seals resulting from this launch.

Authorization

The USAF complied with the requirements of the 2011 LOA, and NMFS has determined that the marine mammal take resulting from the 2011 launches is within that analyzed in and anticipated by the associated regulations. Accordingly, NMFS has issued a LOA to the 30th Space Wing, USAF, authorizing the take by harassment of marine mammals incidental to space vehicle and test flight activities at VAFB. Issuance of this LOA is based on findings described in the preamble to the final rule (74 FR 6236, February 6, 2009) and supported by information contained in VAFB's 2011 annual report that the activities described under this LOA will have a negligible impact on marine mammal stocks. The provision requiring that the activity not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses does not apply for this action.

Dated: February 1, 2012.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–2747 Filed 2–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2012–OS–0011]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics/Defense Standardization Program Office, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics announces a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 8, 2012

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collections instruments, please write to the Defense Standardization Program Office, Defense

Logistics Agency, 8725 John J. Kingman Road, STOP 5100, ATTN: Mr. Tim Koczanski, Fort Belvoir, VA 22060, or call the Defense Standardization Program Office at (703) 767–6870.

Title; Associated Form; and OMB Number: Certification of Qualified Products; DD Form 1718, OMB Control Number 0704–TBD.

Needs and Uses: The information collection requirement is necessary to obtain, certify and record qualification of products or processes falling under the DoD Qualification Program. This form is included as an exhibit in an appeal or hearing case file as evidence of the reviewer's products or process qualifications in advance of, and independent of an acquisition.

Affected Public: Business or other for profit.

Annual Burden Hours: 638.

Number of Respondents: 1276.

Responses per Respondent: 1.

Average Burden per Response: 0.30 minutes.

Frequency: Biennially .

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Respondents are individuals who supply products to the Department of Defense that are listed on Qualified Products Lists (QPLs) or Qualified Manufacturers Lists (QMLs). DD Form 1718, ''Certification of Qualified Products'' records and certifies, from the manufacturers, distributor, or reseller that the products still conforms to the specification. If the form is not included in the contract file, individuals procuring these items cannot be assured that the products conform to the specification and therefore are qualified products from qualified sources. The use of the DD Form 1718 is essential in maintaining the integrity of the qualification program.

Dated: January 20, 2012.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–2724 Filed 2–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2011–OS–0139]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995*, the Office of the Under Secretary of Defense for Personnel and Readiness announces a public information collection and seeks public comment on the provisions thereof related to immediately begin, prospectively, adding a deliverable reporting requirement to contract statements of work in order to fully comply with sections 235 and 2330a of title 10, United States Code. There is precedent within the Department based on the experience of the Department of the Army for the past five years to support statements made in the attachment. As such, Department of the Army efforts constitute actions to date to consult with interested agencies, affected private sector firms, and members of the public, to ensure minimal burden for the collection of this information. Comments are invited on: (a) The accuracy of the agency's estimate of the burden of the proposed information collection; (b) ways to enhance the quality, utility, and clarity of the information to be collected; and (c) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 23, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Under Secretary of Defense for Personnel and Readiness, ATTN: Amy Parker, 4000 Defense Pentagon, Washington, DC 20301 or call OUSD(P&R) at (703) 614–5133.

Title; Associated Form; and OMB Number: Department of Defense Inventory of Contracts for Services Compliance; OMB Number 0704–TBD.

Needs and Uses: The collection of information is essential to the DoD mission, without this reporting DoD will be unable to fully comply with the statutory requirements specified below. The Department has received clear guidance from the Armed Services Committees that all DoD organizations fully implement sections 235 and 2330a of title 10, United States Code (U.S.C.).

Affected Public: Business or other for profit; Not-for-profit institutions.

Annual Burden Hours: 4,074.

Number of Respondents: 48,884.

Responses per Respondent: 1.

Average Burden per Response: 5 minutes.

Frequency: Annually.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The DoD will use a streamlined, user-friendly, and secure Web site to obtain contractor work force information, based on the Army system located at *https://cmra.DoD.mil/.* This Web site allows contractors the option of entering their data directly into the Web site via short drop-down menus or batch loading data based on formatted spreadsheets.

The information requested, such as the Reporting Period, Contract Number, Task/Delivery Order Number, Customer Name and Address, Contracting Office Name and Address, Federal Supply Class or Service Code, Contractor Name and Address, Value of Contract Instrument, and the Number and Value of Direct Labor Hours will be used to facilitate the accurate identification of the function performed and to facilitate estimate the reliability of the data.

The Direct Labor Hours are requested for use in calculating contractor manpower equivalents. This information is reported directly from the contractor because this is the most credible data source.

Each contractor may determine their cost for submitting information on the Contractor Manpower Reporting System Web site. Given the streamlined menu of data requested and the user-friendly Web site for submitting the data, the actual costs for reporting this information to date have been minimal. The cost elements can include the man-hours spent entering the data, man-hours spent configuring current systems, and the man-hours spent collecting the data. The Army has found that during the first five years of

reporting, most contractors are choosing to absorb the cost of reporting into overhead rather than separately identifying the direct cost.

The contractor name, address, and point of contact with an email address are requested to facilitate reconciliation of the data and clarification of any ambiguous entries with the contractor. The Army has instituted several program enhancements that will enable DoD to further minimize the reporting burden for all parties. For instance, contract funding information can be pre-populated from defense accounting system data and edited, if necessary with a series of easy-to-use drop down menus of standard accounting data elements. In the previous data collection effort, contractors were expected to know Department funding source data. Another enhancement to the data collection effort is the drop down menus for the identification of the DoD organizational customer supported. In this regard, rather than have the contractor go into the system and presume whom they are proving support services to, the system is now designed with drop down menus that start from the top level. The DoD system will be pre-populated with information on the ''organization supported'' to minimize reporting confusion.

Dated: January 23, 2012.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–2727 Filed 2–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2011–OS–0015]

Proposed Collection; Comment Request

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Service announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 9, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to ATTN: DFAS–HGA/CL, Scott Lafferty, Acting Assistant General Counsel for Garnishment Operations, Defense Finance and Accounting Service—Cleveland, P.O. Box 998002, Cleveland, OH 44199–8002; or call Mr. Scott Lafferty at (216) 522–5118.

Title, Associated Form, and OMB Number: Application for Former Spouse Payments From Retired Pay, DD Form 2293; OMB Control Number 0730–0008.

Needs and Uses: Under 10 U.S.C. 1408, state courts may divide military retired pay as property or order alimony and child support payment from that retired pay. The former spouse may apply to the Defense Finance and Accounting Service (DFAS) for direct payment of these monies by using DD Form 2293. This information collection is needed to provide DFAS the basic data needed to process the request.

Affected Public: Individuals and households.

Annual Burden Hours: 7282 hours.

Number of Respondents: 29,127.

Responses per Respondent: 1.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The respondents of this information collection are spouses or former spouses of military members. The applicant submits a DD Form 2293 to the Defense Finance and Accounting Service (DFAS). The information from the DD Form 2293 is used by DFAS in processing the applicant's request as authorized by 10 U.S.C. 1408. The DD Form 2293 was devised to standardize applications for payment under the Act. Information on the form is also used to determine the applicant's current status and contains statutorily required certifications the applicant/former spouse must make when applying for payments.

Dated: January 23, 2012.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–2728 Filed 2–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2012–OS–0012]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995*, the Office of the USD(P&R) announces an extension of a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 9, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to DoD Sexual Assault Prevention and Response Office (SAPRO), 1401 Wilson Boulevard, Suite 402, Arlington, VA 22209, ATTN: Ms. Darlene Sullivan, (703) 696–8695.

Title; Associated Form; and OMB Number: Defense Sexual Assault Incident Database (DSAID); OMB Control Number 0704–0482.

Needs and Uses: Section 563 of Public Law (Pub. L.) 110–417, the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 mandated the implementation of a centralized, case-level database for the collection, in a manner consistent with DoD regulations for Unrestricted and Restricted Reporting, and maintenance of information regarding sexual assaults involving a member of the Armed Forces, including information, if available, about the nature of the assault, the victim, the offender, and case outcomes in connection with the assault.

DSAID will include the capability for entering records and interfacing data; generating predefined and ad hoc reports; and conducting case and business management. Specifically, the system will be a warehouse of sexual assault case information; have the ability to run queries and reports; provide the Sexual Assault Response Coordinator (SARC) with the capability to interface and manage case-level data; include victim, subject, and case outcomes in connection with the assault; allow for Sexual Assault Prevention and Response (SAPR) Program Administration and Management; and include additional business management functionalities.

Affected Public: Federal Government; Individuals or Households; Business or Other For-Profit; Not-For-Profit Institutions; Farms; State, Local or Tribal Government.

Annual Burden Hours: 3200 hours.

Number of Respondents: 3200.

Responses per Respondent: 1.

Average Burden per Response: 1 hour.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The system will collect data regarding incidence of sexual assaults involving persons required by Section 577(f) of Public Law 108–375, NDAA for FY05; Section 596(c) of Public Law 109–163, the NDAA for FY06; Section 583 of Public Law 109–364, the NDAA for FY07; Sections 561 and 562 of Public Law 111–84, the NDAA for FY10; and Section 1631 of Public Law 111–383, NDAA for FY11. Those individuals are as follows: Active duty Service members; National Guard members on Title 10, United States Code (U.S.C.); National Guard members on Title 32, U.S.C.; Service members who are on active duty but were victims of sexual assault prior to enlistment or commissioning; Active duty Reserve members; military dependents age 18 and older; DoD Civilians and their family dependents 18 years of age and older; DoD Contractors; other government civilians; U.S. Civilians; and foreign military members.

At the Military Service level, SARCs and SAPR Victim Advocates (VA) work with victims to ensure that they are aware of services available and have contact with medical treatment personnel and DoD law enforcement entities. At the DoD level, only de-identified information is used to respond to mandated reporting requirements.

Dated: January 19, 2012.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–2725 Filed 2–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2012–0002]

Proposed Collection; Comment Request

AGENCY: Edgewood Chemical Biological Center, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Edgewood Chemical Biological Center announces a new public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Submit comments on or before April 9, 2012.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please email at *Peter.a.emanuel.civ@mail.mil* with subject heading ''First Responder Survey Collection'', or call Dr. Peter Emanuel at (410) 436–5562.

Title And OMB Number: Edgewood Chemical Biological Center First Responder Survey; OMB Control Number: 0702–TBD.

Needs and Uses: US Army Edgewood Chemical Biological Center (ECBC) will conduct a survey of responder capabilities, detection technologies, and training in support of the Department of Homeland Security (DHS). The effort will use Web site survey tools to collect data about technologies being employed

in the field, and provide information to DHS in order to understand capabilities and perceptions related to CBRN defense. ECBC will also collect data through similar web-based methodologies on commercial hardware systems that detect chemical, biological, and radiological which have applicability in assessing human exposure to pathogens, toxic chemical and radiological agents. The surveillance of hardware systems has been tasked by The Joint Program Executive Office for Chemical and Biological Defense and the Defense Threat Reduction Agency.

Affected Public: Volunteer and professional fire stations, paramedics services, law enforcement officers.

Annual Burden Hours: 291.

Number of Respondents: 700.

Responses per Respondent: 1.

Average Burden per Response: 25 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Continuation of CBRN Surveillance Hardware Systems

ECBC will collect data on CBRN surveillance systems in support of the Joint Program Executive Office for Chemical and Biological Defense and the Defense Threat Reduction Agency. In parallel ECBC will also collect data on responder preparedness related to CBRN defense in support of the Department of Homeland Security. The methodologies used in both web-based surveys have been replicated from highly successful CBRN market surveys conducted since 2003. In those previous efforts commercially available products were evaluated through an online collection tool. In executing these efforts a survey questionnaire is distributed online via *http://www.SurveyMonkey.com* to the targeted community. ECBC maintains an up-to-date contact list from past participation and also works in collaboration with trade groups or professional organizations who share interest and help facilitate distribution of the message. ECBC's subject matter experts have created a small set of targeted questions to be answered by the participants. The information collected will be analyzed using a weighted system and the resulting data is consolidated into a report for the directing organization. In the case of the surveillance hardware surveys the final product was a helpful consolidated guide of all commercially available detection systems which provide a way to compare surveillance and detection equipment and make informed purchasing decisions. Due to rapid changes and inventions in technology, the market survey must be updated to ensure accuracy in the information obtained. Previous published editions include the 2003 Market Research Survey, 2005 Market Research Survey, Market Survey: Biological Detection 2007 Edition, and the 2011 Chemical, Biological, Radiological Technology Survey.

First Responder Survey

ECBC will collect data on responder preparedness related to CBRN defense in support of the Department of Homeland Security. The methodologies shall be a web-based survey distributed online via *http://www.SurveyMonkey.com* to the targeted community. ECBC maintains an up-to-date contact list from past participation and also works in collaboration with trade groups or professional organizations who share interest and help facilitate distribution of the message. ECBC's subject matter experts have created a small set of targeted questions to be answered by the participants. The information collected will be analyzed using a weighted system and the resulting data is consolidated into a report for the directing organization.

Contact First Responders

ECBC will work with DHS, professional trade groups, and the Responder Knowledge Base (*https://www.rkb.us/*) to identify a representative group of first responders to survey. ECBC will provide to these first responders a detailed letter describing the effort and the process for providing information. The survey questionnaire shall be developed using *http://www.SurveyMonkey.com,* the world's leading provider of web-based survey solutions, and shall be hosted at the Web site *http://www.ResponderHorizonScan.com.* This will allow ECBC to electronically capture information for a large number of first responders and quickly organize and download the information for analysis.

Collect and Analyze Data

The data collected by ECBC will be analyzed by a team of subject matter experts in detection and decision analysis. Decision analysis experts will create a system by which to subjectively analyze the information gathered from the first responder community. This system will allow flexibility in the analysis increasing the power of the survey. The field analysis will provide to DHS valuable insight into the tools being used in the field.

Create and Deliver Final Report and/or Publication

ECBC will provide to DHS a final report consisting of the full and final raw data collected via *www.ResponderHorizonScan.com* and a written report detailing the analysis performed and the results of the analysis. In addition, ECBC will provide to DHS a presentation for conferences and meetings that highlights the survey results.

Dated: January 23, 2012.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–2726 Filed 2–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulation System

[Docket No. DARS–2011–0069–0002]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Defense Acquisition Regulations System has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by March 8, 2012.

Title, Associated Forms and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 243, Contract Modifications, and the related clause at DFARS 252.243–7002; OMB Control Number 0704–0397.

Type of Request: Extension.

Number of Respondents: 440.

Responses per Respondent: 1.

Annual Responses: 440.

Average Burden per Response: Approximately 4.8 hours.

Annual Burden Hours: 2,120.

Needs and Uses: The information collection required by the clause at DFARS 252.243–7002, Requests for Equitable Adjustment, implements 10 U.S.C. 2410(a). DoD contracting officers and auditors use this information to evaluate contractor requests for equitable adjustment to contract terms.

Affected Public: Businesses or other for-profit and not-for- profit institutions.

Frequency: On occasion.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Intructions: All submissions received must include the agency name, docket number, and title for the **Federal Register** document. The general policy for comments and other public submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information provided. To confirm receipt of your comment(s), please check *http://www.regulations.gov* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2012–2811 Filed 2–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket No. DARS–2011–0078–0002]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Defense Acquisition Regulations System has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by March 9, 2012.

Title, Associated Forms and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 204, Administrative Matters: U.S.-International Atomic Energy Agency Additional Protocol; and related clause at DFARS 252.204–7010, Requirement for Contractor to Notify DoD if the Contractor's Activities are Subject to Reporting Under the U.S.-International Atomic Energy Agency Additional Protocol; OMB Control Number 0704–0454.

Type of Request: Extension.

Number of Respondents: 300.

Responses per Respondent: 1.

Annual Responses: 300.

Average Burden per Response: 1 hour.

Annual Burden Hours: 300.

Frequency: On occasion.

Needs and Uses: This requirement is necessary to provide for protection of information or activities with national security significance. As such, this information collection requires contractors to comply with the notification process at DFARS clause 252.204–7010, Requirement for Contractor to Notify DoD if the Contractor's Activities are Subject to Reporting Under the U.S.-International Atomic Energy Agency Additional Protocol.

Under the U.S.-International Atomic Energy Agency (IAEA) Additional Protocol, the United States is required to declare a wide range of public and private nuclear-related activities to the IAEA and potentially provide access to IAEA inspectors for verification purposes. The U.S.-IAEA Additional Protocol permits the United States unilaterally to declare exclusions from inspection requirements for activities with direct national security significance.

The clause at 252.204–7010 is included in contracts for research and development or major defense acquisition programs involving fissionable materials (*e.g.,* uranium, plutonium, neptunium, thorium, americium); other radiological source materials; or technologies directly related to nuclear power production, including nuclear or radiological waste materials.

The clause requires a contractor to provide written notification to the applicable DoD program manager and a copy of the notification to the contracting officer, if the contractor is required to report its activities under the U.S.-IAEA Additional Protocol. Upon such notification, DoD will determine if access may be granted to IAEA inspectors, or if a national security exclusion should be applied.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or maintain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number, and title for the **Federal Register** document. The general policy for comments and other public submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information provided. To confirm receipt of your comment(s), please check *http://www.regulations.gov* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2012–2813 Filed 2–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulation System

[Docket No. DARS–2011–0072; Sequence 02]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Defense Acquisition Regulations System has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by March 8, 2012.

Title, Associated Forms and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) part 245, Government Property; DD Form 1149, Requisition and Invoice/Shipping Document; DD Form 1348–1A, DoD Single Line item Release/Receipt Document; DD Form 1637, Notice of Acceptance of Inventory Schedules; DD Form 1639, Scrap Warranty; DD Form 1640, Request for Plant Clearance; DD Form 1641, Disposal Determination/ Approval; and DD Form 1822, End Use Certificate; OMB Control Number 0704–0246.

Type of Request: Extension.

Number of Respondents: 10,625.

Responses per Respondent: 1.95.

Annual Responses: 20,765.

Average Burden per Response: Approximately 0.87 hours.

Annual Burden Hours: 18,135.

Needs and Uses: DoD needs this information to account for Government property in the possession of contractors. Property administrators, contracting officers, and contractors use this information to maintain property records and material inspection, shipping, and receiving reports.

Affected Public: Businesses or other for-profit and not-for- profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or maintain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Intructions: All submissions received must include the agency name, docket number, and title for the **Federal Register** document. The general policy for comments and other public submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information provided. To confirm receipt of your comment(s), please check *http://www.regulations.gov* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/ Information Management Division, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2012–2740 Filed 2–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Acting Director, FOIA Service Center, Privacy, Information and Records Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before March 8, 2012.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or emailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: February 1, 2012.

James Hyler,

Acting Director, FOIA Service Center, Privacy, Information and Records Management Services, Office of Management.

Federal Student Aid

Type of Review: Extension.

Title of Collection: Teacher Education Assistance for College and Higher Education (TEACH) Grant Eligibility Regulations.

OMB Control Number: 1845–0084.

Agency Form Number(s): N/A.

Total Estimated Number of Annual Responses: 233,276.

Total Estimated Annual Burden Hours: 33,568.

Abstract: The TEACH Grant program regulations are required to ensure accountability of the program participants, both institutions and student recipients, for proper program administration, to determine eligibility to receive program benefits and to prevent fraud and abuse of program funds. The regulations include both recordkeeping and reporting requirements. The reporting is made to the Department of when the institution applies to participate in the TEACH Grant program. The recordkeeping is held at the institution to document compliance with regulation.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4752. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to (202) 401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information

Relay Service (FIRS) at 1 (800) 877–8339.

[FR Doc. 2012–2647 Filed 2–6–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Indian Education—Professional Development Grants Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information:

Indian Education—Professional Development Grants Program Notice inviting applications for new awards for fiscal year (FY) 2012.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.299B.

DATES:

Applications Available: February 7, 2012.

Deadline for Transmittal of Applications: March 8, 2012.

Deadline for Intergovernmental Review: May 7, 2012.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of the Indian Education Professional Development Grants program are to (1) increase the number of qualified Indian individuals in professions that serve Indians; (2) provide training to qualified Indian individuals to become teachers, administrators, teacher aides, social workers, and ancillary educational personnel; and (3) improve the skills of qualified Indian individuals who serve in the education field. Activities may include, but are not limited to, continuing education programs, symposia, workshops, conferences, and direct financial support.

Priorities: This competition contains three absolute priorities and two competitive preference priorities.

Background: On November 5, 2009, President Obama signed a memorandum requiring Federal agencies to conduct consultations with tribal officials when developing policies that have implications for tribal communities. In response to the President's memorandum, the U.S. Department of Education (Department) conducted six consultations with tribal officials during FY 2010. During these consultations, the Department received numerous comments regarding teacher recruitment and retention. Specifically, these comments described difficulties that local educational agencies (LEAs) located on or near tribally controlled lands—which typically operate high-need schools—face in attracting and retaining highly qualified teachers due to their remote location and other factors. The Indian Education Professional Development Grants program can help address these difficulties.

For FY 2012 the Secretary adds a new absolute priority, *Enabling More Data-Based Decision-Making.* This priority will support projects that provide the data that grantees need, and the capacity and training to use those data to inform professional development practices and approaches and to make informed decisions that increase program effectiveness. For questions and assistance about this priority, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice.

Absolute Priorities: The absolute priorities are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637), and, in accordance with 34 CFR 75.105(b)(2)(ii), from the regulations for this program (34 CFR 263.5(c)). For FY 2012 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet absolute priority 1 and one or both of absolute priorities 2 and 3.

These priorities are:

Absolute Priority 1: Enabling More Data-Based Decision-Making

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in the following priority area:

Improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success.

Absolute Priority 2: Pre-Service Training for Teachers

Projects that provide support and training to Indian individuals to complete a pre-service education program that enables these individuals to meet the requirements for full State certification or licensure as a teacher through—

(i)(A) Training that leads to a bachelor's degree in education before the end of the award period; or

(B) For States allowing a degree in a specific subject area, training that leads to a bachelor's degree in the subject area as long as the training meets the requirements for full State teacher certification or licensure; or

(C) Training in a current or new specialized teaching assignment that requires at least a bachelor's degree and in which a documented teacher shortage exists; and

(ii) One-year induction services after graduation, certification, or licensure, provided during the award period to graduates of the pre-service program while they are completing their first year of work in schools with significant Indian populations.

Note: In working with various institutions of higher education and reviewing State certification and licensure requirements, we have found that States allowing a candidate for teacher certification to obtain a degree in a specific subject area (e.g., in a specialty area or in teaching at the secondary level) generally require a master's degree or fifth year of study before an individual can be certified or licensed as a teacher. These students would be eligible to participate so long as their training meets the requirements for full State certification or licensure as a teacher.

Absolute Priority 3: Pre-Service Administrator Training

A project that provides—

(1) Support and training to Indian individuals to complete a master's degree in education administration that is provided before the end of the award period and that allows participants to meet the requirements for State certification or licensure as an education administrator; and

(2) One year of induction services, during the award period, to participants after graduation, certification, or licensure, while they are completing their first year of work as administrators in schools with significant Indian student populations.

Competitive Preference Priorities: In accordance with 34 CFR 75.105(b)(2)(ii) and (iv), the competitive preference priorities are from the regulations for this program (34 CFR 263.5(a) and (b)). For FY 2012 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 10 points to an application, depending on how well the application meets one or both of these priorities.

These priorities are:

Competitive Preference Priority One (5 points)

We award five competitive preference points to an application submitted by an Indian tribe, Indian organization, or Indian institution of higher education that is eligible to participate in the Indian Education Professional Development program. A consortium application of eligible entities that meets the requirements of 34 CFR 75.127 through 75.129 of the Education Department General Administrative Regulations (EDGAR) and includes an Indian tribe, Indian organization, or Indian institution of higher education will be considered eligible to receive the five priority points. The consortium agreement, signed by all parties, must be submitted with the application in order to be considered as a consortium application.

Competitive Preference Priority Two (5 points)

We award five competitive preference points to an application submitted by a consortium of eligible applicants that includes a tribal college or university and that designates that tribal college or university as the fiscal agent for the application. The consortium application of eligible entities must meet the requirements of 34 CFR 75.127 through 75.129 of EDGAR to be considered eligible to receive the five priority points. These competitive preference points are in addition to the five competitive preference points that may be given under Competitive Preference Priority One. The consortium agreement, signed by all parties, must be submitted with the application in order to be considered as a consortium application.

Definitions: The following definition is from the notice of supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637), and applies to this competition. Additional definitions applicable to this program are found in the authorizing statute for this program at 20 U.S.C. 7442 and 7491, and in applicable regulations in 34 CFR parts 77 and 263, and will be included in the application package.

Privacy requirements means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State and local requirements regarding privacy.

Program Authority: 20 U.S.C. 7442.

Applicable Regulations: (a) EDGAR in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98 and 99. (b) The regulations for this program in 34 CFR part 263. (c) The supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $4,047,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2013 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $300,000–$400,000.

Estimated Average Size of Awards: $340,000.

Maximum Award: We will reject any application that proposes a budget exceeding $400,000 for the first, second, or third 12-month budget period. The last 12-month budget period of a 48-month award will be limited to induction services only, at a cost not to exceed $90,000. The Assistant Secretary for Elementary and Secondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 12.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* Eligible applicants for this program are institutions of higher education, including Indian institutions of higher education; State educational agencies (SEAs) or LEAs in consortium with an institution of higher education; Indian tribes or organizations in consortium with an institution of higher education; and Department of the Interior/Bureau of Indian Education-funded schools in consortium with an institution of higher education. LEAs include charter schools that are considered LEAs under State law.

An application from a consortium of eligible entities must meet the requirements of 34 CFR 75.127 through 75.129. An application from a consortium of eligible entities must include a consortium agreement, signed by all parties, with the application. Letters of support do not meet the requirement for a consortium agreement.

In order to be considered an eligible entity, applicants, including institutions of higher education, must be eligible to provide the level and type of degree proposed in the application or must apply in a consortium with an institution of higher education that is eligible to grant the target degree.

Applicants applying in consortium with or as an Indian organization must demonstrate that they meet the definition of ''Indian organization'' in 34 CFR 263.3.

The term ''Indian institution of higher education'' means an accredited college or university within the United States cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note), any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*), and Dine College (formerly Navajo Community College), authorized in the Navajo Community College Assistance Act of 1978 (25 U.S.C. 640a *et seq.*).

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other:* Projects funded under this competition are encouraged to budget for a two-day Project Directors' meeting in Washington, DC during each year of the project period. In addition, the Department strongly encourages grantees to begin to provide training by January 2013.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantapps/index.html*. To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–(877) 433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–(877) 576–7734.

You can contact ED Pubs at its Web site, also: *www.ed.gov/pubs/edpubs.html* or at its email address: *edpubs@inet.ed.gov*

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.299B.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. The suggested page limit for the application narrative is no more than 35 pages, using the following standards:

- A page is 8.5'' x 11'', on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The suggested page limit does not apply to the cover sheet; the budget section, including the budget narrative justification; the assurances and certifications; or the abstract, table of contents, the resumes, the bibliography, letters of support, or the signed consortium agreement if applicable.

3. *Submission Dates and Times:* Applications Available: February 7, 2012.

Deadline for Transmittal of Applications: March 8, 2012.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: May 7, 2012.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We specify allowable costs in 34 CFR 263.4, a project funded under this program may include, as training costs, assistance to either fully finance a student's educational expenses or supplement other financial aid for meeting a student's educational expenses. For the payment of stipends to project participants receiving training, the Secretary expects to set the stipend maximum at $1,800 per month for full-time students and provide for a $300 allowance per month per dependent during an academic term. The terms ''stipend,'' ''full-time student,'' and ''dependent allowance'' are defined in 34 CFR 263.3. Stipends may be paid only to full-time students.

We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *http://www.grants.gov/applicants/get_registered.jsp*.

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Indian Education—Professional Development program, CFDA Number 84.299B, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Indian Education—Professional Development program at *www.Grants.gov*. You must search for the downloadable application package

for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.299, not 84.299B).

Please note the following:

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted, and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov*.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information form SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) read-only, non-modifiable format. If you upload a file type other than a read-only, non-modifiable .PDF or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system;

and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Lana Shaughnessy, U.S. Department of Education, 400 Maryland Avenue SW., room number 3E231, Washington, DC 20202. FAX: (202) 260–7779.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.299B, LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.299B) 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 263.6 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR 170 should you receive funding under this competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) During the entire performance period of the grant, the grantee must submit a Semi-Annual Participant Report (SAPR), OMB Control No. 1810–069. The SAPR includes budget expenditures, data on project performance measures, and information about participants and their status in the program.

4. *Performance Measures:* The Secretary has established the following key performance measures to evaluate the overall effectiveness of the Indian Education Professional Development program: (1) The percentage of participants in administrator preparation projects who become principals, vice principals, or other school administrators in LEAs that enroll five percent or more American Indian and Alaska Native students; (2) The percentage of participants in teacher preparation projects who become teachers in LEAs that enroll five percent or more American Indian and Alaska Native students; (3) The percentage of program participants who meet the definition of ''Highly Qualified'' in section 9101(23) of the ESEA; (4) The percentage of program participants who complete their service requirement on schedule; (5) The cost per individual who successfully completes an administrator preparation program, takes a position in a school district with at least five percent American Indian/Alaska Native enrollment, and completes the service requirement in such a district; and (6) The cost per individual who successfully completes a teacher preparation program, takes a position in such a school district with at least five percent American Indian/Alaska Native enrollment, and completes the service requirement in such a district.

We encourage applicants to demonstrate a strong capacity to provide reliable data on these measures in their responses to the selection criteria ''Quality of project services'' and ''Quality of the project evaluation.''

All grantees will be expected to submit, as part of their performance report, information with respect to these performance measures.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Lana Shaughnessy, U.S. Department of Education, 400 Maryland Avenue SW., room 3E231, Washington, DC 20202–6335. Telephone: (202) 205–2528 *mail to:* or by email: *Lana.Shaughnessy@ed.gov*.

If you use a TDD, you may call the Federal Relay Service, the (FRS), toll free, at 1– (800) 877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., Braille, large print, audiotape, or compact disc) on request to the program contact person listed under **For Further Information Contact** in section VII in this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: February 2, 2012.

Michael Yudin,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2012–2768 Filed 2–6–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP12–348–000
Applicants: Dauphin Island Gathering Partners
Description: Negotiated Rates 2012–01–31 to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5081
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–349–000
Applicants: Gas Transmission Northwest LLC
Description: Gas Transmission Northwest LLC Medford Lateral Annual Report on Deferred Revenue Recovery Mechanism and Revenue Reconciliation.
Filed Date: 1/31/12
Accession Number: 20120131–5105
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–350–000
Applicants: Trailblazer Pipeline Company LLC
Description: MIECO Negotiated Rate to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5122
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–351–000
Applicants: Kinder Morgan Louisiana Pipeline LLC
Description: Kinder Morgan Louisiana Pipeline LLC Penalty Revenue Crediting Report.
Filed Date: 1/31/12
Accession Number: 20120131–5125
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–352–000
Applicants: Trailblazer Pipeline Company LLC
Description: Concord Negotiated Rate to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5146
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–353–000
Applicants: Gulf South Pipeline Company, LP
Description: HK 37731 to Texla 39522 Capacity Release Negotiated Rate Agreement Filing to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5165
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–354–000
Applicants: Gulf South Pipeline Company, LP
Description: HK 37731 to Sequent 39523 Capacity Release Negotiated Rate Agreement Filing to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5166
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–355–000
Applicants: Trailblazer Pipeline Company LLC
Description: United Energy Trading Negotiated Rate to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5168
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–356–000
Applicants: Trailblazer Pipeline Company LLC
Description: CIMA Negotiated Rate to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5171
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–357–000
Applicants: Trailblazer Pipeline Company LLC
Description: Macquarie Negotiated Rate to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5216
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–358–000
Applicants: Trailblazer Pipeline Company LLC
Description: Koch Negotiated Rate to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5236
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–359–000
Applicants: CenterPoint Energy Gas Transmission Company, LLC
Description: CEGT LLC—February 2012 Negotiated Rate Filing to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5312
Comments Due: 5 p.m. ET 2/13/12

Docket Numbers: RP12–360–000

Applicants: ANR Pipeline Company
Description: PFSA Revisions to be effective 3/2/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5324
Comments Due: 5 p.m. ET 2/13/12
Docket Numbers: RP12–361–000
Applicants: Empire Pipeline, Inc.
Description: Reorganized Rate Sheet, New Sec 3.6 to be effective 3/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5342
Comments Due: 5 p.m. ET 2/13/12
Docket Numbers: RP12–362–000
Applicants: Northern Natural Gas Company
Description: 20120131 Negotiated Rate to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5351
Comments Due: 5 p.m. ET 2/13/12

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 1, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2715 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #3

Take notice that the Commission received the following exempt wholesale generator filings:
Docket Numbers: EG12–30–000
Applicants: Spring Valley Wind LLC
Description: Self-Certification of EG of Spring Valley Wind LLC.
Filed Date: 1/31/12
Accession Number: 20120131–5153
Comments Due: 5 p.m. ET 2/21/12

Take notice that the Commission received the following electric rate filings:
Docket Numbers: ER12–938–000
Applicants: Pacific Gas and Electric Company
Description: CCSF IA—36th Quarterly Filing of Facilities Agreements to be effective 12/31/2011.
Filed Date: 1/31/12
Accession Number: 20120131–5000
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–939–000
Applicants: PacifiCorp
Description: PAC Energy NITSA Rev 12 to be effective 1/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5001
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–943–000
Applicants: ITC Midwest LLC
Description: Filing of Amended and Restated Agreement to be effective 4/2/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5065
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–944–000
Applicants: ITC Midwest LLC
Description: Filing of Amended and Restated Agreement to be effective 4/2/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5073
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–945–000
Applicants: Southern California Edison Company
Description: Notices of Cancellation of 8 Letter Agreements with SCE–GBU for Roof Top Solar Projects to be effective 4/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5104
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–946–000
Applicants: PJM Interconnection, L.L.C.
Description: ISA for Integration of Duke Energy Ohio, Inc. Into PJM SA No. 3192 to be effective 1/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5106
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–947–000
Applicants: ISO New England Inc., New England Power Pool Participants Committee
Description: FCM Conforming Changes to be effective 6/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5117
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–948–000
Applicants: Accent Energy Midwest II LLC
Description: Baseline new Market Based Rates to be effective 2/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5163
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–949–000
Applicants: PacifiCorp
Description: Black Hills NITSA and Long Term Firm Point to Point Service Agreement to be effective 1/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5167
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–950–000
Applicants: Public Service Company of Colorado
Description: Public Service Company of Colorado submits Notice of Termination of Rate Schedule No. 63.
Filed Date: 1/31/12
Accession Number: 20120131–5287
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–951–000
Applicants: New England Power Pool Participants Committee
Description: Feb 2012 Membership Filing to be effective 1/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5290
Comments Due: 5 p.m. ET 2/21/12
Docket Numbers: ER12–952–000
Applicants: Essential Power, LLC
Description: Application for Market-Based Rate Authority to be effective 4/1/2012.
Filed Date: 1/31/12
Accession Number: 20120131–5291
Comments Due: 5 p.m. ET 2/21/12

Take notice that the Commission received the following electric securities filings:
Docket Numbers: ES12–19–000
Applicants: Alliant Energy Corporate Services, Inc.
Description: Application of Alliant Energy Corporate Services, Inc., for FPA Section 204 Authorization.
Filed Date: 1/31/12
Accession Number: 20120131–5288
Comments Due: 5 p.m. ET 2/21/12

Take notice that the Commission received the following land acquisition reports:
Docket Numbers: LA11–4–000
Applicants: Spring Canyon Energy LLC, Judith Gap Energy LLC, Invenergy TN LLC, Wolverine Creek Energy LLC, Grays Harbor Energy LLC, Forward Energy LLC, Willow Creek Energy LLC, Sheldon Energy LLC, Hardee Power Partners Limited, Spindle Hill Energy LLC, Invenergy Cannon Falls LLC, Beech Ridge Energy LLC, Grand Ridge Energy LLC, Grand Ridge Energy II LLC, Grand Ridge Energy III LLC, Grand Ridge Energy IV LLC, Grand Ridge Energy V LLC, VantageWind Energy LLC, Stony Creek Energy LLC, Gratiot CountyWind LLC, Gratiot CountyWind II LLC, Bishop Hill Energy LLC, Bishop Hill Energy II LLC, Bishop Hill Energy III LLC

Description: Generation Site Report Fourth Quarter 2011 of Spring Canyon Energy LLC, et al.

Filed Date: 1/31/12

Accession Number: 20120131–5126

Comments Due: 5 p.m. ET 2/21/12

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 pm Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

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Dated: January 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2714 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER09–36–002

Applicants: Prairie Wind Transmission LLC

Description: Amended Compliance filing of Prairie Wind Transmission, LLC.

Filed Date: 1/30/12

Accession Number: 20120130–5331

Comments Due: 5 p.m. ET 2/21/12

Docket Numbers: ER10–2016–002; ER10–2011–004

Applicants: PPL Montana, LLC, PPL EnergyPlus, LLC

Description: Notice of Change in Status of PPL Montana, LLC, et al.

Filed Date: 1/30/12

Accession Number: 20120130–5319

Comments Due: 5 p.m. ET 2/21/12

Docket Numbers: ER10–2984–004

Applicants: Merrill Lynch Commodities, Inc.

Description: Notice of Non-Material Change in Status of Merrill Lynch Commodities, Inc.

Filed Date: 1/30/12

Accession Number: 20120130–5327

Comments Due: 5 p.m. ET 2/21/12

Docket Numbers: ER11–4501–003

Applicants: Caney River Wind Project, LLC

Description: Notice of Change in Status of Caney River Wind Project, LLC.

Filed Date: 1/30/12

Accession Number: 20120130–5322

Comments Due: 5 p.m. ET 2/21/12

Docket Numbers: ER12–309–000

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc.'s Response to the Commission's December 30, 2011 request for additional information.

Filed Date: 1/30/12

Accession Number: 20120130–5318

Comments Due: 5 p.m. ET 2/21/12

Docket Numbers: ER12–310–000

Applicants: Ameren Illinois Company, Midwest Independent Transmission System Operator, Inc.

Description: Response to Letter Requesting Additional Information of Midwest Independent Transmission System Operator, Inc.

Filed Date: 1/30/12

Accession Number: 20120130–5323

Comments Due: 5 p.m. ET 2/21/12

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–4–000

Applicants: Alabama Electric Marketing, LLC, Big Sandy Peaker Plant, LLC, California Electric Marketing, LLC, Crete Energy Venture, LLC, CSOLAR IV South, LLC, High Desert Power Project, LLC, Kiowa Power Partners, LLC, Lincoln Generating Facility, LLC, New Covert Generating Company, LLC, New Mexico Electric Marketing, LLC, Rolling Hills Generating, LLC, Tenaska Alabama Partners, L.P., Tenaska

Alabama II Partners, L.P., Tenaska Frontier Partners, Ltd., Tenaska Gateway Partners, Ltd., Tenaska Georgia Partners, L.P., Tenaska Power Management, LLC, Tenaska Power Services Co., Tenaska Virginia Partners, L.P., Tenaska Washington Partners, L.P., Texas Electric Marketing, LLC,TPF Generation Holdings, LLC, Wolf Hills Energy, LLC

Description: Quarterly Land Acquisition Report.

Filed Date: 1/30/12

Accession Number: 20120130–5320

Comments Due: 5 p.m. ET 2/21/12

Docket Numbers: LA11–4–000

Applicants: Macho Springs Power I, LLC

Description: Site Control Report for Q4 2011 of Macho Springs Power I, LLC.

Filed Date: 1/30/12

Accession Number: 20120130–5325

Comments Due: 5 p.m. ET 2/21/12

Docket Numbers: LA11–4–000

Applicants: Bluegrass Generation Company, LLC, Blythe Energy, LLC, Calhoun Power Company, LLC, DeSoto County Generating Company, LLC, Doswell Limited Partnership, Las Vegas Power Company, LLC, LS Power Marketing, LLC, LSP Safe Harbor Holdings, LLC, LSP University Park, LLC, Renaissance Power, LLC, Riverside Generating Company, LLC, Rocky Road Power, LLC, Tilton Energy LLC, University Park Energy, LLC, Wallingford Energy LLC, Wyoming Colorado Intertie, LLC

Description: Quarterly Land Acquisition Report of Bluegrass Generation Company, LLC, et al.

Filed Date: 1/30/12

Accession Number: 20120130–5326

Comments Due: 5 p.m. ET 2/21/12

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

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Dated: January 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2713 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1513–002.

Applicants: Wolverine Power Supply Cooperative, Inc.

Description: Notification of Change in Status of Wolverine Power Supply Cooperative, Inc.
Filed Date: 1/30/12.
Accession Number: 20120130–5312.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER10–1627–001; ER12–60–002; ER10–1632–002.
Applicants: Tenaska Power Services Co., Tenaska Washington Partners, L.P., Tenaska Power Management, LLC.
Description: Notification of Change in Status of Tenaska Washington Partners, L.P., et al.
Filed Date: 1/30/12.
Accession Number: 20120130–5315.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER10–2319–005; ER10–2320–005; ER10–2317–004; ER10–2322–006; ER10–2324–005; ER10–2325–004; ER10–2332–005; ER10–2326–006; ER10–2327–007; ER10–2328–005; ER10–2343–006; ER10–2331–006; ER11–4609–004; ER10–2330–006.
Applicants: J.P. Morgan Ventures Energy Corporation, Triton Power Michigan LLC, BE Allegheny LLC, BE CA LLC, BE Ironwood LLC, BE KJ LLC, BE Rayle LLC, BE Alabama LLC, BE Louisiana LLC, Cedar Brakes I, L.L.C., Utility Contract Funding, L.L.C., Central Power & Lime LLC, Cedar Brakes II, L.L.C., J.P. Morgan Commodities Canada Corporation.
Description: BE Alabama LLC, *et al.* Notice of Non-Material Change in Status.
Filed Date: 1/30/12.
Accession Number: 20120130–5080.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER11–4219–001.
Applicants: Michigan Electric Transmission Company, Wolverine Power Supply Cooperative, Inc.
Description: Compliance Filing to be effective 5/6/2011.
Filed Date: 1/30/12.
Accession Number: 20120130–5232.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–316–001.
Applicants: NorthWestern Corporation.
Description: Compliance Filing—Revision to MT OATT Schedule 3 Regarding Self-Supply to be effective 12/31/2011.
Filed Date: 1/30/12.
Accession Number: 20120130–5269.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–925–000.
Applicants: Central Maine Power Company.
Description: Central Maine Power Company—Topsham Hydro Partners LP Interconnection Agreement. to be effective 1/1/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5062.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–926–000.
Applicants: Central Maine Power Company.
Description: Central Maine Power Company—Robbins Lumber, Inc. Interconnection Agreement to be effective 1/1/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5076.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–927–000.
Applicants: Southwest Power Pool, Inc.
Description: 2289 Southwestern Power Administration Loss Compensation to be effective 1/1/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5111.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–928–000.
Applicants: Duke Energy Carolinas, LLC.
Description: NCEMC and NCMPA NITSA Revisions to be effective 1/1/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5112.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–929–000.
Applicants: Southern California Edison Company.
Description: SGIA WDAT SERV AG SCE–TDBU SCE–PPD 9687 Transport Fontana Roof Top Solar Project to be effective 1/31/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5137.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–930–000.
Applicants: Southern California Edison Company.
Description: SGIA WDAT SERV AG SCE–TDBU SCE–PPD 1901 CA St Redlands Roof Top Solar Project to be effective 1/31/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5139.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–931–000.
Applicants: Southern California Edison Company.
Description: Notice of Cancellation of SGIA WDAT SERV AG with SCE–GPS for Site 31 Project to be effective 8/29/2011.
Filed Date: 01/30/2012.
Accession Number: 20120130–5152.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–932–000.
Applicants: Southwest Power Pool, Inc.
Description: 1765R5 Kansas City Power and Light GMO NITSA NOAS to be effective 12/1/2011.
Filed Date: 1/30/12.
Accession Number: 20120130–5193.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–933–000.
Applicants: Public Service Company of Colorado.
Description: 20120130_BHCE Notice of Cancellation to be effective 12/31/2011.
Filed Date: 1/30/12.
Accession Number: 20120130–5205.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–934–000.
Applicants: PJM Interconnection, L.L.C.
Description: First Revised Service Agreement No. 2437; Queue No. V2–025 to be effective 12/29/2011.
Filed Date: 1/30/12.
Accession Number: 20120130–5253.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–935–000.
Applicants: Arizona Public Service Company.
Description: Service Agreement 216–Added Points of Delivery and Direct Assignment Charge to be effective 3/31/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5259.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–936–000.
Applicants: Southwest Power Pool, Inc.
Description: Revisions to Update SPA's Pricing Zone Rate to be effective 1/1/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5270.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–937–000.
Applicants: Wildcat Power Holdings, LLC.
Description: Cancellation of Market-Based Rate Tariff to be effective 3/30/2012.
Filed Date: 1/30/12.
Accession Number: 20120130–5271.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–940–000.
Applicants: PacifiCorp.
Description: PacifiCorp's cancellation of Powerex service agreements.
Filed Date: 1/30/12.
Accession Number: 20120130–5308.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–941–000.
Applicants: Seneca Energy II, LLC.
Description: Petition of Seneca Energy II, LLC for Waiver of Show of Interest Deadline for ISO–NE FCA #7.
Filed Date: 1/30/12.
Accession Number: 20120130–5309.
Comments Due: 5 p.m. ET 2/21/12.
Docket Numbers: ER12–942–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc.'s Notice of Cancellation.

Filed Date: 1/30/12.
Accession Number: 20120130–5316.
Comments Due: 5 p.m. ET 2/21/12.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–4–000.
Applicants: Pocahontas Prairie Wind, LLC.
Description: Quarterly Land Acquisition Report of Pocahontas Prairie Wind, LLC.
Filed Date: 1/30/12.
Accession Number: 20120130–5103.
Comments Due: 5 p.m. ET 2/21/12.

Docket Numbers: LA11–4–000.
Applicants: Astoria Generating Company, L.P.
Description: Quarterly Land Acquisition Report of Astoria Generating Company, L.P.
Filed Date: 1/30/12.
Accession Number: 20120130–5104.
Comments Due: 5 p.m. ET 2/21/12.

Docket Numbers: LA11–4–000.
Applicants: Elizabethtown Energy, LLC, Lumberton Energy, LLC, Hatchet Ridge Wind, LLC, Lyonsdale Biomass, LLC, ReEnergy Sterling CT Limited Partnership, Bayonne Plant Holding, L.L.C., Camden Plant Holding, L.L.C., Dartmouth Power Associates Limited Partnership, Elmwood Park Power, LLC, Newark Bay Cogeneration Partnership, L.P., Pedricktown Cogeneration Company LP, York Generation Company LLC, Boralex Ashland LP, Boralex Fort Fairfield LP, Boralex Livermore Falls LP, Boralex Stratton Energy LP, Black River Generation, LLC.
Description: Quarterly Land Acquisition Report of Elizabethtown Energy, LLC, et al.
Filed Date: 1/30/12.
Accession Number: 20120130–5317.
Comments Due: 5 p.m. ET 2/21/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

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Dated: January 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2712 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–50–000.
Applicants: Alta Wind VIII, LLC, BAIF U.S. Renewable Power Holdings LLC.
Description: Alta Wind VIII, LLC, et. al. submits notice of consummation.
Filed Date: 1/27/12.
Accession Number: 20120127–5097.
Comments Due: 5 p.m. ET 2/17/12.

Docket Numbers: EC12–63–000.
Applicants: AEP Retail Energy Partners LLC, BlueStar Energy Services Inc.
Description: Section 203 Application of BlueStar Energy Services Inc. and AEP Retail Energy Partners LLC.
Filed Date: 1/26/12.
Accession Number: 20120126–5250.
Comments Due: 5 p.m. ET 2/16/12.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG12–26–000.
Applicants: Pattern Santa Isabel LLC.
Description: NOTICE OF SELF-CERTIFICATION OF EXEMPT WHOLESALE GENERATOR STATUS.
Filed Date: 1/26/12.
Accession Number: 20120126–5110.
Comments Due: 5 p.m. ET 2/16/12.

Docket Numbers: EG12–27–000.
Applicants: Mariposa Energy, LLC.
Description: Self-Certification of EG of Mariposa Energy, LLC.
Filed Date: 1/26/12.
Accession Number: 20120126–5148.
Comments Due: 5 p.m. ET 2/16/12.

Docket Numbers: EG12–28–000.
Applicants: Blue Summit Wind, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Blue Summit Wind, LLC.
Filed Date: 1/27/12.
Accession Number: 20120127–5043.
Comments Due: 5 p.m. ET 2/17/12.

Docket Numbers: EG12–29–000.
Applicants: CPV Sentinel, LLC.
Description: CPV Sentinel, LLC Self-Certification of EWG Status.
Filed Date: 1/27/12.
Accession Number: 20120127–5106.
Comments Due: 5 p.m. ET 2/17/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER08–565–000.
Applicants: Pacific Gas and Electric Company.
Description: Compliance Refund *Report of Pacific Gas and Electric Company.*
Filed Date: 1/27/12.
Accession Number: 20120127–5149.
Comments Due: 5 p.m. ET 2/17/12.

Docket Numbers: ER10–1852–002.
Applicants: Florida Power & Light Company.
Description: Florida Power & Light Company Notice of Change in Status.
Filed Date: 1/26/12.
Accession Number: 20120126–5249.
Comments Due: 5 p.m. ET 2/16/12.

Docket Numbers: ER10–2794–003; ER10–2849–002; ER11–2028–003; ER11–3642–003.
Applicants: EDF Trading North America, LLC, EDF Industrial Power Services (IL), LLC, EDF Industrial Power Services (NY), LLC, Tanner Street Generation, LLC.
Description: Notice of Non-Material Change in Status of EDF Trading North America, LLC, et. al.
Filed Date: 1/27/12.
Accession Number: 20120127–5202.
Comments Due: 5 p.m. ET 2/17/12.

Docket Numbers: ER12–455–001.
Applicants: Southwest Power Pool, Inc.
Description: Compliance Filing in Order No. ER12–455—Attachment W to be effective 1/17/2012.
Filed Date: 1/26/12.
Accession Number: 20120126–5173.
Comments Due: 5 p.m. ET 2/16/12.

Docket Numbers: ER12–682–001.
Applicants: Erie Wind, LLC.
Description: Supplement to MBR Application of Erie Wind, LLC to be effective 12/24/2011.
Filed Date: 1/26/12.
Accession Number: 20120126–5216.
Comments Due: 5 p.m. ET 2/6/12.

Docket Numbers: ER12–898–000.
Applicants: Southwest Power Pool, Inc.
Description: 1517R5 DeWind Frisco, LLC SGIA to be effective 12/27/2011.
Filed Date: 1/26/12.
Accession Number: 20120126–5146.
Comments Due: 5 p.m. ET 2/16/12.

Docket Numbers: ER12–899–000.
Applicants: Dominion Energy Manchester Street, Inc.
Description: Compliance Filing—Designation of Filer to be effective 1/26/2012.

Filed Date: 1/26/12.
Accession Number: 20120126–5180.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–900–000.
Applicants: Kincaid Generation, L.L.C.
Description: Compliance Filing—Designation of Filer to be effective 1/26/2012.
Filed Date: 1/26/12.
Accession Number: 20120126–5190.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–901–000.
Applicants: New England Power Company.
Description: Local Service Agreement with Mansfield Municipal Electric Department to be effective 1/1/2012.
Filed Date: 1/26/12.
Accession Number: 20120126–5191.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–902–000.
Applicants: Elwood Energy, LLC.
Description: Compliance Filing—Designation of Filer to be effective 1/26/2012.
Filed Date: 1/26/12.
Accession Number: 20120126–5195.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–903–000.
Applicants: Dominion Nuclear Connecticut, Inc.
Description: Compliance Filing—Designation of Filer to be effective 1/26/2012.
Filed Date: 1/26/12.
Accession Number: 20120126–5199.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–904–000.
Applicants: Southwest Power Pool, Inc.
Description: 2304 Post Rock Wind Power Project, LLC GIA to be effective 12/27/2011.
Filed Date: 1/26/12.
Accession Number: 20120126–5212.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–905–000.
Applicants: Southern California Edison Company.
Description: SGIA SCE—Windpower Partners 1993, L.P. Buck Wind Park Project to be effective 12/28/2011.
Filed Date: 1/26/12.
Accession Number: 20120126–5213.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–906–000.
Applicants: Southwestern Electric Power Company.
Description: 20120126 Minden Revised PSA to be effective 12/17/2010.
Filed Date: 1/26/12.
Accession Number: 20120126–5224.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–907–000.
Applicants: Southwestern Electric Power Company.
Description: 20120126 Prescott Revised PSA to be effective 12/17/2010.
Filed Date: 1/26/12.
Accession Number: 20120126–5227.
Comments Due: 5 p.m. ET 2/16/12.
Docket Numbers: ER12–908–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3182; Queue No. W3–140 to be effective 12/28/2011.
Filed Date: 1/27/12.
Accession Number: 20120127–5065.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–909–000.
Applicants: Westar Energy, Inc.
Description: Amendment, OATT Sections 15.7 and 28.5 to be effective 4/1/2012.
Filed Date: 1/27/12.
Accession Number: 20120127–5066.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–910–000.
Applicants: PJM Interconnection, L.L.C., Duke Energy Ohio, Inc.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Duke submits PJM Service Agreement No. 3193 to be effective 1/1/2012.
Filed Date: 1/27/12.
Accession Number: 20120127–5095.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–911–000.
Applicants: CPV Sentinel, LLC.
Description: CPV Sentinel, LLC submits tariff filing per 35.12: Market-Based Rate Application to be effective 3/27/2012.
Filed Date: 1/27/12.
Accession Number: 20120127–5113.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–912–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Queue Position W1–113; Original Service Agreement No. 3195 to be effective 12/28/2011.
Filed Date: 1/27/12.
Accession Number: 20120127–5122.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–913–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: CapX-Brookings-GRE T–T to be effective 1/28/2012.
Filed Date: 1/27/12.
Accession Number: 20120127–5165.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–914–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: CapX-Brookings-NSPM T–T to be effective 1/28/2012.
Filed Date: 1/27/12.
Accession Number: 20120127–5167.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–915–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3194; Queue Position W4–010 to be effective 12/28/2011.
Filed Date: 1/27/12.
Accession Number: 20120127–5171.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–916–000.
Applicants: Twin Cities Energy, LLC.
Description: Twin Cities Energy, LLC submits tariff filing per 35.15: Cancellation of Market-Based Rate Tariff to be effective 3/27/2012.
Filed Date: 1/27/12.
Accession Number: 20120127–5183.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–917–000.
Applicants: TC Energy Trading, LLC.
Description: TC Energy Trading, LLC submits tariff filing per 35.15: Cancellation of Market-Based Rate Tariff to be effective 3/27/2012.
Filed Date: 1/27/12.
Accession Number: 20120127–5189.
Comments Due: 5 p.m. ET 2/17/12.
Docket Numbers: ER12–918–000.
Applicants: FirstEnergy Solutions Corp.
Description: Application of FirstEnergy Solutions Corp. for Authorization to Sell Electricity to Potomac Edison Company, an affiliate.
Filed Date: 1/27/12.
Accession Number: 20120127–5195.
Comments Due: 5 p.m. ET 2/17/12.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–4–000.
Applicants: NextEra Energy Companies, Ashtabula Wind, LLC, Ashtabula Wind II, LLC, Ashtabula Wind III, LLC, Backbone Mountain Windpower LLC, Badger Windpower, LLC, Baldwin Wind, LLC, Bayswater Peaking Facility, LLC, Blackwell Wind, LLC, Butler Ridge Wind Energy Center, LLC, Crystal Lake Wind, LLC, Crystal Lake Wind II, LLC, Crystal Lake Wind III,LLC, Day County Wind, LLC, Diablo Winds, LLC, Elk City Wind, LLC, Elk City II Wind, LLC, Florida Power & Light Co., FPL Energy Burleigh County Wind, LLC, FPL Energy Cabazon Wind, LLC, FPL Energy Cape, LLC, FPL Energy

Cowboy Wind, LLC, FPL Energy Green Power Wind, LLC, FPL Energy Hancock County Wind, LLC, FPL Energy Illinois Wind, LLC, FPL, Energy Maine Hydro LLC, FPL Energy Marcus Hook, L.P., FPL Energy MH50 L.P., FPL Energy Montezuma Wind, LLC, FPL Energy Mower County, LLC, FPL Energy New Mexico Wind, LLC, FPL Energy North Dakota Wind, LLC, FPL Energy North Dakota Wind II, LLC, FPL Energy Oklahoma Wind, LLC, FPL Energy Oliver Wind I, LLC, FPL Energy Oliver Wind II, LLC, FPL Energy Sooner Wind, LLC, FPL Energy South Dakota Wind, LLC, FPL Energy Stateline II, Inc., FPL Energy Vansycle, LLC, FPL Energy Wyman, LLC, FPL Energy Wyman IV, LLC, FPL Energy Wyoming, LLC, Garden Wind, LLC, Gray County Wind Energy, LLC, Hatch Solar Energy Center I, LLC, Hawkeye Power Partners, LLC, High Majestic Wind Energy Center, LLC, High Winds, LLC, Jamaica Bay Peaking Facility, LLC, Lake Benton Power Partners II, LLC, Langdon Wind, LLC, Logan Wind Energy LLC, Meyersdale Windpower LLC, Mill Run Windpower, LLC, Minco Wind, LLC, Minco Wind II, LLC, NEPM II, LLC, NextEra Energy Duane Arnold, LLC, NextEra Energy Montezuma II Wind, LLC, NextEra Energy Power Marketing, LLC, NextEra Energy Point Beach, LLC, NextEra Energy Seabrook, LLC, NextEra Energy Services Massachusetts, LLC, Northeast Energy Associates, A Limited Partnership, North Jersey Energy Associates, A Limited Partnership, Northern Colorado Wind Energy, LLC, Osceola Windpower, LLC, Osceola Windpower II, LLC, Paradise Solar Urban Renewal, L.L.C., Peetz Table Wind Energy, LLC, Pennsylvania Windfarms, Inc., Perrin Ranch Wind, LLC, Red Mesa Wind, LLC, Sky River LLC, Somerset Windpower, LLC, Story Wind, LLC, Vasco Winds, LLC, Victory Garden Phase IV, LLC, Waymart Wind Farm, L.P., Wessington Wind Energy Center, LLC, White Oak Energy LLC, Wilton Wind II, LLC, Windpower Partners 1993, L.P.

Description: NextEra Energy Companies 2011 4th Quarter Report on the Acquisition of Control of a Site or Sites for New Generation Capacity Development.

Filed Date: 1/26/12.

Accession Number: 20120126–5252.

Comments Due: 5 p.m. ET 2/16/12.

Docket Numbers: LA11–4–000.

Applicants: East Coast Power Linden Holding, LLC, Cogen Technologies Linden Venture, L.P., Fox Energy Company, LLC, Birchwood Power Partners, L.P., Shady Hills Power Company, L.L.C., EFS Parlin Holdings, LLC, and Inland Empire Energy Center, LLC.

Description: Quarterly Report on the Acquisition of Control of a Site or Sites for New Generation Capacity Development for East Coast Power Linden Holding, LLC, et. al.

Filed Date: 1/27/12.

Accession Number: 20120127–5182.

Comments Due: 5 p.m. ET 2/17/12.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM12–2–000.

Applicants: Public Service Company of New Mexico.

Description: Response of Public Service of New Mexico to January 19, 2012 Deficiency Letter.

Filed Date: 1/26/12.

Accession Number: 20120126–5188.

Comments Due: 5 p.m. ET 2/16/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 pm Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 27, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2711 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR12–12–000]

Arcadia Gas Storage, LLC; Notice of Filing

Take notice that on January 30, 2012, Arcadia Gas Storage, LLC filed a Statement of Operating Conditions to set forth the addition of its Enhanced Authorized Overrun Service.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Monday, February 13, 2012.

Dated: February 1, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–2700 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–911–000]

CPV Sentinel, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of CPV Sentinel, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that

such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 21, 2012.

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 Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 1, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–2701 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–952–000]

Essential Power, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Essential Power, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 21, 2012.

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 Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 1, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–2704 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–948–000]

Accent Energy Midwest II LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Accent Energy Midwest II LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 21, 2012.

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 Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the

Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 1, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–2703 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–922–000]

Phillips 66 Company; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Phillips 66 Company's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 21, 2012.

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 Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 1, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–2702 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–896–000]

Mariposa Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Mariposa Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 21, 2012.

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 Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2718 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–846–000]

Bishop Hill Energy II LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Bishop Hill Energy II LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214

of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 21, 2012.

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 Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2717 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–845–000]

Bishop Hill Interconnection LLC; Supplemental Notice that Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Bishop Hill Interconnection LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is February 21, 2012.

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 Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2716 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR12–13–000]

Public Service Company of Colorado; Notice of Petition for Rate Approval and Revised Statement of Operating Conditions

Take notice that on January 30, 2012, Public Service Company of Colorado (PSCo) filed a Rate Election and revised Statement of Operating Conditions (SOC). PSCo proposes to utilize rates that are the same as those contained in PSCo's transportation rate schedules for comparable intrastate service on file with the Colorado Public Utilities Commission. In addition, PSCo also proposes to make certain revisions to its SOC as more fully detailed in the petition.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call

(866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Monday, February 13, 2012.

Dated: February 1, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–2698 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Prohibited:

Docket No.	Communication date	Presenter or requester
1. ER12–309–000	11–30–11	David Scheibel.
2. RC11–6–000	12–22–11	Michigan PSC.[1]
3. CP07–444–000	12–22–11	CitizenLetter.[2]
4. P–2246–058	12–29–11	Yuba County Water Agency.
5. RM11–6–000	12–30–11	Gordy Wrobel.
6. P–2305–000	12–30–11	Randy and Deborah Pennington.
7. CP08–6–000	1–6–12	John C. Braun, DDS, MD.
8. P–2299–075	1–13–12	Lower Tuolumne Farmers.
9. P–739–022 & P–2210–207	1–23–12	Bill Brush.[3]

Exempt:

Docket No.	Communication date	Presenter or requester
1. CP11–161–000	12–13–11	Commission Staff.[4]
2. RM11–6–000	1–6–12	Governor Sean Parnell.
3. P–2305–036	1–6–12	Department of the Interior Staff.
4. P–12632–000	1–6–12	Hon. Allan Ritter.
5. CP11–56–000	1–6–12	Hon. Michael G. Grimm.
6. CP11–56–000	1–10–12	Commission Staff.[5]
7. CP12–11–000	1–10–12	Commission Staff.[6]
8. P–14263–000	1–11–12	Hon. Michael B. Enzi.
9. CP08–6–000	1–12–12	Hon. Roger F. Wicker.
10. CP11–72–000	1–12–12	Hon. Charles Boustany Jr., MD.
11. P–199–205	1–18–12	Commission Staff.[7]
12. P–2305–000	1–18–12	Hon. John Cornyn.
13. CP11–56–000	1–24–12	Commission Staff.[8]
14. CP07–441 & CP07–444	1–24–12	Commission Staff.[9]
15. EL11–44–000	1–24–12	Members of Congress.[10]

[1] Letter from Messrs. John D. Quackenbush, Orjiakor N. Isiogu and Greg R. White.

[2] A total of ten form letters received on December 22 & 29, 2011.

[3] Email record.

[4] Conference calls that occurred on December 13 & 22, 2011, and January 24, 2012.

[5] Telephone record.

[6] Meeting with Commission Staff.

[7] Email record.

[8] Email record.

[9] Email record.

[10] Letter signed from 19 members of Congress, addressed to Secretary Steven Chu.

Dated: January 31, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2710 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commissioner and Staff Attendance at North American Electric Reliability Corporation Meetings

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission and/or Commission staff may attend the following meetings:

North American Electric Reliability Corporation, Member Representatives Committee and Board of Trustees Meetings.

Arizona Grand Resort, 8000 S. Arizona Grand Parkway, Phoenix, AZ 85044.

February 8, 2012 (1 p.m.–5 p.m.) and 9 (8 a.m.–1 p.m.)

Further information regarding these meetings may be found at: *http://www.nerc.com/calendar.php.*

The discussions at the meetings, which are open to the public, may address matters at issue in the following Commission proceedings:

Docket No. RC08–5, North American Electric Reliability Corporation
Docket No. RC11–1, North American Electric Reliability Corporation
Docket No. RC11–2, North American Electric Reliability Corporation
Docket No. RC11–5, North American Electric Reliability Corporation
Docket No. RC11–6, North American Electric Reliability Corporation
Docket No. RR08–4, North American Electric Reliability Corporation
Docket No. RR10–11, North American Electric Reliability Corporation
Docket No. RR12–3, North American Electric Reliability Corporation
Docket No. RD09–11, North American Electric Reliability Corporation
Docket No. RD10–2, North American Electric Reliability Corporation
Docket No. RD11–5, North American Electric Reliability Corporation
Docket No. R11–13, North American Electric Reliability Corporation
Docket No. RD12–3, North American Electric Reliability Corporation
Docket No. RD12–10, North American Electric Reliability Corporation
Docket No. NP11–238, North American Electric Reliability Corporation

For further information, please contact Jonathan First, (202) 502–8529, or *jonathan.first@ferc.gov.*

Dated: February 1, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–2705 Filed 2–6–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9627–9]

Notice of Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges From Concentrated Animal Feeding Operations (CAFOs) in Oklahoma (OKG010000)

AGENCY: Environmental Protection Agency (EPA), Region 6.

ACTION: Notice of NPDES general permit reissuance.

SUMMARY: EPA Region 6 today is providing notice that an NPDES general permit for discharges from eligible owners/operators of concentrated animal feeding operations (CAFOs), in Oklahoma, except those discharges on Indian Country was issued. Unless excluded by Part I.D or I.F of the final permit, animal feeding operations that are defined as CAFOs or designated as CAFOs by the permitting authority (See Part VII Definitions, ''CAFOs'') and that are subject to 40 CFR part 412, Subparts A (Horses and Sheep), C (Dairy Cows and Cattle Other than Veal Calves), and D (Swine, Poultry, and Veal Calves) are eligible for coverage under this permit. This permit covers the types of animal feeding operations listed above which meet the definition of a CAFO and discharge pollutants to waters of the United States.

A copy of the Region's responses to comments and the final permit may be obtained from the EPA Region 6 Internet site: *http://www.epa.gov/region6/water/npdes/cafo/index.htm.*

DATES: This permit shall be effective on February 1, 2012 and expire on January 31, 2017. In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review on February 21, 2012. Under section 509(b) of the Clean Water Act, judicial review of this general permit can be had by filing a petition for review in the United States Court of Appeals within 120 days after the permit is considered issued for judicial review. Under section 509(b)(2) of the Clean Water Act, the requirements in this permit may not be challenged later in civil or criminal proceedings to enforce these requirements. In addition, this permit may not be challenged in other agency proceedings. Deadlines for submittal of notices of intent are provided in Part I.E of the permit.

FOR FURTHER INFORMATION CONTACT: Ms. Diane Smith, Water Quality Protection Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone: (214) 665–2145, or via email at: *smith.diane@epa.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 402 of the Clean Water Act (CWA), 33 U.S.C. section 1342, EPA proposed and solicited comments on NPDES general permit OKG010000 at 74 FR 12849 (March 25, 2009). The comment period was extended to May 26, 2009. See 74 FR 20296 (May 1, 2009).

Region 6 received comments from Jean Public; Leo Byford; Oklahoma Department of Agriculture, Food, and Forestry (ODAFF); Crawford Farms, Inc.; Enviro-Ag Engineering; U.S. Fish and Wildlife Service (USFWS); Oklahoma State University (OSU); Pride Feeders, LP; Oklahoma Farm Bureau (OFB); Premium Beef Feeders, LLC; Tri-State Feeders, Inc.; Dairy Producers of New Mexico (DPNM); Karen Brewer; Murphy-Brown LLC; Seaboard Foods; Texas Cattle Feeders Association (TCFA); The Hanor Company of Wisconsin, LLC; The Maschhoffs; Wheeler Brothers Grain Company (WBGC); Hitch Enterprises (Jason Hitch); Hitch Enterprises (Patricia Burt); JBS Five Rivers Cattle Feeding LLC, Oklahoma Pork Council (OPC); Robert Bergner; Tyson Foods, Inc.; Richard Robinson.

On September 15, 2010, the United States Fish and Wildlife Service (USFWS) initiated formal consultation on the proposed permitting action under section 7 of the Endangered Species Act. Due to the conclusion of formal consultation with the USFWS and finalization of its Biological Opinion (BO) on December 14, 2011, EPA has removed Part I.D.5 from the permit. Additionally, consultation between EPA and the USFWS has resulted in the addition and modification of certain permit conditions designed with consideration for listed species and critical habitat.

EPA Region 6 considered all comments received in reaching the final permit decision. Additionally, the Oklahoma Department of Environmental Quality provided EPA with a CWA Section 401 Certification on June 24, 2009, which included conditions of certification that were incorporated into the final permit. An explicit option to submit notice of intent documents electronically was removed from the final permit due to unforeseen

difficulties in setting up such a system at this time. A summary of the changes made to the proposed permit can be found in the response to comments document on the aforementioned EPA Region 6 Internet site.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: January 30, 2012.

William K. Honker,

Acting Director, Water Quality Protection Division, EPA Region 6.

[FR Doc. 2012–2722 Filed 2–6–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Federal Advisory Committee Act; Advisory Committee on Diversity for Communications in the Digital Age

AGENCY: Federal Communications Commission.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC's) Advisory Committee on Diversity for Communications in the Digital Age (''Diversity Committee''). The Committee's mission is to provide recommendations to the Commission regarding policies and practices that will further enhance diversity in the telecommunications and related industries. In particular, the Committee will focus primarily on lowering barrier to entry for historically disadvantaged men and women, exploring ways in which to ensure universal access to and adoption of broadband, and creating an environment that enables employment of a diverse workforce within the telecommunications and related industries. The Committee will be charged with gathering the data and information necessary to formulate meaningful recommendations for these objectives.

DATED: Wednesday, March 14, 2012 at 2 p.m.

ADDRESSES: Federal Communications Commission, Room TW–C305 (Commission Meeting Room, TW–C305), 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Barbara Kreisman, (202) 418–1605; *Barbara.Kreisman@FCC.gov.*

SUPPLEMENTARY INFORMATION: This is the second meeting of the Diversity Federal Advisory Committee under its current charter. At this meeting there will be reports from the three working committees: Channels 5 and 6 feasibility; WiFi Technology; and EEO enforcement. Issues raised by these working groups will be discussed by the entire Diversity Committee.

Members of the general public may attend the meeting. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. The public may submit written comments before the meeting to: Barbara Kreisman, the FCC's Designated Federal Officer for the Diversity Committee by email: *Barbara.Kreisman@fcc.gov* or U.S. Postal Service Mail (Barbara Kreisman, Federal Communications Commission, Room 2–A665, 445 12th Street SW., Washington, DC 20554).

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). Such requests should include a detailed description of the accommodation needed. In addition, please include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Additional information regarding the Diversity Committee can be found at *http://www.fcc.gov/DiversityFAC.*

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 2012–2745 Filed 2–6–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 12–15]

Video Programming and Accessibility Advisory Committee; Announcement of Date of Next Meeting

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the next meeting of the Video Programming Accessibility Advisory Committee (''Committee'' or ''VPAAC''). The Committee will continue developing recommendations for the Commission regarding the provision of video description, access to emergency programming, and access to user interfaces, menus, and programming guides viewed on equipment used to deliver video programming, as required in the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA). This and all meetings of the VPAAC are open to the public.

DATES: The Committee's next meeting will be held on Thursday, February 9, 2012, 9 a.m. to 5 p.m. (EST).

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Commission Meeting Room, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Pam Gregory, Consumer and Governmental Affairs Bureau, (202) 418–2498 (voice), (202) 418–1169 (TTY), email: *Pam.Gregory@fcc.gov;* or Alison Neplokh, Media Bureau, (202) 418–1083, email: *Alison.Neplokh@fcc.gov.*

SUPPLEMENTARY INFORMATION: On December 7, 2010, in document DA 10–2320, Chairman Julius Genachowski announced the establishment and appointment of members of the VPAAC, following a nominations period that closed on November 1, 2010. The purpose of the VPAAC is to develop recommendations on closed captioning of Internet programming previously captioned on television; the compatibility between video programming delivered using Internet protocol and devices capable of receiving and displaying such programming to facilitate access to captioning, video description and emergency information; video description and accessible emergency information on television programming delivered using Internet protocol or digital broadcast television; accessible user interfaces on video programming devices; and accessible programming guides and menus. Within six months of its first meeting, the VPAAC submitted its recommendations to the Commission concerning the provision of closed captions for Internet-delivered video programming and the ability of video devices to pass through closed captions contained on Internet-based video programming. By April 8, 2012, the VPAAC shall submit recommendations on the remaining issues listed above. At the February 9, 2012 VPAAC meeting, members will continue to develop recommendations for the Commission regarding video description, access to emergency programming, and access to user interfaces, menus, and programming guides viewed on equipment used to deliver video programming. To request materials in accessible formats for people with

disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Federal Communications Commission.

Karen Peltz Strauss,

Deputy Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2012–2754 Filed 2–6–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of the Termination of the Receivership of Thunder Bank (Fund 10269) Sylvan Grove, KS

Notice is hereby given that the Federal Deposit Insurance Corporation (''FDIC'') as Receiver for Thunder Bank, (''the Receiver'') intends to terminate its receivership for said institution. The FDIC was appointed receiver of Thunder Bank on July 23, 2010. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 34th Floor, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–2723 Filed 2–6–12; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC is seeking public comments on its proposal to extend through April 30, 2015, the current PRA clearances for information collection requirements contained in four consumer financial regulations enforced by the Commission. Those clearances expire on April 30, 2012.

DATES: Comments must be filed by April 9, 2012.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Regs BEMZ, PRA Comments, P084812'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/RegsBEMZpra* by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information requirements should be addressed to Carole Reynolds or Soyong Cho, Attorneys, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave. NW., Washington, DC 20580, (202) 326–3224.

SUPPLEMENTARY INFORMATION: The four regulations covered by this notice are:

(1) Regulations promulgated under The Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.* (''ECOA'') (''Regulation B'') (OMB Control Number: 3084–0087);

(2) Regulations promulgated under The Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.* (''EFTA'') (''Regulation E'') (OMB Control Number: 3084–0085);

(3) Regulations promulgated under The Consumer Leasing Act, 15 U.S.C. 1667 *et seq.* (''CLA'') (''Regulation M'') (OMB Control Number: 3084–0086); and

(4) Regulations promulgated under The Truth-In-Lending Act, 15 U.S.C. 1601 *et seq.* (''TILA'') (''Regulation Z'') (OMB Control Number: 3084–0088).

The FTC enforces these statutes as to all businesses engaged in conduct these laws cover unless these businesses (such as federally chartered or insured depository institutions) are subject to the regulatory authority of another federal agency.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''), Public Law 111–203,124 Stat. 1376 (2010), almost all rulemaking authority for the ECOA, EFTA, CLA, and TILA transferred from the Board of Governors of the Federal Reserve System (Board) to the Consumer Financial Protection Bureau (CFPB) on July 21, 2011 (''transfer date''). To implement this transferred authority, the CFPB has published for public comment interim final rules for new regulations in 12 CFR part 1002 (Regulation B), 12 CFR part 1005 (Regulation E), 12 CFR part 1013 (Regulation M), and 12 CFR 1026 (Regulation Z) for those entities under its rulemaking jurisdiction.[1] Although the Dodd-Frank Act transferred most rulemaking authority under ECOA, EFTA, CLA, and TILA to the CFPB, the Board retained rulemaking authority for certain motor vehicle dealers[2] under all of these statutes and also for certain interchange-related requirements under EFTA.[3]

As a result of the Dodd-Frank Act, the FTC and the CFPB now share the authority to enforce Regulations B, E, M, and Z for entities for which the FTC had enforcement authority before the Act, except for certain motor vehicle dealers. Because of this shared enforcement jurisdiction, the two agencies have divided the FTC's previously-cleared PRA burden between them,[4] except that the FTC retained all of the part of that burden associated with certain motor vehicle dealers (for brevity, referred to in the burden summaries below as a ''carve-out'').[5] The division of PRA

[1] 12 CFR part 1002 (Reg. B) (76 FR 79442, Dec. 21, 2011); 12 CFR 1005 (Reg. E) (76 FR 81020, Dec. 27, 2011); 12 CFR part 1013 (Reg. M) (76 FR 78500, Dec. 19, 2011); 12 CFR part 1026 (Reg. Z) (76 FR 79768, Dec. 22, 2011).

[2] Generally, these are dealers ''predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.'' *See* Dodd-Frank Act, § 1029(a)–(c).

[3] *See* Dodd-Frank Act, § 1075 (these requirements are implemented through Board Regulation II, 12 CFR part 235, rather than EFTA's implementing Regulation E).

[4] The CFPB also factored into its burden estimates respondents over which it has jurisdiction but the FTC does not.

[5] These are dealers specified by the Dodd-Frank Act under § 1029(a), but as limited by subsection

burden hours not attributable to certain motor vehicle dealers is reflected in the CFPB's recent PRA clearance requests to OMB,[6] as well as in the FTC's burden estimates below.

As a result of the Dodd-Frank Act, the FTC generally has sole authority to enforce Regulations B, E, M, and Z regarding motor vehicle dealers predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[7] Because the FTC has exclusive jurisdiction to enforce these rules for such motor vehicle dealers, it is including the entire PRA burden for them in the burden estimates below.

The regulations impose certain recordkeeping and disclosure requirements associated with providing credit or with other financial transactions. Under the PRA, 44 U.S.C. 3501–3521, Federal agencies must get OMB approval for each collection of information they conduct or sponsor. ''Collection of information'' includes agency requests or requirements to keep records or provide information to a third party. *See* 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

All four of these regulations require covered entities to keep certain records, but FTC staff believes these records are kept in the normal course of business even absent the particular recordkeeping requirements.[8] Covered entities, however, may incur some burden associated with ensuring that they do not prematurely dispose of relevant records (*i.e.,* during the time span they must retain records under the applicable regulation).

The regulations also require covered entities to make disclosures to third-parties. Related compliance involves set-up/monitoring and transaction-specific costs. ''Set-up'' burden, incurred only by covered new entrants, includes their identifying the applicable required disclosures, determining how best to comply, and designing and developing compliance systems and procedures. ''Monitoring'' burden, incurred by all covered entities, includes their time and costs to review changes to regulatory requirements, make necessary revisions to compliance systems and procedures, and to monitor the ongoing operation of systems and procedures to ensure continued compliance. ''Transaction-related'' burden refers to the time and cost associated with providing the various required disclosures in individual transactions. While this burden varies with the number of transactions, the figures shown for transaction-related burden in the tables that follow are estimated averages.

The required disclosures do not impose PRA burden on some covered entities because they make those disclosures in their normal course of activities. For other covered entities that do not, their compliance burden will vary widely depending on the extent to which they have developed effective computer-based or electronic systems and procedures to communicate and document required disclosures.[9]

Calculating the burden associated with the four regulations' disclosure requirements is very difficult because of the highly diverse group of affected entities. The ''respondents'' included in the following burden calculations consist of, among others, credit and lease advertisers, creditors, owners (such as purchasers and assignees) of credit obligations, financial institutions, service providers, certain government agencies and others involved in delivering electronic fund transfers (''EFTs'') of government benefits, and lessors.[10] The burden estimates represent FTC staff's best assessment, based on its knowledge and expertise relating to the financial services industry. Staff considered the wide variations in covered entities' (1) size and location; (2) credit or lease products offered, extended, or advertised, and their particular terms; (3) EFT types used; (4) types and frequency of adverse actions taken; (5) types of appraisal reports utilized; and (6) computer systems and electronic features of compliance operations.

The cost estimates that follow relate solely to labor costs, and they include the time necessary to train employees how to comply with the regulations. Staff calculated labor costs by multiplying appropriate hourly wage rates by the burden hours described above. The hourly rates used were $49 for managerial oversight, $30 for skilled technical services, and $16 for clerical work. These figures are averages drawn from Bureau of Labor Statistics data.[11] Further, the FTC cost estimates assume the following labor category apportionments, except where otherwise indicated below: recordkeeping—10% skilled technical, 90% clerical; disclosure—10% managerial, 90% skilled technical.

The applicable PRA requirements impose minimal capital or other non-labor costs. Affected entities generally already have the necessary equipment for other business purposes. Similarly, FTC staff estimates that compliance with these rules entails minimal printing and copying costs beyond that associated with documenting financial transactions in the ordinary course of business.

1. Regulation B

The ECOA prohibits discrimination in the extension of credit. Regulation B implements the ECOA, establishing disclosure requirements to assist customers in understanding their rights under the ECOA and recordkeeping requirements to assist agencies in enforcement. Regulation B applies to retailers, mortgage lenders, mortgage brokers, finance companies, and others.

Recordkeeping

FTC staff estimates that Regulation B's general recordkeeping requirements affect 530,479 credit firms subject to the Commission's jurisdiction, at an average annual burden of 1.25 hours per firm for a total of 663,099 hours.[12] Staff also

(b). Subsection (b) does not preclude CFPB regulatory oversight regarding, among others, businesses that extend retail credit or retail leases for motor vehicles in which the credit or lease offered is provided directly from those businesses, rather than unaffiliated third parties, to consumers. It is not practicable, however, for PRA purposes, to estimate the portion of dealers that engage in one form of financing versus another (and that would or would not be subject to CFPB oversight). Thus, FTC staff's ''carve-out'' for this PRA burden analysis reflects a general estimated volume of motor vehicle dealers. This attribution does not change actual enforcement authority.

[6] OMB Control Numbers 3170–0013 (Regulation B), 3170–0014 (Regulation E), 3170–0008 (Regulation M), and 3170–0015 (Regulation Z)

[7] *See* Dodd-Frank Act, § 1029(a)–(c).

[8] PRA ''burden'' does not include effort expended in the ordinary course of business, regardless of any regulatory requirement. 5 CFR 1320.3(b)(2).

[9] For example, large companies may use computer-based and/or electronic means to provide required disclosures, including issuing some disclosures en masse, *e.g.,* notices of changes in terms. Smaller companies may have less automated compliance systems but may nonetheless rely on electronic mechanisms for disclosures and recordkeeping. Regardless of size, some entities may utilize compliance systems that are fully integrated into their general business operational system; if so, they may have minimal additional burden. Other entities may have incorporated fewer of these approaches into their systems and thus may have a higher burden.

[10] The Commission generally does not have jurisdiction over banks, thrifts, and federal credit unions under the applicable regulations.

[11] These inputs are based broadly on mean hourly data found within the National Compensation Survey: Occupational Earnings in the United States, 2010, Bulletin 2753 (May 2011), Table 3 (*http://www.bls.gov/ncs/ocs/sp/nctb1477.pdf*).

[12] Section 1071 of the Dodd-Frank Act amends the ECOA to require financial institutions to collect and report information concerning credit applications by women- or minority-owned businesses and small businesses, effective on the July 21, 2011 transfer date. Both the CFPB and the Board have exempted affected entities from complying with this requirement until a date set by the prospective final rules these agencies issue to implement the Dodd-Frank Act's requirements. The Commission will address PRA burden for its

Continued

estimates that the requirement that mortgage creditors monitor information about race/national origin, sex, age, and marital status imposes a maximum burden of one minute each (of skilled technical time) for approximately 2.25 million credit applications (based on industry data regarding the approximate number of mortgage purchase and refinance originations), for a total of 37,500 hours.[13] Staff also estimates that recordkeeping of self-testing subject to the regulation would affect 1,375 firms, with an average annual burden of one hour (of skilled technical time) per firm, for a total of 1,375 hours, and that recordkeeping of any corrective action as a result of self-testing would affect 10% of them, *i.e.,* 138 firms, with an average annual burden of four hours (of skilled technical time) per firm, for a total of 552 hours.[14] Keeping records of race/national origin, sex, age, and marital status requires an estimated one minute of skilled technical time. Recordkeeping for the self-test responsibility and of any corrective actions requires an estimated one hour and four hours, respectively, of skilled technical time.

Disclosure

Regulation B requires that creditors (*i.e.,* entities that regularly participate in the decision whether to extend credit under Regulation B) provide notices whenever they take adverse action, such as denial of a credit application. It requires entities that extend various types of mortgage credit to provide a copy of the appraisal report to applicants or to notify them of their right to a copy of the report (and thereafter provide a copy of the report, upon the applicant's request). Finally, Regulation B also requires that for accounts which spouses may use or for which they are contractually liable, creditors who report credit history must do so in a manner reflecting both spouses' participation. Further, it requires creditors that collect applicant characteristics for purposes of conducting a self-test to disclose to those applicants that: (1) Providing the information is optional; (2) the creditor will not take the information into account in any aspect of the credit transactions; and (3) if applicable, the information will be noted by visual observation or surname if the applicant chooses not to provide it.[15]

Burden Totals

Recordkeeping: 702,526 hours (625,977 + 76,549 carve-out for motor vehicles); $12,720,734 ($11,384,370 + $1,336,364 carve-out for motor vehicles), associated labor costs

Disclosures: 1,164,458 hours (1,032,206 + 132,252 carve-out for motor vehicles); $37,146,184 ($32,927,330 + $4,218,854 carve-out for motor vehicles), associated labor costs

REGULATION B—DISCLOSURES—BURDEN HOURS

Disclosures	Setup/monitoring [1]			Transaction-related [2]			
	Respondents	Average burden per respondent (hours)	Total setup/ monitoring burden (hours)	Number of transactions	Average burden per transaction (minutes)	Total transaction burden (hours)	Total burden (hours)
Credit history reporting	133,000	.25	33,250	66,309,750	.25	276,291	309,541
Adverse action notices	530,000	.75	397,500	106,096,000	.25	442,067	839,567
Appraisal notices	5,000	.5	2,500	1,125,000	.25	4,688	7,188
Appraisal reports	5,000	.5	2,500	1,125,000	.25	4,688	7,188
Self-test disclosures	1,375	.5	688	68,750	.25	286	974
Total							1,164,458

[1] The estimates shown reflect a decrease in applicable mortgage entities regarding appraisal notices and appraisal reports. The figures assume that approximately half of mortgage entities (.5 × 10,000, or 5,000 businesses) would not otherwise provide this information and thus would be affected. The figures also assume that all applicable entities would provide notices first and thereafter provide the reports upon request.

[2] The above figures reflect a decrease in mortgage transactions, compared to prior FTC estimates. They also assume that half of applicable mortgage transactions (.5 × 2,250,000, or 1,125,000) would not otherwise provide the appraisal notices and reports and thus would be affected.

REGULATION B—RECORDKEEPING AND DISCLOSURES—COST

Required task	Managerial		Skilled technical		Clerical		Total cost ($)
	Time (hours)	Cost ($49/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	
General recordkeeping	0	$0	66,310	$1,989,300	596,789	$9,548,624	$11,537,924
Other recordkeeping	0	0	37,500	1,125,000	0	0	1,125,000
Recordkeeping of test	0	0	1,375	41,250	0	0	41,250
Recordkeeping of corrective action	0	0	552	16,560	0	0	16,650
Total Recordkeeping							12,720,734
Disclosures:							
Credit history reporting	30,954	1,516,746	278,587	8,357,610	0	0	9,874,356

enforcement of these requirements after the CFPB and the Board have issued the associated final rules.

[13] Regulation B contains model forms that creditors may use to gather and retain the required information.

[14] In contrast to banks, for example, entities under FTC jurisdiction are not subject to audits for compliance with Regulation B; rather they may be subject to FTC investigations and enforcement actions. This may impact the level of self-testing (as specifically defined by Regulation B) in a given year, and staff has sought to address such factors in its burden estimates.

[15] The disclosure may be provided orally or in writing. The model form provided by Regulation B assists creditors in providing the written disclosure.

REGULATION B—RECORDKEEPING AND DISCLOSURES—COST—Continued

Required task	Managerial		Skilled technical		Clerical		Total cost ($)
	Time (hours)	Cost ($49/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	
Adverse action notices	83,957	4,113,893	755,610	22,668,300	0	0	26,782,193
Appraisal notices	719	35,231	6,469	194,070	0	0	229,301
Appraisal reports	719	35,231	6,469	194,070	0	0	229,301
Self-test disclosure	97	4,753	877	26,310	0	0	31,063
Total Disclosures							37,146,214
Total Recordkeeping and Disclosures							49,866,948

2. Regulation E

The EFTA requires that covered entities provide consumers with accurate disclosure of the costs, terms, and rights relating to EFT and certain other services. Regulation E implements the EFTA, establishing disclosure and other requirements to aid consumers and recordkeeping requirements to assist agencies with enforcement. It applies to financial institutions, retailers, gift card issuers and others that provide gift cards, service providers, various federal and state agencies offering EFTs, *etc.* Staff estimates that Regulation E's recordkeeping requirements affect 391,120 firms offering EFT services to consumers and that are subject to the Commission's jurisdiction, at an average annual burden of one hour per firm, for a total of 391,120 hours.

Burden Totals

Recordkeeping: 391,120 hours (375,881 + 15,239 carve-out); $6,805,488 ($6,540,328 + $265,160 carve-out), associated labor costs

Disclosures: 4,019,797 hours (4,002,868 + 16,929 carve-out); $128,236,961 ($127,696,924 + $540,037 carve-out), associated labor costs

REGULATION E: DISCLOSURES —BURDEN HOURS

Disclosures	Setup/monitoring			Transaction-related			
	Respondents	Average burden per respondent (hours)	Total setup/monitoring burden (hours)	Number of transactions	Average burden per transaction (minutes)	Total transaction burden (hours)	Total burden (hours)
Initial terms	50,000	.5	25,000	500,000	.02	167	25,167
Change in terms	12,500	.5	6,250	16,500,000	.02	5,500	11,750
Periodic statements	50,000	.5	25,000	600,000,000	.02	200,000	225,000
Error resolution	50,000	.5	25,000	500,000	5	41,667	66,667
Transaction receipts	50,000	.5	25,000	2,500,000,000	.02	833,333	858,333
Preauthorized transfers [1]	257,620	.5	128,810	6,440,500	.25	26,835	155,645
Service provider notices	50,000	.25	12,500	500,000	.25	2,083	14,583
Govt. benefit notices	5,000	.5	2,500	50,000,000	.25	208,333	210,833
ATM notices [2]	250	.25	63	50,000,000	.25	208,333	208,396
Electronic check conversion [3]	57,620	.5	28,810	1,152,400	.02	384	29,194
Payroll cards [4]	125	.5	63	500,000	3	25,000	25,063
Overdraft services [5]	50,000	.5	25,000	2,500,000	.02	833	25,833
Gift cards [6]	50,000	.5	25,000	2,500,000,000	.02	833,333	858,333
Remittance transfers [7]							
Disclosures	35,000	1	35,000	18,000,000	1	300,000	335,000
Error resolution	35,000	1	35,000	36,000,000	1	600,000	635,000
Agent compliance	35,000	1	35,000	18,000,000	1	300,000	335,000
Total							4,019,797

[1] Estimated preauthorized transfers have increased from the FTC's previously cleared estimate.
[2] Estimated ATM transactions have increased from the FTC's previously cleared estimate.
[3] Estimated electronic check conversion has decreased from the FTC's previously cleared estimate.
[4] Payroll card entities and transactions have increased greatly over the years, in large part due to the evolving economy as well as companies seeking ways to cut costs and reduce the amount of paper used in daily operations.
[5] Regulation E now covers overdraft services.
[6] Regulation E now, in part, covers gift cards.
[7] Regulation E now covers remittance transfers.

REGULATION E: RECORDKEEPING AND DISCLOSURES—COST

Required task	Managerial		Skilled technical		Clerical		Total cost ($)
	Time (hours)	Cost ($49/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	
Recordkeeping	0	0	35,762	1,072,860	321,858	5,149,728	6,222,588
Disclosures:							
Initial terms	2,517	123,333	22,650	679,500	0	0	802,833
Change in terms	1,175	57,575	10,750	322,500	0	0	380,075
Periodic statements	22,500	1,102,500	202,500	6,075,000	0	0	7,177,500
Error resolution	6,667	326,883	60,000	1,800,000	0	0	2,126,883
Transaction receipts	85,833	4,205,817	772,500	23,175,000	0	0	27,380,817
Preauthorized transfers	15,565	762,685	140,080	4,202,400	0	0	4,965,085
Service provider notices	1,458	71,442	13,125	393,750	0	0	465,192
Govt. benefit notices	21,083	1,033,067	189,750	5,692,500	0	0	6,725,567
ATM notices	20,840	1,021,160	187,556	5,626,680	0	0	6,647,840
Electronic check conversion	2,919	143,031	26,275	788,250	0	0	931,281
Payroll cards	2,506	122,794	22,557	676,710	0	0	799,504
Overdraft services	2,583	126,567	23,250	697,500	0	0	824,067
Gift cards	85,833	4,205,817	772,500	23,175,000	0	0	27,380,817
Remittance transfers:							
Disclosures	33,500	1,641,500	301,500	9,045,000	0	0	10,686,500
Error resolution	63,500	3,111,500	571,500	17,145,000	0	0	20,256,500
Agent compliance	33,500	1,641,500	301,500	9,045,000	0	0	10,686,500
Total Disclosures	.....	.....	.....	.....	.....	.....	128,236,961
Total Recordkeeping and Disclosures	.....	.....	.....	.....	.....	.....	$135,042,449

3. Regulation M

The CLA requires that covered entities provide consumers with accurate disclosure of the costs and terms of leases. Regulation M implements the CLA, establishing disclosure requirements to help consumers comparison shop and understand the terms of leases and recordkeeping requirements. It applies to vehicle lessors (such as auto dealers, independent leasing companies, and manufacturers' captive finance companies), computer lessors (such as computer dealers and other retailers), furniture lessors, various electronic commerce lessors, diverse types of lease advertisers, and others.

Staff estimates that Regulation M's recordkeeping requirements affect approximately 54,442 firms within the FTC's jurisdiction leasing products to consumers at an average annual burden of one hour per firm, for a total of 54,442 hours.

Burden Totals

Recordkeeping: 54,442 hours (40,558 + 13,884 carve-out);
$947,288 ($705,712 + $241,576 carve-out), associated labor costs
Disclosures: 68,403 hours (42,139 + 26,264 carve-out);
$2,182,050 ($1,344,217 + $837,833 carve-out), associated labor costs

REGULATION M: DISCLOSURES—BURDEN HOURS

Disclosures	Setup/monitoring		Transaction-related				
Respondents	Average burden per respondent (hours)	Total setup/monitoring burden (minutes)	Number of transactions	Average burden per transaction (minutes)	Total transaction burden (hours)	Total burden (hours)	
Motor Vehicle Leases[1]	29,442	1	29,442	1,972,614	.50	16,438	45,880
Other Leases[2]	25,000	.50	12,500	250,000	.25	1,042	13,542
Advertising	13,471	.50	6,736	538,840	.25	2,245	8,981
Total	.....	.....	.....	.....	.....	.....	68,403

[1] This category focuses on consumer vehicle leases. Vehicle leases are subject to more lease disclosure requirements (pertaining to computation of payment obligations) than other lease transactions. (Only consumer leases for more than four months are covered.) *See* 15 U.S.C. § 1667(1); 12 CFR § 1013.2(e)(1). Leases up to $50,000 (plus an annual adjustment) are now covered, which increases the breadth of transactions subject to the FTC's jurisdiction under Regulation M. This increase, however, is more than offset by the FTC now sharing PRA burden with the CFPB, which thus yields a net decrease from past FTC estimates of the number of transactions.

[2] This category focuses on all types of consumer leases other than vehicle leases. It includes leases for computers, other electronics, small appliances, furniture, and other transactions. (Only consumer leases for more than four months are covered.) *See* 15 U.S.C. § 1667(1); 12 CFR § 1013.2(e)(1). The figures shown for respondents and transactions reflect a net decrease from prior FTC estimates, given current market conditions and the new PRA burden sharing with the CFPB while also recognizing that the CLA and Regulation M now cover leases up to $50,000 (plus an annual adjustment).

REGULATION M: RECORDKEEPING AND DISCLOSURES—COST

Required task	Managerial		Skilled technical		Clerical		Total
	Time (hours)	Cost ($49/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	Cost ($)
Recordkeeping	0	0	5,444	163,320	48,998	783,968	947,288
Disclosures:							
Motor Vehicle Leases	4,588	224,812	41,292	1,238,760	0	0	1,463,572
Other Leases	1,354	66,346	12,188	365,640	0	0	431,986
Advertising	898	44,002	8,083	242,490	0	$0	286,492
Total Disclosures	.....	.....	.....	.....	.....	.....	2,182,050
Total Recordkeeping and Disclosures	.....	.....	.....	.....	.....	.....	3,123,338

4. Regulation Z

The TILA was enacted to foster comparison credit shopping and informed credit decision making by requiring creditors and others to provide accurate disclosures regarding the costs and terms of credit to consumers. Regulation Z implements the TILA, establishing disclosure requirements to assist consumers and recordkeeping requirements to assist agencies with enforcement. These requirements pertain to open-end and closed-end credit and apply to various types of entities, including mortgage companies; finance companies; auto dealerships; private education loan companies; merchants who extend credit for goods or services; credit advertisers; acquirers of mortgages; and others.

FTC staff estimates that Regulation Z's recordkeeping requirements affect approximately 530,479 entities subject to the Commission's jurisdiction, at an average annual burden of 1.25 hours per entity, for a total of 663,099 hours.

Burden Totals

Recordkeeping: 663,099 hours (586,900 + 76,199 carve-out); $11,537,924 ($10,212,060 + $1,325,864 carve-out), associated labor costs

Disclosures: 12,000,274 hours (10,957,621 + 1,042,653 carve-out); $382,858,568 ($349,597,924 + $33,260,644 carve-out), associated labor costs

REGULATION Z: DISCLOSURES—BURDEN HOURS

Disclosures [1]	Setup/monitoring			Transaction-related			
	Respondents	Average burden per respondent [2] (hours)	Total setup/monitoring burden (hours)	Number of transactions	Average burden per transaction [3] (minutes)	Total transaction burden (hours)	Total burden (hours)
Open-end credit:							
Initial terms	45,000	.75	33,750	20,000,000	.375	125,000	158,750
Rescission notices [4]	1,875	.5	938	100,000	.25	417	1,355
Subsequent disclosures	10,000	.75	7,500	62,500,000	.188	195,833	203,333
Periodic statements	45,000	.75	33,750	1,750,000,000	.0938	2,735,833	2,769,583
Error resolution	45,000	.75	33,750	4,000,000	6	400,000	433,750
Credit and charge card accounts	25,000	.75	18,750	12,500,000	.375	78,125	96,875
Settlement of estate debts [5]	45,000	.75	33,750	1,000,000	.375	6,250	40,000
Special credit card requirements [6]	25,000	.75	18,750	12,500,000	.375	78,125	96,875
Home equity lines of credit [7]	1,875	.5	938	875,000	.25	3,646	4,584
College student credit card marketing—ed. institutions [8]	2,500	.5	1,250	250,000	.25	1,042	2,292
College student credit card marketing—card issuer reports [9]	300	.75	225	18,000	.75	225	450
Posting and reporting of credit card agreements [10]	25,000	.75	18,750	12,500,000	.375	78,125	96,875
Advertising	100,000	.75	75,000	300,000	.75	3,750	78,750
Sale, transfer, or assignment of mortgages [11]	1,875	.5	938	1,750,000	.25	7,292	8,230

REGULATION Z: DISCLOSURES—BURDEN HOURS—Continued

Disclosures [1]	Setup/monitoring			Transaction-related			
	Respondents	Average burden per respondent [2] (hours)	Total setup/ monitoring burden (hours)	Number of transactions	Average burden per transaction [3] (minutes)	Total transaction burden (hours)	Total burden (hours)
Appraiser misconduct reporting [12]	625,000	.75	468,750	12,500,000	.375	78,125	546,875
Closed-end credit:							
Credit disclosures	380,480	.75	285,360	163,225,920	2.25	6,120,972	6,406,332
Rescission notices [13]	18,750	.5	9,375	7,500,000	1	125,000	134,375
Redisclosures [14]	200,000	.5	100,000	1,000,000	2.25	37,500	137,500
Variable rate mortgages [15]	17,500	.5	8,750	500,000	1.5	12,500	21,250
High rate/high-fee mortgages and higher priced mortgages [16]	10,000	.5	5,000	125,000	1.5	3,125	8,125
Reverse mortgages [17]	12,500	.5	6,250	43,750	1	729	6,979
Advertising	240,240	.5	120,120	480,480	1	8,008	128,128
Private education loans [18]	100	.5	50	50,000	1.5	1,250	1,300
Sale, transfer, or assignment of mortgages [19]	100,000	.5	50,000	5,000,000	.25	20,833	70,833
Appraiser misconduct reporting [20]	625,000	.75	468,750	12,500,000	.375	78,125	546,875
Total open-end credit							4,538,577
Total closed-end credit							7,461,697
Total credit							12,000,274

[1] Regulation Z requires disclosures for closed-end and open-end credit. TILA and Regulation Z now cover credit up to $50,000 plus an annual adjustment (except that real estate credit and private education loans are covered regardless of amount), generally causing an increase in transactions. In some instances noted below, market changes have reduced estimated PRA burden. In other instances noted below, changes to Regulation Z have increased estimated PRA burden. The overall effect of these competing factors, combined with the FTC now sharing with the CFPB estimated PRA burden (for all but certain motor vehicle dealers) yields a net decrease from the FTC's prior reported estimate for open-end credit and a net increase from the FTC's prior burden estimate for closed-end credit.
[2] Burden per respondent in many categories has increased compared to prior FTC estimates, due to changes in rules.
[3] Burden per transaction in many categories has increased compared to prior FTC estimates, due to changes in rules.
[4] Mortgages have decreased.
[5] Regulation Z now requires disclosures for timely settlement of estate debts.
[6] Regulation Z now has special credit card requirements.
[7] Home equity lines of credit have decreased.
[8] Regulation Z now requires higher education institutions to disclose credit card marketing agreements.
[9] Regulation Z now requires card issuers to submit reports on college student credit card marketing.
[10] Regulation Z now requires card issuers to post and report general credit card agreements.
[11] Regulation Z now requires certain acquirers of legal title to disclose the sale, transfer, or assignment of mortgages.
[12] Regulation Z now requires reporting of appraiser misconduct.
[13] Mortgages have decreased.
[14] Regulation Z now has substantial redisclosure requirements. Previously, redisclosures were generally provided in the ordinary course of business. Rule changes since set numerous procedures and circumstances for redisclosures.
[15] Variable rate mortgages have decreased.
[16] Mortgages have decreased.
[17] Reverse mortgages have decreased.
[18] Regulation Z now requires disclosures for private education loans.
[19] Regulation Z now requires certain acquirers of legal title to disclose the sale, transfer, or assignment of mortgages.
[20] Regulation Z now requires reporting of appraiser misconduct.

REGULATION Z: RECORDKEEPING AND DISCLOSURES—COST

Required task	Managerial		Skilled technical		Clerical		Total cost ($)
	Time (hours)	Cost ($49/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	
Recordkeeping	0	$0	66,310	$1,989,300	596,789	$9,548,624	$11,537,924
Open-end credit Disclosures:							
Initial terms	15,875	777,875	142,875	4,286,250	0	0	5,064,125

REGULATION Z: RECORDKEEPING AND DISCLOSURES—COST—Continued

Required task	Managerial		Skilled technical		Clerical		Total cost ($)
	Time (hours)	Cost ($49/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	
Rescission notices	135	6,615	1,220	36,600	0	0	43,215
Subsequent disclosures	20,333	996,317	183,000	5,490,000	0	0	6,486,317
Periodic statements	276,958	13,570,942	2,492,625	74,778,750	0	0	88,349,692
Error resolution	43,375	2,125,375	390,375	11,711,250	0	0	13,836,625
Credit and charge card accounts	9,688	474,712	87,187	2,615,610	0	0	3,090,322
Settlement of estate debts	4,000	196,000	36,000	1,080,000	0	0	1,276,000
Special credit card requirements	9,688	474,712	87,187	2,615,610	0	0	3,090,322
Home equity lines of credit	458	22,442	4,126	123,780	0	0	146,222
College student credit card marketing—ed institutions	229	11,221	2,063	61,890	0	0	73,111
College student credit card marketing—card issuer reports	45	2,205	405	12,150	0	0	14,355
Posting and reporting of credit card agreements	9,688	474,712	87,187	2,615,610	0	0	3,090,322
Advertising	7,875	385,875	70,875	2,126,250	0	0	2,512,125
Sale, transfer, or assignment of mortgages	823	40,327	7,407	222,210	0	0	262,537
Appraiser misconduct reporting	54,687	2,679,663	492,188	14,765,640	0	0	17,445,303
Total open-end credit	.....	.....	.....	.....	.....	.....	144,780,593
Closed-end credit Disclosures:							
Credit disclosures	640,633	31,391,017	5,765,699	172,970,970	0	0	204,361,987
Rescission notices	13,437	658,413	120,938	3,628,140	0	0	4,286,553
Redisclosures	13,750	673,750	123,750	3,712,500	0	0	4,386,250
Variable rate mortgages	2,125	104,125	19,125	573,750	0	0	677,875
High-rate/high-fee mortgages and higher priced mortgages	969	47,481	8,719	261,570	0	0	309,051
Reverse mortgages	698	34,202	6,281	188,430	0	0	222,632
Advertising	12,813	627,837	115,315	3,459,450	0	0	4,087,287
Private education loans	130	6,370	1,170	35,100	0	0	41,470
Sale, transfer, or assignment of mortgages	7,083	347,067	63,750	1,912,500	0	0	2,259,567
Appraiser misconduct reporting	54,687	2,679,663	492,188	14,765,640	0	0	17,445,303
Total closed-end credit	.....	.....	.....	.....	.....	.....	238,077,975
Total Disclosures	.....	.....	.....	.....	.....	.....	382,858,568
Total Recordkeeping and Disclosures	.....	.....	.....	.....	.....	.....	394,396,492

Request for Comment: You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 9, 2012. Write ''Regs BEMZ, PRA Comments, P084812'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because you comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential'' as provided in Section 6(f) of the FTC Act 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns devices, manufacturing processes, or customer names.

If you want the Commission to give you comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c)).[16] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in

[16] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), CFR 4.9(c), 16 CFR 4.9(c).

accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/RegsBEMZpra,* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Regs BEMZ, PRA Comments, P084812'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J) 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before April 9, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Willard K. Tom,

General Counsel.

[FR Doc. 2012–2665 Filed 2–6–12; 8:45 am]

BILLING CODE 6750–01–P

GENERAL SERVICES ADMINISTRATION

[Notice-FAS–2011–01; Docket No. 2011–0006; Sequence 22]

Providing Refurbishment Services to Federal Agencies

AGENCY: Federal Acquisition Service, U.S. General Services Administration.

ACTION: Notice.

SUMMARY: In accordance with the National Strategy for Electronics Stewardship recommendations (*http://www.gsa.gov/estewardship*), GSA is exploring whether and how best to make cost-effective refurbishment services available to Federal agencies to extend the useful life of non-functional electronic equipment. GSA seeks to determine whether providing refurbishment as a service to Federal agencies fits into viable business models, what appropriate standards and certifications ought to be considered, and how best to build Federal contracts for such services.

DATES: *Effective date:* Submit comments on or before March 8, 2012.

ADDRESSES: Submit comments identified by ''Notice-FAS–2011–01'' by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''Notice-FAS–2011–01'' under the heading ''Enter Keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''Notice-FAS–2011–01.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Notice-FAS–2011–01'' on your attached document.
- *Fax:* (202) 501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite ''Notice-FAS–2011–01'', in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Inquiries and clarifications may be sent to Mr. Chris Hoagland, Office of Governmentwide Policy, U.S. General Services Administration, *christopher.hoagland@gsa.gov.*

SUPPLEMENTARY INFORMATION:

I. Purpose and Information Sought

This notice is for data gathering and planning purposes only, does not constitute a solicitation, and is not to be construed as a commitment by the government to issue a solicitation, Blanket Purchase Agreement (BPA) or award a contract. The Government will not reimburse any respondent for any costs associated with information submitted in response to this notice.

GSA seeks to determine whether providing refurbishment as a service to Federal agencies fits into viable business models, what appropriate standards and certifications ought to be considered, and how best to build Federal contracts for such services. GSA is seeking this information through voluntary responses to the following questions:

1. If you currently provide refurbishment as a service to customers, including Federal, state, or local government entities, describe the process of obtaining equipment and returning it to the customer, including the typical amount of time between pick-up and return.

2. Is there a minimum number of pieces of electronic equipment that must be provided (*e.g.*, a pallet load, a truckload)?

3. Does providing refurbishment as a service (rather than refurbished equipment) fit into viable business models for computer refurbishment companies?

4. How do the fees you charge per refurbished item compare to the cost of new or used equipment?

5. Describe the process for disposing and recycling of failed equipment. Have all facilities in your recycling and disposal process been certified to safely recycle and manage electronics? If so, what certifications do they hold?

6. Who is responsible for disposition of equipment that cannot be refurbished, the customer or the provider of refurbishment services? Is there an additional fee for disposition of equipment that cannot be refurbished?

7. What certifications should the government require of firms offering refurbishment services, including those developed specifically for recycling facilities (*e.g.*, R2 and e-Stewards)?

Dated: February 2, 2012.

Houston Taylor,

Assistant Commissioner, Office of Acquisition Management, Federal Acquisition Service, General Services Administration.

[FR Doc. 2012–2767 Filed 2–6–12; 8:45 am]

BILLING CODE 6820–89–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Presidential Advisory Council on HIV/AIDS

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Service (DHHS) is hereby giving notice that the Presidential Advisory Council on HIV/AIDS (PACHA) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will be held Tuesday, February 28, 2012 and Wednesday, February 29, 2012. The meeting will be held from 9:30 a.m. to approximately 5 p.m. on Tuesday, February 28, 2012, and from 10 a.m. to approximately 3 p.m. on Wednesday, February 29, 2012.

ADDRESSES: South Court Auditorium, Eisenhower Executive Office Building, Pennsylvania Avenue and 17th Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Melvin Joppy, Committee Manager, Presidential Advisory Council on HIV/AIDS, Department of Health and Human Services, 200 Independence Avenue SW., Room 443H, Hubert H. Humphrey Building, Washington, DC 20201; (202) 690–5560. More detailed information about PACHA can be obtained by accessing the Council's Web site, *www.pacha.gov*.

SUPPLEMENTARY INFORMATION: PACHA was established by Executive Order 12963, dated June 14, 1995, as amended by Executive Order 13009, dated June 14, 1996. The Council was established to provide advice, information, and recommendations to the Secretary regarding programs and policies intended to promote effective prevention of HIV disease and AIDS. The functions of the Council are solely advisory in nature.

The Council consists of not more than 25 members. Council members are selected from prominent community leaders with particular expertise in, or knowledge of, matters concerning HIV and AIDS, public health, global health, philanthropy, marketing or business, as well as other national leaders held in high esteem from other sectors of society. Council members are appointed by the Secretary or designee, in consultation with the White House Office on National AIDS Policy. The agenda for the upcoming meeting will be posted on the Council's Web site at *www.pacha.gov*.

This meeting of the PACHA will be on White House property, thus, each person must be screened and cleared by the U.S. Secret Service. Pre-registration for public attendance is mandatory. Please contact: Melvin Joppy, Office of HIV/AIDS Policy (202) 690–5560 or *melvin.joppy@hhs.gov*. The second day of the meeting, February 29, will be held in a different room within the same venue; space will be limited. For this reason, members of the public will be accommodated on a first come, first serve basis for this portion of the meeting. Mr. Joppy will need your full name, social security number, date of birth, country of origin, gender, and city and state of residence to process public access attendance. Registration must be submitted by close of business Tuesday, February 21, 2012.

Members of the public will have the opportunity to provide comments at the meeting. Any individual who wishes to participate in the public comment session must register with Melvin Joppy at *melvin.joppy@hhs.gov;* registration for public comment will not be accepted by telephone. Public comment will be limited to two minutes per speaker. It is requested that any members of the public who wish to have printed material distributed to PACHA members at the meeting submit, at a minimum, two copies of the materials to the Committee Manager, PACHA, no later than close of business Tuesday, February 21, 2012. Contact information for the PACHA Committee Manager is listed above.

Dated: February 1, 2012.

Christopher Bates,

Executive Director, Presidential Advisory Council on HIV/AIDS.

[FR Doc. 2012–2707 Filed 2–6–12; 8:45 am]

BILLING CODE 4150–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10421]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Fee-for-Service Recovery Audit Prepayment Review Demonstration and Prior Authorization Demonstration; *Use:* The Centers for Medicare & Medicaid Services (CMS) is requesting the Office of Management and Budget (OMB) approval of the collections required for two demonstrations of prepayment review and prior authorization. The first demonstration would allow Medicare Recovery Auditors to review claims on a pre-payment basis in certain States. The second demonstration would establish a prior authorization program for Power Mobility Device claims in certain States.

For the Recovery Audit Prepayment Review Demonstration, CMS and its agents will request additional documentation, including medical records, to support submitted claims. As discussed in more detail in Chapter 3 of the Program Integrity Manual, additional documentation includes any medical documentation, beyond what is included on the face of the claim that supports the item or service that is billed. For Medicare to consider coverage and payment for any item or service, the information submitted by the provider or supplier (*e.g.,* claims) must be supported by the documentation in the patient's medical records. When conducting complex medical review, the contractor specifies documentation they require in accordance with Medicare's rules and policies. In addition, providers and suppliers may supply additional documentation not explicitly listed by the contractor. This supporting information may be requested by CMS and its agents on a routine basis in instances where diagnoses on a claim do not clearly indicate medical necessity, or if there is a suspicion of fraud.

For the Prior Authorization of Power Mobility Devices (PMDs) Demonstration, CMS will pilot prior authorization for Power Mobility Devices. Prior authorization will allow the applicable documentation that supports a claim to be submitted before the item is delivered. For prior authorization, relevant documentation for review is submitted before the item is delivered or the service is rendered. CMS will conduct this demonstration in California, Florida, Illinois, Michigan, New York, North Carolina and Texas based on beneficiary address as reported to the Social Security Administration and recorded in the Common Working File (CWF). For the demonstration, a prior authorization request can be completed by the (ordering) physician

or treating practitioner and submitted to the appropriate DME MAC for an initial decision. The supplier may also submit the request on behalf of the physician or treating practitioner. The physician, treating practitioner or supplier who submits the request on behalf of the physician or treating practitioner, is referred to as the ''submitter.'' Under this demonstration, the submitter will submit to the DME MAC a request for prior authorization and all relevant documentation to support Medicare coverage of the PMD item.

These demonstrations have been designed to develop and demonstrate improved methods for the investigation and prosecution of fraud in the provision of care or services under the health programs established by the Social Security Act. The information required under this information collection request is requested by Medicare contractors to determine proper payment or if there is a suspicion of fraud. For the RAC demonstration, Medicare contractors may request the information from providers or suppliers submitting claims for payment from the Medicare program when data analysis indicates aberrant billing patterns or other information which may present a vulnerability to the Medicare program. Under the prior authorization demonstration, for certain PMDs, with a history of aberrant billing patterns, this information is requested in advance to determine appropriate payment or if there is a suspicion of fraud. *Form Number:* CMS–10421 (OCN 0938–New); *Frequency:* Occasionally; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 479,750; *Total Annual Responses:* 479,750; *Total Annual Hours:* 243,060. (For policy questions regarding this collection contact Debbie Skinner at (410) 786–7480. For all other issues call (410) 786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *April 9, 2012:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number CMS–10161 (OCN 0938–0979), Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: February 1, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–2821 Filed 2–3–12; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–668B and CMS–1557]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection. *Title of Information Collection:* Post Clinical Laboratory Survey Questionnaire and Supporting Regulations in 42 CFR 493.1771, 493.1773, and 493.1777. *Use:* Form CMS–668B is used by a Clinical Laboratory Improvement Amendments (CLIA) laboratory to express its satisfaction with the survey process and to make recommendations for improvement. Surveyors furnish this form to all laboratories that receive either an onsite survey or the Alternate Quality Assessment Survey (i.e., paper survey of quality indicators). CMS Central Office performs an overview evaluation of the completed forms. Each calendar year, a summary of the information collected is sent to the State and CMS Regional Office. *Form Number:* CMS–668B (OCN 0938–0653). *Frequency:* Biennially; *Affected Public:* Business or other for-profits and not-for-profit institutions. State, Local, or Tribal Government, Federal Government. *Number of Respondents:* 21,000. *Total Annual Responses:* 10,500. *Total Annual Hours:* 2,625. (For policy questions regarding this collection contact Kathleen Todd at (410) 786–3385. For all other issues call (410) 786–1326.)

2. *Type of Information Collection Request:* Extension of a currently approved collection. *Title of Information Collection:* Survey Report Form for Clinical Laboratory Improvement Amendments (CLIA) and Supporting Regulations in 42 CFR 493.1–493.2001. *Use:* CMS 1557 is used to report surveyor findings during a CLIA survey. For each type of survey conducted (i.e., initial certification, recertification, validation, complaint, addition/deletion of specialty/subspecialty, transfusion fatality investigation, or revisit inspections) the Survey Report Form incorporates the requirements specified in the CLIA regulations. *Form Number:* CMS–1557 (OCN 0938–0544). *Frequency:* Biennially. *Affected Public:* Business or other for-profit, Not-for-profit institutions, State, Local or Tribal Governments and Federal Government. *Number of Respondents:* 21,000. *Total Annual Responses:* 10,500. *Total Annual Hours:* 5,248. (For policy questions regarding this collection contact Kathleen Todd at (410) 786–3385. For all other issues call (410) 786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the

Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *April 9, 2012:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: January 31, 2012.

Martique Jones,

Director, Regulations Development Group, Division B Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–2774 Filed 2–6–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–29 and CMS–10366]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Request for Certification as a Rural Health Clinic Form and Supporting Regulations in 42 CFR 491.1–491.11; *Use:* The Form CMS–29, Request for Certification as a Supplier of Rural Health Clinic (RHC) Services under the Medicare/Medicaid Program, is utilized as an application to be completed by suppliers of RHC services requesting participation in the Medicare program. This form initiates the process of obtaining a decision as to whether the conditions for certification are met as a supplier of RHC services. It also promotes data reduction or introduction to and retrieval from the Automated Survey Process Environment (ASPEN) and related survey and certification databases by the CMS Regional Offices. Should any question arise regarding the structure of the organization, this information is readily available. With this renewal request, the title of the Form CMS–29 is being revised to better describe the purpose of the data being collected. Both new and existing clinics must provide and attest to the accuracy of specific clinic data as a part of the RHC certification process. Therefore, the revised title is ''Form CMS–29/Verification of Clinic Data—Rural Health Clinic Program.'' The Form CMS–29 is also being revised to remove Section V, Federal Support. The information captured under Section V is not a deciding factor as to whether or not a clinic meets RHC certification requirements. Therefore, it is unnecessary to require facilities to complete this section as a part of the certification process; *Form Number:* CMS–29 (OCN 0938–0074); *Frequency:* Occasionally (initially and then every six years); *Affected Public:* Private Sector (Business or other for-profit and Not-for-profit institutions); *Number of Respondents:* 3,981; *Total Annual Responses:* 830; *Total Annual Hours:* 138. (For policy questions regarding this collection contact Shonté Carter at (410) 786–3532. For all other issues call (410) 786–1326.)

2. *Type of Information Collection Request:* New collection (request for new OMB control number); *Title of Information Collection:* Nursing Home Quality Improvement Questionnaire; *Use:* The information obtained via the Nursing Home Quality Improvement Questionnaire will be utilized by CMS staff in the Survey & Certification Group, Division of Nursing Homes, to identify areas for quality assurance and performance improvement (QAPI) technical assistance (TA) that will be useful to nursing facilities as they prepare to meet the new QAPI regulation that was mandated as part of the Affordable Care Act. Specifically, the information collected through the use of the questionnaire will be used to establish a baseline of QAPI practices in nursing homes, gather information on the challenges and barriers to implementing effective QAPI programs, assess the development of QAPI systems, determine what types of TA to make available to nursing homes, and assess the potential impact of TA in advancing QAPI in nursing homes; *Form Number:* CMS–10366 (OCN 0938–New); *Frequency:* Once; *Affected Public:* Private Sector (Business or other for-profits and Not-for-profit institutions) and State, Local or Tribal Governments; *Number of Respondents:* 4,200; *Total Annual Responses:* 4,200; *Total Annual Hours:* 1,386. (For policy questions regarding this collection contact Debra Lyons at (410) 786–6780. For all other issues call (410) 786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *March 8, 2012.* OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer. *Fax Number:* (202) 395–6974. *Email: OIRA_submission@omb.eop.gov*.

Dated: January 31, 2012.

Martique Jones,

Director, Regulations Development Group, Division-B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–2762 Filed 2–6–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Impact Studies of the Health Professions Opportunity Grants.

OMB No.: New Collection.

Description

The Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS) is proposing data collection activities as part of the Impact Studies of the Health Professions Opportunity Grants (HPOG-Impact). The goal of HPOG-Impact is to evaluate the effectiveness of approaches HPOG grantees use to provide Temporary Assistance for Needy Families (TANF) recipients and other low-income individuals with opportunities for education, training and advancement within the health care field. HPOG-Impact also is intended to evaluate variation in participant impact that may be attributable to different HPOG program components and models. The impact study design is a classic experiment in which eligible applicants for HPOG program services will be randomly assigned to a treatment group offered participation in HPOG and a control group not offered the opportunity to enroll in HPOG.

To achieve these goals, it is necessary to collect data about both treatment group and control group sample members. It also is necessary to collect data about implementation from program operators (site managers and staff) and from employers involved in programs. This 60-day notice describes the universe of data collection efforts for this study. However, this information request is limited to the baseline surveys and the program implementation data collection activities, which are described under 1, 2, 3, and 4 below. As part of this submission, we are also requesting permission to waive 60-day notices necessary for the follow-up surveys (described under 5 and 6 below).

The universe of information collection proposed for HPOG-Impact includes:

1. Brief baseline survey of eligible applicants to HPOG programs. This survey will augment data already collected about eligible program applicants through the Performance Reporting System (PRS) that currently is being used in the Implementation, Systems and Outcome Evaluation of the Tribal and Low-Income Health Profession Opportunity Grants (OMB Control No. 0970–0394). To reduce burden to the extent possible, HPOG-Impact will use data from the PRS. The 15-minute ''supplemental survey'' will collect any additional information necessary for HPOG-Impact and will be administered prior to random assignment.

2. In-person interviews with HPOG site managers. The site manager protocol will collect data about program design and content and will provide information about the grantees' rationale for applying for HPOG funding, about administrative challenges and about challenges implementing programs as planned.

3. In-person interviews with HPOG site staff. The protocol for site staff will include questions about staff roles and responsibilities and perceptions of the program.

4. In-person interviews with partnering employer(s). The protocol for employers will include questions about employers' rationale for participating in the effort, their perceptions of program strengths and challenges, and their role in program design and implementation. At each site, evaluators will conduct one meeting with an average of two employers.

5. A follow-up survey of both treatment and control group members. This survey will be administered approximately 12 months after baseline. It will be administered by phone with field back-up. It will collect data about program experiences and outcomes of interest, including certifications and educational achievements, job placement, wages, and benefits. It also will collect some information about participants' tenure and experience in HPOG programming.

6. A second follow-up survey of both treatment and control group members. This survey will be administered approximately 30 months after baseline and will be administered by phone with field back-up. It will collect updated information about outcomes of interest, including certifications and educational achievements, job placement, wages, and benefits.

Respondents

Individuals enrolled in HPOG interventions; control group members; HPOG program managers; HPOG program staff, including program designers, instructors, case managers; employers.

ANNUAL RESPONSE BURDEN ESTIMATES

[These data collection activities will occur over a two-year period]

Instrument	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
1. Brief baseline survey of eligible applicants to HPOG programs	4000	1	.25	1000
2. In-person interviews with HPOG site managers	50	1	3	150
3. In-person interviews with HPOG site staff	200	1	1	200
4. In-person interviews with partnering employer(s)	25	1	1	25

Estimated Annual Response Burden Hours: 1,375.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families (ACF), Department of Health and Human Services, is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded in writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the

proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: January 30, 2012.

Steven M. Hanmer,

Reports Clearance, Officer.

[FR Doc. 2012–2656 Filed 2–6–12; 8:45 am]

BILLING CODE 4184–09–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0084]

Submission of Extended Digital Electrocardiogram Waveform Data; Notice of Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public meeting to consider changes in how digital electrocardiogram (ECG) data gathered to assess a drug's adverse effects on heart function should be submitted for review. At the meeting, an extension of the Health Level-7 (HL7) Annotated ECG standard data format—used by the ECG warehouse—will be presented. The new data format is intended to facilitate electronic submission and sharing of ECG data from continuous recordings. We encourage device manufacturers, ECG laboratories, investigators, industry, and academic researchers to offer advice on the proposed format and perspective on the collection, analysis, submission, and review of data from long-term continuous ECG recordings for assessing the safety of investigational drugs.

Date and Time: The public meeting will be held on Wednesday, March 14, 2012, from 8 a.m. to 5 p.m.

Location: The public meeting will be held at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 2, rm. 2031, Silver Spring, MD 20993.

Contact Person: Devi Kozeli, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 4183, Silver Spring, MD 20993–0002, (301) 796–1128, FAX: (301) 796–9841, email: *Devi.Kozeli@fda.hhs.gov.*

Attendance and Registration: The FDA Conference Center at the White Oak location is a Federal facility with security procedures and limited seating. Therefore, early arrival is encouraged. There is no fee to attend the meeting, and attendees who do not wish to make an oral presentation do not need to register. Seating will be on a first-come, first-served basis.

If you would like to make an oral presentation during the meeting, you must register by sending an email to *devi.kozeli@fda.hhs.gov* by February 14, 2012. Your email should contain complete contact information for each attendee, including name, title, affiliation, address, email address, and phone number. We will try to accommodate all persons who wish to make a presentation. Registrants will receive confirmation after they have been selected. Persons registered to make an oral presentation should check in before the meeting. If you need special accommodations because of a disability, please contact Devi Kozeli (see *Contact Person*) at least 7 days before the meeting.

Comments: Interested persons may submit either electronic or written comments regarding this document. Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. To ensure consideration, all comments must be received by March 28, 2012.

SUPPLEMENTARY INFORMATION:

I. Background

Some drugs are known to interfere with the electrical function of the heart by delaying cardiac repolarization, and this delay may be associated with serious and sometimes fatal adverse events. Delay in cardiac repolarization can be assessed with an ECG, a recording of the cyclical changes in the heart's electrical activity. The delay is quantified as the increase in the Q wave and T wave (QT) interval, the length of time corresponding to the start of the Q wave and the end of the T wave on the ECG tracing. In 2005, FDA issued a guidance that was developed within the Expert Working Group of the International Conference on Harmonization of Technical Requirements (ICH) that made recommendations for the gathering and submission of ECG data, the clinical evaluation of the QT interval, and reporting of adverse events.

In responding to this guidance (ICH E–14), investigators of the efficacy and safety of drugs typically submit digitized 10-second ECGs taken at key protocol time points to FDA's ECG Warehouse. These ECGs are often extracted from continuous ECG recordings collected on Holter, Telemetry, and other long-term monitoring devices. ECG information submitted through the ECG warehouse should be in a format that was jointly developed by FDA, sponsors, core laboratories, and device manufactures under the auspices of HL7, an international organization of information scientists who collaborate to create standards for the exchange of electronic healthcare information.

Because effects on heart function that are only apparent in long-term ECG data from continuous recordings have been shown to be important in the evaluation of drug efficacy and safety, FDA plans to request these data whenever they are collected in clinical trials. This will necessitate changes in the HL7 Annotated ECG.

II. Purpose and Scope of the Meeting

The HL7 Annotated ECG data format will be discussed, and changes to it for handling long-term ECG data from continuous recordings will be proposed. The revised format is expected to proceed through the standard approval processes of HL7. Needed expansions to the hardware and software resources of FDA's ECG Warehouse and modifications to the upload process for ECG data are underway. FDA is interested in the perspective of manufacturers, ECG laboratories, investigators, industry, and academic researchers as it seeks to improve the collection, analysis, submission, and review of continuous ECG recordings for purposes of assessing drug safety.

Dated: February 2, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–2756 Filed 2–6–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

ACTION: 30–Day notice of submission of information collection approval from the Office of Management and Budget (OMB) and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the National Institute of Nursing Research (NINR), National Institutes of Health (NIH), 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) (44 U.S.C. 3501 et seq.).

DATES: Comments must be submitted within 30-days after publication in the **Federal Register**.

ADDRESSES: 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: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to (202) 395–6974, Attention: Desk Officer for NIH.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Amanda Greene, Office of Science Policy and Public Liaison, NINR, NIH, Democracy One, 6701 Democracy Blvd., Suite 710, Bethesda, MD 2089, by phone at (301) 496–9601 or Email your request, including your address to: *amanda.greene@nih.gov*.

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 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.

Below we provide the NINR'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: 14.

Respondents: 1475.

Annual responses: 490.

Frequency of Response: Once per request.

Average minutes per response: 42.

Burden hours: 1025 hours.

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.

NIH received no comments in response to the 60-day notice published in the **Federal Register** on December 22, 2010 (75 FR 80542).

Dated: February 2, 2012.

Amanda Greene,

Science Evaluation Officer, National Institute of Nursing Research/NIH.

[FR Doc. 2012–2805 Filed 2–6–12; 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 application for High-Throughput-Enabled Structural Biology Partnerships (U01).

Date: March 5, 2012.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Room 3An18B, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Margaret J. Weidman, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18B, Bethesda, MD 20892, (301) 594–3663, *weidmanma@nigms.nih.gov*.

(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: February 1, 2012.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–2766 Filed 2–6–12; 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 Initial Review Group; Minority Programs Review Subcommittee A.

Date: March 5–6, 2012.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Mona R. Trempe, Ph.D., 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) 594–3998, *trempemo@mail.nih.gov*.

(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: February 1, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–2736 Filed 2–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging 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: National Institute on Aging Initial Review Group; Behavior and Social Science of Aging Review Committee.

Date: March 1–2, 2012.

Time: 4 p.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Chevy Chase, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Jeannette L. Johnson, Ph.D., Scientific Review Officer, National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2c–212, Bethesda, MD 20892, (301) 402–7705, *johnsonj9@nia.nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group; Clinical Aging Review Committee.

Date: March 2, 2012.

Time: 8 a.m.to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Chevy Chase, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Alicja L. Markowska, Ph.D., DSC, National Institute on Aging, National Institutes of Health, Gateway Building 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–9666, *markowsa@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: February 1, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–2782 Filed 2–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases 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: National Institute of Diabetes and Digestive and Kideny Diseases Special Emphasis Panel; Pediatric Centers of Excellence in Nephrology.

Date: March 7–8, 2012.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20851.

Contact Person: Xiaodu Guo, MD, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 761, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Novel Mechanisms of Progression in PKD.

Date: March 12, 2012.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lakshmanan Sankaran, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *ls38z@nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Nutrition and Metabolism Program Project.

Date: March 29, 2012.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Elena Sanovich, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 750, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8886, *sanoviche@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 1, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–2792 Filed 2–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 a meeting of the Board of Scientific Counselors for Basic Sciences National Cancer Institute.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL CANCER INSTITUTE, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors for Basic Sciences National Cancer Institute.

Date: March 13, 2012.

Time: 8:30 a.m. to 4 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 31, 31 Center Drive, C Wing, 6th floor, Conference Rm 6, Bethesda, MD 20892.

Contact Person: Florence E. Farber, Ph.D., Executive Secretary, Office of the Director, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Room 2205, Bethesda, MD 20892, (301) 496–7628, *ff6p@nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/bsc/bs/bs.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: February 1, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–2775 Filed 2–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 a meeting of the Board of Scientific Counselors for Clinical Sciences and Epidemiology National Cancer Institute.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL CANCER INSTITUTE, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors for Clinical Sciences and Epidemiology; National Cancer Institute; Board of Scientific Counselors—Clinical Sciences and Epidemiology.

Date: March 12, 2012.

Time: 9 a.m. to 2:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 31, 31 Center Drive, C wing, 6th floor, Conference Rm. 6, Bethesda, MD 20892.

Contact Person: Brian E. Wojcik, Ph.D., Senior Review Administrator, Institute Review Office, Office of the Director, National Cancer Institute, 6116 Executive Boulevard, Room 2201, Bethesda, MD 20892, (301) 496–7628, *wojcikb@mail.nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/bsc/cse/cse.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: February 1, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–2771 Filed 2–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Cellular Biology of Kidney Function and Disease.

Date: March 15, 2012.

Time: 1:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lakshmanan Sankaran, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *ls38z@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 1, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–2796 Filed 2–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases 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: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; PAR09–247 Ancillary Studies in Inflammatory Bowel Diseases.

Date: March 7, 2012.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ann A Jerkins, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 759, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–2242, *jerkinsa@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; George M. O'Brien Kidney Research Core Centers

Date: April 2–3, 2012

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 Ave), Bethesda, MD 20814.

Contact Person: Paul A. Rushing, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 747, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8895, *rushingp@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel Program Projects in Digestive Diseases.

Date: April 2, 2012.

Time: 8 a.m.to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Maria E. Davila-Bloom, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 758, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 1, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–2790 Filed 2–6–12; 8:45 am]

BILLING CODE 4140–01–P

NUCLEAR REGULATORY COMMISSION

DEPARTMENT OF HOMELAND SECURITY

[NRC–2012–0015]

Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the Department of Homeland Security Regarding Consultation Concerning Potential Vulnerabilities of the Location of Proposed New Utilization Facilities; Revision 1

I. Purpose

This Memorandum of Understanding (MOU) establishes a process to implement the provisions of Section 657 of the Energy Policy Act of 2005 (EPA), Pub. L. 109–58, 119 Stat. 594, 814 (2005). Section 657 states:

SEC. 657. DEPARTMENT OF HOMELAND SECURITY CONSULTATION.

Before issuing a license for a utilization facility, the Nuclear Regulatory Commission shall consult with the Department of Homeland Security concerning the potential vulnerabilities of the location of the proposed facility to terrorist attack.

II. Background

Nuclear Regulatory Commission

Pursuant to Section 103 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2133, the U.S. Nuclear Regulatory Commission (NRC) is responsible for licensing and regulating the construction and operation of commercial nuclear power plants (known as ''utilization facilities'') in the United States to protect the health and safety of the public and to promote the common defense and security. In conducting its review of applications for such facilities pursuant to the Commission's implementing regulations in Title 10 of the Code of Federal Regulations (10 CFR) Parts 50 and 52, the NRC must, among other matters, determine the suitability of the site for the proposed facility.

Among the provisions pertaining to the determination of site suitability, issues associated with the common defense and security are, as a general matter, addressed through the requirements of 10 CFR 100.21(f). This provision requires applicants to demonstrate that the site characteristics of the proposed location are such ''that adequate security plans and measures can be developed.'' In conducting its technical review of this portion of the application, the NRC addresses potential vulnerabilities of the location of the proposed facility to terrorist attack; this evaluation focuses on assessing the impact of the following factors: (1) pedestrian and vehicular land approaches, (2) railroad approaches, (3) waterborne approaches, (4) potential ''high-ground'' adversary advantage areas, (5) nearby road and/or transportation routes, and (6) nearby hazardous materials facilities, airports, dams, military and chemical facilities, and pipelines.

Department of Homeland Security

The Department of Homeland Security (DHS), pursuant to the Homeland Security Act (HSA) of 2002, Public Law 107–296, 116 Stat. 2135; Homeland Security Presidential Directive 7 (HSPD–7); and the National Infrastructure Protection Plan of 2006, has the authority and responsibility to lead the unified national effort to secure America by preventing, deterring, and responding to terrorist attacks and other

threats and hazards to the Nation, including protecting the Nation's critical infrastructure and key resources, such as the subject ''utilization facilities.''

III. Consultation Roles and Responsibilities

The NRC will ''consult'' with the DHS under Section 657 of the EPA as follows:

Before issuing a license for a utilization facility, the NRC will request, and the DHS will review and provide to the NRC comment on the potential vulnerabilities of the location of the proposed facility to terrorist attack. This review and comment will be based on information, including the application, provided by the NRC, and any other factors, consistent with DHS authorities, the DHS considers vital to assessing the potential vulnerabilities of the location of the proposed facility to terrorist attack.

Within 30 days after acceptance and docketing of an application, the NRC will provide the DHS with the application and any other information it deems relevant. The NRC will communicate promptly any schedule delay.

Within 180 days of receipt of the application materials, the DHS will respond to the NRC in writing. This response will include any and all DHS comments concerning the potential vulnerabilities of the location of the proposed facility to terrorist attack. If within 150 days of receipt of the application materials the DHS anticipates that it cannot complete its review within the 180-day time frame, the DHS will contact the NRC to discuss a mutually agreeable date by which it will respond to the NRC's request for consultation.

The NRC and the DHS recognize that certain portions of the information exchanged pursuant to this MOU may be Safeguards Information in accordance with Section 147 of the Atomic Energy Act of 1954, as amended; classified information; or other sensitive information that must be properly identified and protected from public disclosure in accordance with applicable requirements.

IV. Working Arrangements

The NRC Point of Contact for this agreement is:

Branch Chief, Reactor Security Licensing Branch, Office of Nuclear Security and Incident Response.

The DHS Point of Contact for this agreement is:

Chief, Nuclear Sector Specific Agency and Chief, Office of Infrastructure Protection, Vulnerability Assessment Branch.

V. Funding

All activities pursuant to this MOU are subject to the availability of appropriated funds and each agency's budget priorities.

VI. Memorandum of Understanding

This MOU shall not be construed to provide a private right of action for or by any person or entity.

This MOU is effective upon signature by both parties. It will remain in effect until terminated by one of the parties following 30 days advance written notice to the other party.

Modifications to this MOU may be made by written agreement of both parties.

Approved for the U.S. Nuclear Regulatory Commission.

Dated: October 12, 2011.

R. W. Borchardt,

Executive Director for Operations.

Approved for the Department of Homeland Security.

Dated: December 19, 2011.

Todd M. Keil,

Assistant Secretary for Infrastructure Protection.

[FR Doc. 2012–2600 Filed 2–6–12; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2012–0029]

Information Collection Request to Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval for the following collection of information: 1625—NEW, Coast Guard Exchange System Scholarship Application. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before April 9, 2012.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2012–0029] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(3) *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.

(4) *Fax:* (202) 493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–611), ATTN: PAPERWORK REDUCTION ACT MANAGER, US COAST GUARD, 2100 2ND STREET SW., STOP 7101, WASHINGTON, DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Kenlinishia Tyler, Office of Information Management, telephone (202) 475–3652, or fax (202) 475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, (202) 366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of

Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise this ICR or decide not to seek approval of revisions of the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2012–0029], and must be received by April 9, 2012. We will post all comments received, without change, to *http://www.regulations.gov*. They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2012–0029], indicate the specific section of the document to which each comment applies, providing a reason for each comment. If you submit a comment online via *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 DMF. We recommend you include your name, mailing address, an email address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or hand delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type ''USCG–2012–0029'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this Notice 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–2012–0029'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of comments received in 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 statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information Collection Request

Title: Coast Guard Exchange System Scholarship Application.

OMB Control Number: 1625—NEW.

Summary: This information collected on this form allows the Coast Guard Exchange System Scholarship Program Committee to evaluate and rank scholarship applications in order to award the annual scholarships.

Need: Commandant Instruction, COMDTINST 1780.1 (series), provides policy and procedure for the award of three annual scholarships from the Coast Guard Exchange System (CGES) to dependents of Coast Guard employees. The information collected by this form allows for the awarding of scholarships based upon the criteria and procedures outlined in the Instruction under the auspices of 5 USC § 301.

Forms: CG–5687.

Respondents: Coast Guard dependents

Frequency: Annually.

Burden Estimate: The estimated burden is 30 hours per year.

Dated: February 1, 2012.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2012–2675 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–1169]

Sector Upper Mississippi River Area Maritime Security Committee; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Solicitation for membership.

SUMMARY: This notice requests individuals interested in serving on the Sector Upper Mississippi River Area Maritime Security Committee (AMSC) to submit their application for membership, to the Captain of the Port, Sector Upper Mississippi River.

DATES: Requests for membership should reach the Sector Upper Mississippi Captain of the Port on or before March 8, 2012.

ADDRESSES: Requests for membership should be submitted to the Captain of the Port Sector Upper Mississippi River, AMSC Executive Administrator, 1222 Spruce Street, Room 7.103, St. Louis, MO 63103–2846 or by email to *todd.a.epperson@uscg.mil* or *jared.p.angelle@uscg.mil.*

FOR FURTHER INFORMATION CONTACT: For questions about submitting an application or about the AMSC in general, contact Port Security Specialist Mr. Todd Epperson at (314) 269–2595 or Mr. Jared Angelle at (314) 269–2593.

SUPPLEMENTARY INFORMATION:

Authority

Section 102 of the Maritime Transportation Security Act (MTSA) of 2002 (Pub. L. 107–295) added section 70112 to Title 46 of the U.S. Code, and authorized the Secretary of the Department in which the Coast Guard is operating to establish Area Maritime Security Advisory Committees for any port area of the United States. (See 33 U.S.C. 1226; 46 U.S.C.; 33 CFR 1.05–1, 6.01; Department of Homeland Security Delegation No. 0170.1). The MTSA includes a provision exempting these AMSCs from the Federal Advisory Committee Act (FACA), Public Law 92–463, 86 Stat. 770 (5 U.S.C. App.2).

Sector Upper Mississippi River AMSC Purpose

The AMSCs shall assist the Captain of the Port in the review, update, and exercising of the Area Maritime Security (AMS) Plan for their area of responsibility. Such matters may include, but are not limited to: identifying critical port infrastructure and operations; identifying risks

(threats, vulnerabilities, and consequences); determining mitigation strategies and implementation methods; developing strategies to facilitate the recovery of the Maritime Transportation Security (MTS) after a Transportation Security Incident; developing and describing the process to continually evaluate overall port security by considering consequences and vulnerabilities, how they may change over time, and what additional mitigation strategies can be applied; and providing advice to, and assisting the Captain of the Port in developing and maintaining the AMS Plan.

AMSC Composition

The composition of an AMSC, to include the Sector Upper Mississippi River AMSC, is controlled by 33 CFR 103.305. Accordingly, members may be selected from the Federal, Territorial, or Tribal government; the State government and political subdivisions of the State; local public safety, crisis management, and emergency response agencies; law enforcement and security organizations; maritime industry, including labor; other port stakeholders having a special competence in maritime security; and port stakeholders affected by security practices and policies. Also, members of the AMSC should have at least 5 years of experience related to maritime or port security operations.

Sector Upper Mississippi River AMSC Vacancies

The Sector Upper Mississippi River AMSC is comprised of individuals who represent federal, state, local, and industry stakeholders from port regions in the Upper Midwest (St. Paul/Minneapolis), St. Louis, and Kansas City. We are seeking to fill up to three positions with this solicitation.

Request for Applications

Those seeking membership are not required to submit formal applications to the local Captain of the Port, however, because we do have an obligation to ensure that a specific number of members have the prerequisite maritime security experience, we encourage the submission of résumés highlighting experience in the maritime and security industries. Applicants will be required to pass an appropriate security background check prior to appointment to the committee. Members' term of office will be for 5 years, however, a member is eligible to serve an additional term of office. Members will not receive any salary or other compensation for their service on the AMSC.

In support of the policy of the Coast Guard on gender and ethnic diversity, we encourage qualified men and women and members of all racial and ethnic groups to apply.

Dated: January 27, 2012.

S.C. Teschendorf,

Commander, U.S. Coast Guard, Alternate Federal Maritime Security Coordinator, Sector Upper Mississippi River.

[FR Doc. 2012–2759 Filed 2–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–290B, Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form I–290B, Notice of Appeal or Motion.

* * * * *

The Department of Homeland Security, U.S. Citizenship and Immigration Services will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until April 9, 2012.

During this 60-day period, USCIS will be evaluating whether to revise the Form I–290B. Should USCIS decide to revise the Form I–290B it will advise the public when we publish the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30-days to comment on any revisions to the Form I–290B.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, Clearance Office, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to (202) 272–8352, or via email at *uscisfrcomment@dhs.gov.* When submitting comments by email, please add the OMB Control Number 1615–0095 in the subject box. Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Notice of Appeal or Motion.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–290B, 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. Form I–290B is necessary in order for USCIS to make a determination that the appeal or motion to reopen or reconsider meets the eligibility requirements, and for USCIS to adjudicate the merits of the appeal or motion to reopen or reconsider.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 38,926 responses at 90 minutes (1.5 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 58,389 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/.*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020, telephone number (202) 272–8377.

Dated: January 27, 2012.

William Bacon,

Acting Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2012–2695 Filed 2–6–12; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing information collection.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. There is no change to the information collected. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (76 FR 72715) on November 25, 2011, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before March 8, 2012.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to oira_submission@omb.eop.gov or faxed to (202) 395–5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one 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/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components 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 collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing.

OMB Number: 1651–0001.

Form Numbers: CBP Forms 1302, 1302A, 7509, 7533.

Abstract: CBP Form 1302: The master or commander of a vessel arriving in the United States from abroad with cargo on board must file CBP Form 1302, *Inward Cargo Declaration,* or submit the information on this form using a CBP-approved electronic equivalent. CBP Form 1302 is part of the manifest requirements for vessels entering the United States and was agreed upon by treaty at the United Nations Inter-government Maritime Consultative Organization (IMCO). This form is provided for by 19 CFR 4.5, 4.7, 4.8, 4.33, 4.34, 4.84, 4.85, 4.86, 4.91 and 4.99. It is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_1302.pdf.*

CBP Form 1302A: The master or commander of a vessel departing from the United States must file CBP Form 1302A, *Cargo Declaration Outward With Commercial Forms,* with copies of bills of lading or equivalent commercial documents relating to all cargo encompassed by the manifest. This form is provided for by 19 CFR 4.62, 4.63, 4.75, 4.82, and 4.87–4.89 and is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_1302.pdf.*

CBP Form 7509: The aircraft commander or agent must file two copies of CBP Form 7509, *Air Cargo Manifest,* with CBP at the departure airport, or respondents may submit the information on this form using a CBP-approved electronic equivalent. CBP Form 7509 contains information about the cargo onboard the aircraft. This form is provided for by 19 CFR 122.35, 122.48, 122.52, 122.54, 122.73, 122.113, and 122.118 and is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_7509.pdf.*

CBP Form 7533: The master or person in charge of a conveyance files CBP Form 7533, *INWARD CARGO MANIFEST FOR VESSEL UNDER FIVE TONS, FERRY, TRAIN, CAR, VEHICLE, ETC,* which is required for a vehicle or a vessel of less than 5 net tons arriving in the United States from Canada or Mexico, otherwise than by sea, with baggage or merchandise. Respondents may also submit the information on this form using a CBP-approved electronic equivalent. CBP Form 7533 is provided for by 19 CFR 123.4 and is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_7533.pdf.*

Manifest Confidentiality: An importer or consignee may request confidential treatment of its name and address contained in manifests by following the procedure set forth in 19 CFR 103.31.

Vessel Stow Plan: For all vessels transporting goods to the US, except for any vessel exclusively carrying bulk cargo, the incoming carrier is required to electronically submit a vessel stow plan no later than 48 hours after the vessel departs from the last foreign port which includes information about the vessel and cargo. For voyages less than 48 hours in duration, CBP must receive the vessel stow plan prior to arrival at the first port in the U.S. The vessel stow plan is provided for by 19 CFR 4.7c.

Container Status Messages (CSMs): For all containers destined to arrive within the limits of a U.S. port from a foreign port by vessel, the incoming carrier must submit messages regarding the status of the events if the carrier creates or collects a container status message (CSM) in its equipment tracking system reporting that event. CSMs must be transmitted to CBP via a CBP-approved electronic data interchange system. These messages transmit information regarding events such as the status of a container (full or empty); booking a container destined to arrive in the U.S.; loading or unloading a container from a vessel; and a container arriving or departing the U.S. CSMs are provided for by 19 CFR 4.7d.

Importer Security Filing (ISF): For most cargo arriving in the U.S. by vessel, the importer, or its authorized agent, must submit the data elements listed in 19 CFR 149.3 via a CBP-

approved electronic interchange system within prescribed time frames. Transmission of these data elements provide CBP with advanced information about the shipment.

Current Actions: CBP proposes to extend the expiration date of this information collection with no changes to the information collected on the forms or regulations included in this information collection request. However, CBP has revised its estimates of the burden hours and response times based on analysis of recent data as follows:

CBP Form 7509, *Air Cargo Manifest:* the time per response was lowered from 34 minutes to 15 minutes.

CBP Form 1302, *Cargo Declaration:* the time per response was raised from 10 minutes to 30 minutes.

Importer Security Filing: the number of total annual responses was lowered from 11,300,000 to 8,100,000.

Vessel Stow Plan: the number of respondents was lowered from 440 to 163.

Container Status Messages: the number of respondents was lowered from 74 to 60, and the number of total responses was raised from 72,121,193 to 257,100,000.

Manifest Confidentiality: the number of responses was raised from 1,078 to 5,040 and the time per response was lowered from 30 minutes to 15 minutes.

Type of Review: Extension (with change)

Affected Public: Businesses

Estimates of the burden hours and response times:

Collection	Total burden hours	Number of respondents	Number of responses per respondent	Total responses	Time per response
Air Cargo Manifest (CBP Form 7509)	366,600	260	5,640	1,466,400	15 minutes
Inward Cargo Manifest for Truck, Rail, Vehicles, Vessels, etc. (CBP Form 7533)	962,940	33,000	291.8	9,629,400	6 minutes
Cargo Declaration (CBP Form 1302)	1,500,000	10,000	300	3,000,000	30 minutes
Export Cargo Declaration (CBP Form 1302A)	10,000	500	400	200,000	3 minutes
Importer Security Filing	17,739,000	240,000	33.75	8,100,000	2.19 hours
Vessel Stow Plan	31,803	163	109	17,767	1.79 hours
Container Status Messages	23,996	60	4,285,000	257,100,000	.0056 minutes
Request for Manifest Confidentiality	1,260	5,040	1	5,040	15 minutes
Total	20,635,599	289,023	.....	279,518,607	.....

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC, 20229–1177, at (202) 325–0265.

Dated: February 2, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–2763 Filed 2–6–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Application for Extension of Bond for Temporary Importation

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0015.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Extension of Bond for Temporary Importation (CBP Form 3173). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before April 9, 2012, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC. 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC. 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application for Extension of Bond for Temporary Importation.

OMB Number: 1651–0015.

Form Number: CBP Form 3173.

Abstract: Imported merchandise which is to remain in the customs territory for a period of one year or less without the payment of duties is entered under as a temporary importation, as authorized under the Harmonized Tariff Schedules of the United States (19 U.S.C. 1202). When this time period is not sufficient, it may be extended by submitting an application on CBP Form 3173, *''Application for Extension of Bond for Temporary Importation''.* This form is provided for by 19 CFR 10.37 and is accessible at *http://forms.cbp.gov/pdf/CBP_Form_3173.pdf.*

Current Actions: CBP proposes to extend the expiration date of this information collection with no change

to the burden hours or to CBP Form 3173.

Type of Review: Extension (without change)

Affected Public: Businesses.

Estimated Number of Respondents: 1,200.

Estimated Number of Annual Respondents per Respondent: 14.

Estimated Number of Total Annual Responses: 16,800.

Estimated Time per Response: 13 minutes.

Estimated Total Annual Burden Hours: 3,646.

Dated: February 2, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–2765 Filed 2–6–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Guam-CNMI Visa Waiver Agreement

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0126.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, U.S. Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Guam-CNMI Visa Waiver Agreement (CBP Form I–760). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before April 9, 2012, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at (202) 325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Guam-CNMI Visa Waiver Agreement.

OMB Number: 1651–0126.

Form Number: CBP Form I–760.

Abstract: Carriers are responsible for ensuring that every alien transported to Guam and/or the Commonwealth of the Northern Mariana Islands (CNMI) pursuant to Public Law 110–229 under the Guam-CNMI Visa Waiver Program meets all of the eligibility criteria prior to departure to Guam and/or the CNMI. See 8 CFR 212.1(q). Carriers are liable and subject to fine, pursuant to section 273 of the Immigration and Nationality Act (INA) (8 U.S.C. 1323), for transporting to the United States any alien who does not have a valid passport and an unexpired visa, if a visa was required. Any transportation line bringing any alien to Guam and/or the CNMI under the Guam-CNMI Visa Waiver Program must enter into an agreement with CBP on Form I–760. This form is accessible at *http://forms.cbp.gov/pdf/CBP_Form_i760.pdf.*

Current Actions: This submission is being made to extend the expiration date with a change to the burden hours as a result of the increase in the number of estimated responses from 10 to 31. There is no change to the information collected or to CBP Form I–760.

Type of Review: Extension (with change).

Affected Public: Businesses.

Estimated Number of Respondents: 31.

Estimated Time per Respondent: 12 minutes.

Estimated Total Annual Burden Hours: 6.2.

Dated: February 2, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–2769 Filed 2–6–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5609–N–03]

Notice of Proposed Information Collection for Public Comment: Data Collection for Full Housing Choice Voucher Program Administrative Fee Study

AGENCY: Office of the Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due Date: *April 9, 2012.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control number and should be sent to: Reports Liaison Officer, Office of Policy Development & Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8226, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Marina L. Myhre, (202) 402–5705, for copies of the proposed forms and other available documents. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This Notice is soliciting comments from members of the public and affected agencies concerning the proposed 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).

This Notice also lists the following information:

Title of Proposal: Data Collection for Full Housing Choice Voucher Program Administrative Fee Study.

Description of the need for the information and proposed use: This request is for the clearance of on-site and telephone data collection from public housing agencies (PHAs) in support of the Housing Choice Voucher (HCV) Program Administrative Fee Study. The purpose of the study is to collect accurate information on the costs of administering the HCV program across a national sample of high-performing and efficient PHAs, and to use this information to develop a new administrative fee allocation formula for the HCV program. This request for clearance is the fourth OMB request in support of this study and is for data collection for the full national study. The prior OMB requests have covered the reconnaissance or research design phase of the study, pretesting the full national study design, and conducting additional reconnaissance visits to increase the study sample. For the current OMB request, the research team proposes three main types of data collection: (1) Measuring the time that HCV staff spend working on the various activities required to administer the program over a two-month period; (2) collecting information via interviews and document review on overhead costs, other costs related to HCV program administration that cannot be captured by measuring staff time, and ''transaction counts'' (the number of times an HCV program activity is completed over a specified period of time) in order to translate the staff time spent on that activity into a time per activity or cost per activity; and (3) a telephone survey of 130 small HCV programs (fewer than 250 vouchers) to understand how smaller agencies administer the HCV program effectively without the benefit of economies of scale that apply to larger programs. The results of the data collection will be used to generate estimates of total cost per activity per PHA and to build a multivariate regression model that tests how much the variation across PHAs in administrative costs can be explained by PHA, participant, and market characteristics. The results of the model will be used to inform the development of an administrative fee formula that is based on the average cost per activity and takes into account the most important factors that cause some HCV programs to be more costly to administer than others.

OMB Approval Number: Pending.

Agency form numbers: None.

Members of Affected Public: An average of 25 PHA staff per site at up to 60 PHAs and an average of 2 PHA staff per site at up to 130 PHAs, for a total of 1,760 PHA staff persons across 190 PHAs.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The research team plans to collect time measurement and cost data at up to 60 PHAs across the country and to survey an additional 130 PHAs with small HCV programs. There are four data collection activities that involve PHA staff. First, up to 3 staff at each of the 60 PHAs will spend a total of 1,440 hours assembling overhead cost data and preparing for the site visit (3 staff × 8 hours × 60 sites = 1,440 hours). Second, up to 3 staff at each of the 60 PHAs will spend up to 2 days each being interviewed in person or by telephone by the study team about program overhead costs, transaction counts, and recent changes in voucher program operations (3 staff × 16 hours × 60 sites = 2,880 hours). Third, an average of 20 HCV program staff per site will participate in the time measurement data collection. This will entail receiving 2 hours of training (20 staff × 2 hours × 60 sites = 2,400 hours) and responding to notifications via a smart phone provided by the study team on their work activities over a two-month period (40 working days). Responding to the notifications will take approximately 15 minutes per day per staff, for a total of 10 hours per staff over the 40 working days (20 staff × 10 hours × 60 sites = 12,000 hours). Finally, up to 2 PHA staff at 130 PHAs will participate in the small program telephone survey. These staff will spend up to 2 hours preparing for the telephone survey, including assembling financial statements and other documentation, and an average of 45 minutes completing the survey (2 staff × 2.75 hours × 130 PHAs = 715 hours). The total estimated burden across all proposed data collection activities is 19,435 hours.

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: January 30, 2012.

Erika Poethig,

Deputy Assistant Secretary for Policy Development and Research.

[FR Doc. 2012–2720 Filed 2–6–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. FWS–R9–ES–2011–0031; FXES11130900000C6–123—FF09E32000; DOC Docket No. 110131072–1277–01]

RIN 1018–AX49; 0648–BA78

Draft Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species''

AGENCIES: Fish and Wildlife Service, Interior; National Marine Fisheries Service, NOAA, Commerce.

ACTION: Notice of extension of public comment period.

SUMMARY: We, the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services), announce a 30-day extension of the period for submission of public comments on the draft policy interpreting the phrase ''significant portion of its range'' in the Endangered Species Act's (Act's) definitions of ''endangered species'' and ''threatened species.'' We encourage all interested parties to provide us with information and comments regarding the draft policy. Information previously submitted does not need to be resubmitted, and will be incorporated into the public record and fully considered in our development of a final policy.

DATES: We will consider comments and information we receive from all interested parties on or before March 8, 2012.

ADDRESSES: You may submit comments by one of the following methods:

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

on docket number FWS–R9–ES–2011–0031.

• *U.S. mail or hand delivery:* Public Comments Processing, Attn: FWS–R9–ES–2011–0031; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, MS 2042; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Rick Sayers, U.S. Fish and Wildlife Service, Endangered Species Program, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone (703) 358–2171; facsimile (703) 358–1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone (301) 427–8469); fax (301) 713–0376). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: On December 9, 2011, we published a notice of our draft policy (76 FR 76987) to establish a joint interpretation and application of ''significant portion of its range'' that reflects a permissible reading of the law and its legislative history and minimizes undesirable policy outcomes, while fulfilling the conservation purposes of the Act. That notice established a 60-day comment period ending February 7, 2012. We have received a number of requests to extend the public comment period. Considering the complexity of the issues addressed in the draft policy and the level of public interest, we have decided that additional time for public comment will be particularly valuable for this action and thus are extending the comment period for an additional 30 days. The draft policy and supporting materials are available for review at *http://www.regulations.gov* under Docket No. FWS–R9–ES–2011–0031.

Public Comments; Request for Information

We intend that the final policy on interpretation of the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' will consider information and recommendations from all interested parties. We therefore solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed in the **DATES** section above will be considered prior to the approval of a final document. For the complete list of subjects on which we seek comments, please refer to the December 9, 2011, draft policy (76 FR 76987), available on line at *http://www.regulations.gov* under Docket No. FWS–R9–ES–2011–0031.

Please include sufficient information with your submission (such as references to scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

You may submit your information concerning this draft policy by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and supporting documentation used in preparing this document is available for you to review at *http://www.regulations.gov,* or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Endangered Species Program (see **FOR FURTHER INFORMATION CONTACT**).

Authority

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 30, 2012.

Daniel M. Ashe,

Director, Fish and Wildlife Service.

Dated: January 27, 2012.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2012–2667 Filed 2–6–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2012–N029; FXIA16710900000P5–123–FF09A30000]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before March 8, 2012.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov*.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1)

Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken.

III. Permit Applications

A. Endangered Species

Applicant: Project Survival, Dunlap, CA; PRT–58624A

The applicant requests a permit to import two cheetahs (a male and a female) (*Acinonyx jubatus*) that were captive born at Cango Wildlife Ranch, South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Zoological Society of San Diego, San Diego, CA; PRT–57926A

The applicant requests a permit to import one male and three female captive-bred mandrill (*Mandrillus sphinx*) from Toronto, Ontario, Canada, for the purpose of enhancement of the survival of the species.

Applicant: Peter Lee, Secaucus, NJ; PRT–196626

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for red siskin (*Carduelis cucullata*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Matthew Kirkwood, Lafayette, IN; PRT–63673A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the Cuban amazon (*Amazona leucocephala*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Denver Zoological Gardens, Denver, CO; PRT–685150

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for the following families, genus, and species, to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Families:

Bovidae
Callithricidae
Canidae
Cebidae
Cercopithecidae
Cervidae
Equidae
Felidae (does not include jaguar, margay or ocelot)
Hominidae
Lemuridae
Rhinocerotidae
Suidae
Tapiridae
Gruidae
Psittacidae
Sturnidae (does not include *Aplonis pelzelni*)
Crocodylidae (does not include American crocodile)
Iguanidae
Testudinidae

Species:

Asian elephant (*Elephas maximus*)
Andean condor (*Vultur gryphus*)
Lesser rhea (*Rhea pennata*)

Applicant: Forrest Simpson, Conroe, TX; PRT–115345

The applicant requests amendment and renewal of his captive-bred wildlife registration under 50 CFR 17.21(g) to include the barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Forrest Simpson, Conroe, TX; PRT–115344

The applicant requests amendment and renewal of his permit authorizing interstate and foreign commerce, export and cull of excess barasingha (*Rucervus duvaucelii*) and scimitar-horned oryx (*Oryx dammah)* from the captive herd maintained at his facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: John Warren, Austin, TX; PRT–63439A

Applicant: Jacqueline Seeno, Concord, CA; PRT–61192A

Applicant: Frank Metzger, Westerville, OH; PRT–63679A

Applicant: Paul Monsen, Salt Lake City, UT; PRT–63627A

Applicant: Michael Moore, Pocola, OK; PRT–52774A

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2012–2662 Filed 2–6–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV952000 L14200000.BJ0000 241A; 12–08807; MO# 4500031675; TAS: 14X1109]

Filing of Plats of Survey; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested State and local government officials of the filing of Plats of Survey in Nevada.

DATES: *Effective Dates:* Filing is effective at 10 a.m. on the dates indicated below.

FOR FURTHER INFORMATION CONTACT: David D. Morlan, Chief, Branch of Geographic Sciences, Bureau of Land Management, Nevada State Office, 1340 Financial Blvd., P.O. Box 12000, Reno, Nevada 89520, (775) 861–6541. 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:

1. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on October 17, 2011:

This plat represents the dependent resurvey of a portion of north boundary, a portion of the subdivisional lines, and a portion of Mineral Survey No. 2534 B, and the metes-and-bounds survey of Lot 14 in section 3, Township 3 South, Range 42 East, Mount Diablo Meridian, Nevada, under Group No. 907, was accepted on October 13, 2011. This survey was executed to meet certain administrative needs of the Bureau of Land Management.

The above-listed survey is now the basic record for describing the lands for all authorized purposes. This survey has been placed in the open files in the Bureau of Land Management, Nevada State Office and is available to the public as a matter of information. Copies of the survey and related field notes may be furnished to the public upon payment of the appropriate fees.

Dated: January 30, 2012.

David D. Morlan,

Chief Cadastral Surveyor, Nevada.

[FR Doc. 2012–2697 Filed 2–6–12; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT980300–L10400000–PH0000–24–1A]

Notice of Utah's Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the Department of the Interior, Bureau of Land Management's (BLM) Utah Resource Advisory Council (RAC) will meet as indicated below.

DATES: The Utah RAC will meet Wednesday, March 28, 2012, (8:30 a.m.–4:30 p.m.), in Salt Lake City, Utah.

ADDRESSES: The Council will meet at the Little America Hotel (Wyoming meeting room), 500 South Main Street, Salt Lake City, Utah.

FOR FURTHER INFORMATION CONTACT: Sherry Foot, Special Programs Coordinator, Utah State Office, Bureau of Land Management, P.O. Box 45155, Salt Lake City, Utah 84145–0155; phone (801) 539–4195.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in Utah.

Planned agenda topics include a welcome and introduction of new Council members; election of officers; overview and procedures of resource advisory councils; issues and concerns in BLM Utah; recreation fee refresher and fee proposals on the Buckeye Recreation Area (United States Forest Service) and Westwater Canyon (BLM); presentations on energy (renewable/fossil fuels), Sage Grouse, the Cedar City Resource Management Plan; and future project work for the RAC. A half-hour public comment period where the public may address the Council is scheduled to begin at 12:30 p.m. Written comments may be sent to the BLM address listed above. All meetings are open to the public; however, transportation, lodging, and meals are the responsibility of the participating public.

Shelley J. Smith,

Actg. Associate State Director.

[FR Doc. 2012–2696 Filed 2–6–12; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request approval to continue the collection of information for the Permanent Regulatory Program—Small Operator Assistance Program (SOAP). This information collection activity was previously approved by the Office of Management and Budget (OMB), and assigned clearance number 1029–0061.

DATES: Comments on the proposed information collection activity must be received by April 9, 2012, to be assured of consideration.

ADDRESSES: Comments may be mailed to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203—SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request contact John Trelease, at (202) 208–2783 or via email at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (P.L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies an information collection that OSM will be submitting to OMB for renewed approval. This collection is contained in 30 CFR Part 795—Permanent Regulatory Program—Small Operator Assistance Program. OSM will request a 3-year term of approval for this information collection activity.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such

as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

This notice provides the public with 60 days in which to comment on the following information collection activity:

Title: 30 CFR Part 795—Permanent Regulatory Program—Small Operator Assistance Program.

OMB Control Number: 1029–0061.

Summary: This information collection requirement is needed to provide assistance to qualified small mine operators under section 507(c) of P.L. 95–87. The information requested will provide the regulatory authority with data to determine the eligibility of the applicant and the capability and expertise of laboratories to perform required tasks.

Bureau Form Number: FS–6.

Frequency of Collection: Once per application.

Description of Respondents: Small operators, laboratories, and State regulatory authorities.

Total Annual Responses: 4.

Total Annual Burden Hours: 93 hours.

Dated: January 31, 2012.

Andrew F. DeVito,

Chief, Division of Regulatory Support.

[FR Doc. 2012–2612 Filed 2–6–12; 8:45 am]

BILLING CODE 4310–05–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. DN 2874]

Certain Ink Application Devices and Components Thereof and Methods of Using the Same (Corrected); Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Ink Application Devices and Components Thereof and Methods of Using the Same,* DN 2874; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of MT.Derm GmbH and Nouveau Cosmetique USA Inc. on January 30, 2012. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ink application devices and components thereof and methods of using the same. The complaint names as respondents T–Tech Tattoo Device Inc. of Canada; Yiwu Beyond Tattoo Equipments Co., Ltd. of China; and Guangzhou Pengcheng Cosmetology Firm of China.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) Identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) Indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) Explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 2874'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such

treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: February 1, 2012.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–2677 Filed 2–6–12; 8:45 am]

BILLING CODE 7020–02–P

NATIONAL SCIENCE FOUNDATION

Committee on Equal Opportunities in Science and Engineering (CEOSE); Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Committee on Equal Opportunities in Science and Engineering (1173).

Dates/Time: February 28, 2012, 9 a.m.–5:30 p.m.,

February 29, 2012, 9 a.m.–3 p.m.

Place: National Science Foundation (NSF), 4201 Wilson Boulevard Arlington, VA 22230.

To help facilitate your entry into the building, contact the individual listed below. Your request to attend this meeting must be received by email (*kmack@nsf.gov*) on or prior to February 21, 2012.

Type of Meeting: Open.

Contact Person: Dr. Kelly Mack, Program Officer and CEOSE Executive Secretary, Division of Human Resource Development, Directorate for Education and Human Resources, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Telephone Numbers: (703) 292–8575 *kmack@nsf.gov.*

Minutes: Meeting minutes and other information may be obtained from the Executive Secretary at the above address or the Web site at *http://www.nsf.gov/od/oia/activities/ceose/index.jsp.*

Purpose of Meeting: To study data, programs, policies, and other information pertinent to the National Science Foundation and to provide advice and recommendations concerning broadening participation in science and engineering.

Agenda:

Tuesday, February 28, 2012

Opening Statement by the CEOSE Chair.

Feature Presentation:

• NSTC Inventory of Federal STEM Education and the Federal STEM Education Strategic Plan: Dr. Michael Feder (Policy Analyst, OSTP).

Discussions and Reports:

• Concurrence on the minutes of the CEOSE October 17–18, 2011 meeting;

• Report of CEOSE Executive Officer meeting with Dr. Suresh (February 8, 2012);

• Report of CEOSE liaisons to NSF Directorate Committees on NSF Advisory Committee Meetings;

• CEOSE 2011–12 Biennial Report to Congress;

• Diversity and inclusion discussion with federal agency liaisons to CEOSE;

• Establishment of Ad Hoc Subcommittees and Development of Charges to Those Subcommittees.

Wednesday, February 29, 2012

Opening Statement by the CEOSE Chair.

Feature Presentation:

• Expanding Underrepresented Minority Participation in STEM: Dr. Subra Suresh (Director, NSF) and Dr. Freeman Hrabowski (President, UMBC and Chair, Committee on Underrepresented Groups and the Expansion of the Science and Engineering Workforce Pipeline).

Discussions and Reports:

• Conversation with NSF Director, Dr. Subra Suresh.

• Broadening Participation Programs and Initiatives in the NSF Social, Behavioral and Economic Sciences Directorate.

• NSF Veterans' Science and Engineering Initiative: Dr. Sue Kemnitzer.

• Update: Mini-Symposium on Hispanic Serving Institutions.

• Update: Mini-Symposium on the Science of Broadening Participation.

Dated: February 1, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–2666 Filed 2–6–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Public Availability of FY 2010 Service Contract Inventory Analysis and FY 2011 Service Contract Inventory for the National Transportation Safety Board

AGENCY: National Transportation Safety Board.

ACTION: Notice of Public Availability of FY 2010 Service Contract Inventory Analysis and FY 2011 Service Contract Inventory.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the National Transportation Safety Board is publishing this notice to advise the public of the availability of the FY 2010 Service Contract Inventory Analysis and the FY 2011 Service Contract Inventory. The FY 2010 inventory analysis provides information on specific service contract actions that were analyzed as part of the FY 2010 inventory. The FY 2011 inventory provides information on service contract actions over $25,000 that were made in FY 2011. The inventory information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* The National Transportation Safety Board has posted its FY 2011 inventory and FY 2010 inventory analysis at the following link: *http://www.ntsb.gov/about/open.html.*

FOR FURTHER INFORMATION CONTACT: Questions regarding the service contract inventory should be directed to Christopher Blumberg, Chief Acquisition and Lease Management Division, NTSB at (202) 314–6102 or *christopher.blumbeg@ntsb.gov.*

Dated: February 1, 2012.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2012–2657 Filed 2–6–12; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0227]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on October 13, 2011 (76 FR 63667).

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* NRC Form 313, ''Application for Materials License'' and NRC Forms 313A (RSO), 313A (AMP), 313A (ANP), 313A (AUD), 313A (AUT), and 313A (AUS).

3. *Current OMB approval number:* 3150–0120.

4. *The form number if applicable:* NRC Form 313.

5. *How often the collection is required:* There is a one-time submittal of the NRC Form 313 (which may include the NRC Form 313A series of forms) with information to receive a license. Once a specific license has been issued, there is a 10-year resubmittal of the NRC Form 313 (which may include the NRC form 313A series of forms) with information for renewal of the license. Amendment requests are submitted as needed by the licensee.

There is a one-time submittal for all limited specific medical use applicants of a NRC Form 313A series form to have each new individual identified as a Radiation Safety Officer (RSO), authorized medical physicist (AMP), authorized nuclear pharmacist (ANP), or authorized user or a subsequent submittal of additional information for one of these individuals to be identified with a new authorization on a limited specific medical use license.

NRC Form 313A (RSO) is also used by medical broad scope licensees when identifying a new individual as an RSO or adding an additional RSO authorization for the individual. This submittal may occur when applying for a new license, amendment, or renewal.

NRC Form 313A (ANP) is also used by commercial nuclear pharmacy licensees when requesting an individual be identified for the first time as ANP. This submittal may occur when applying for a new license, amendment, or renewal.

6. *Who will be required or asked to report:* All applicants requesting a license, amendment or renewal of a license for byproduct or source material.

7. *An estimate of the number of annual responses:* 19,432 (2,362 NRC licensees and 17,070 Agreement State licensees).

8. *The estimated number of annual respondents:* 19,432 (2,362 NRC licensees and 17,070 Agreement State licensees).

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 83,558 hours (10,157 NRC and 73,401 Agreement State hours).

10. *Abstract:* Applicants must submit NRC Form 313, which may include the six forms in the 313A series, to obtain a specific license to possess, use, or distribute byproduct or source material. These six forms in the 313A series are: (1) NRC Form 313A (RSO), ''Radiation Safety Officer Training and Experience and Preceptor Attestation''; (2) NRC Form 313A (AMP), ''Authorized Medical Physicist Training and Experience and Preceptor Attestation''; (3) NRC Form 313A (ANP), ''Authorized Nuclear Pharmacist Training and Experience and Preceptor Attestation''; (4) NRC Form 313A (AUD), ''Authorized User Training and Experience and Preceptor Attestation (for uses defined under 35.100, 35.200, and 35.500)''; (5) NRC Form 313A (AUT), ''Authorized User Training and Experience and Preceptor Attestation (for uses defined under 35.300)''; and (6) NRC Form 313A (AUS), ''Authorized User Training and Experience and Preceptor Attestation (for uses defined under 35.400 and 35.600).'' The information is reviewed by the NRC to determine whether the applicant is qualified by training and experience, and has equipment, facilities, and procedures which are adequate to protect the public health and safety, and minimize danger to life or property.

The public may examine and have copied for a fee publicly available documents, including the final supporting statement, at the NRC's Public Document Room, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by March 8, 2012. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Chad Whiteman, Desk Officer, Office of Information and Regulatory Affairs (3150–0120), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be emailed to *Chad_S_Whiteman@omb.eop.gov* or submitted by telephone at (202) 395–4718.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 1st day of February, 2012. For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2012–2640 Filed 2–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0025]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from January 12, 2012 to January 25, 2012. The last biweekly notice was published on January 24, 2012 (77 FR 3508).

ADDRESSES: Please include Docket ID NRC–2012–0025 in the subject line of your comments. For additional instructions on submitting comments and instructions on accessing documents related to this action, see ''Submitting Comments and Accessing Information'' in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2012–0025. Address questions about NRC dockets to Carol Gallagher, telephone: (301) 492–3668; email: *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.

SUPPLEMENTARY INFORMATION:

Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document using the following methods:

• *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 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 email to *pdr.resource@nrc.gov.*

• *Federal Rulemaking Web Site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2012–0025.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20874. The NRC's regulations are accessible electronically from the NRC Library on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one

contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in the NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E–Filing rule (72 FR 49139, August 28, 2007). The E–Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E–Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E–Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–(866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the

adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are available online through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR Reference staff at 1–(800) 397–4209, (301) 415–4737, or by email to *pdr.resource@nrc.gov.*

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: July 27, 2011, as supplemented by letter dated September 16, 2011.

Description of amendment request: The amendment would modify Technical Specification (TS) 3.3.6.1, ''Primary Containment and Drywell Isolation Instrumentation,'' to revise the allowable value setpoints for the Main Steam Tunnel Temperature functions. Specifically, the amendment would modify TS Table 3.3.6.1–1, items; 1.e, ''Main Steam Tunnel Temperature-High,'' 3.f. ''Main Steam Line Tunnel Ambient Temperature-High,'' and 4.h, ''Main Steam Line Tunnel Ambient Temperature-High.'' This setpoint revision is based upon a revision to the analytical limit calculation. The change will provide additional margin for elevated temperatures in the Main Steam Tunnel—North during the summer reliability period. In addition, the amendment would revise the River Bend Station (RBS) Emergency Plan by modifying the Emergency Action Levels (EAL) in support of the proposed changes to TS 3.3.6.1.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change increases the Technical Specification allowable value for the main steam tunnel ambient temperature isolation instrumentation for the main steam line isolation, Reactor Core Isolation Cooling System isolation and the Reactor Water Cleanup System isolation. This TS change does not introduce the possibility of an increase in the probability or consequences of an accident because the basis for the instrument setpoint is not being changed as a result of this request. The proposed TS change involves no physical alteration of the plant. The proposed TS change does not degrade the performance of, or increase the challenges to, any safety systems assumed to function in the accident analysis. Therefore, the proposed change does not involve a significant increase in the probability of an accident previously evaluated.

The consequences of a previously evaluated accident are not significantly increased. The proposed change does not affect the performance of any equipment credited to mitigate the radiological consequences of an accident. The basis for the main steam tunnel ambient temperature isolation instrumentation has not changed as a result of this proposed Allowable value change.

The proposed change to the Emergency Action Level (EAL) does not increase the probability of an accident. The change only impacts the initial condition for entry into the Emergency Plan and thus has no impact on the probability of an event. The proposed change to the Emergency Action Level (EAL) does not increase the consequences of an accident. As described in the Technical Analysis the revised setpoint continues to support the current licensing basis and event analysis.

Because the process, personnel, and equipment involved in implementing the Emergency Plan would complete the same functions as those completed under the existing Emergency Plan, the plan would continue to ensure adequate protection of public health and safety.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

As discussed above, the proposed change involves increasing the TS allowable value for the main steam tunnel ambient temperature isolation instrumentation for the main steam line isolation, Reactor Core Isolation Cooling System isolation and the Reactor Water Cleanup System isolation. The proposed TS change does not introduce any failure mechanisms of a different type than those previously evaluated, since there are no physical changes being made to the facility. No new or different equipment is being installed. No installed equipment is being operated in a different manner. The computer program being used has been previously used and reviewed. As a result, no new failure modes are being introduced. There are no new types of failures or new or different kinds of accidents or transients that could be created by these changes.

The change affects the implementation of the Emergency Plan by changing the EALs temperature value for entry into the Emergency Plan; however, the basis for the temperature value is not changed. The change to the EAL does not impact any plant equipment or systems needed to respond to an accident, nor does it change the results of an analysis of plant accident consequences.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

As discussed above, the proposed change involves increasing the TS allowable value for the for the main steam tunnel ambient temperature isolation instrumentation, the main steam line isolation, the Reactor Core Isolation Cooling System isolation and the Reactor Water Cleanup System isolation. The effect of this change on system availability is not significant, based on the determination that the basis for the allowable values is not being revised. The proposed change does not adversely affect the condition or performance of structures, systems, and components relied upon for accident mitigation. The proposed change does not result in any hardware changes. Existing operating margin between plant conditions and actual plant setpoints is not significantly reduced due to these changes. The proposed change does not significantly impact any safety analysis assumptions or results.

The change to the Emergency Plan does not reduce the margin of safety currently provided by the plan. As discussed in this submittal the change does not revise the design criteria of detecting a 25 gpm [gallon per minute] leak. Also the methods used to determine the revised analytical limit and setpoint values are currently' accepted. The proposed change does not impact other design basis evaluations or consequences. Therefore the changes do not affect a margin of safety identified in the plant accident analysis.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Joseph A. Aluise, Associate General Counsel—

Nuclear, Entergy Services, Inc., 639 Loyola Avenue, New Orleans, Louisiana 70113.

NRC Branch Chief: Michael T. Markley.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: January 23, 2012.

Description of amendment request: The amendment would revise Technical Specification (TS) 3.1.7, ''Standby Liquid Control (SLC) System.'' Implementation of the Grand Gulf Nuclear Station (GGNS) Cycle 19 core design results in increased core reactivity, which requires a corresponding increase in negative reactivity to be provided by the SLC system. The proposed TS changes reflect the change in the enrichment of the boron-10 (B–10) isotope in the sodium pentaborate (SPB) solution, which is the credited neutron absorber. Increasing the enrichment of the B–10 isotope in the SPB solution effectively increases the available negative reactivity inserted by the SLC system without having to increase the system's storage capacity. The proposed change is needed to ensure appropriate shutdown margin can be maintained during reload design for future cycles beginning with Cycle 19. In addition, TS 3.1.7 will be modified from a graphical limiting condition for operation (LCO) to an LCO based on the product of the SPB solution concentration (C) and the B–10 enrichment (E) in the SPB solution being greater than or equal to 420.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The SLC system is designed to provide the capability of bringing the reactor, at any time in a fuel cycle, from full power and minimum control rod inventory to a subcritical condition with the reactor in the most reactive xenon-free state without taking credit for control rod movement. The SLC system design satisfies the requirements of 10 CFR 50.62, *Requirements for the Reduction of Risk from Anticipated Transients without Scram (ATWS) Events for Light-Water-Cooled Nuclear Power Plants.* The proposed changes to the SPB solution requirements maintain the capability of the SLC system to perform this reactivity control function and ensure continued compliance with the requirements of 10 CFR 50.62.

The SLC system is not considered to be an initiator of any event. The use of the proposed SPB solution enriched with the B–10 isotope does not alter the design, function, or operation of the SLC system or increase the likelihood of a system malfunction that could increase the consequences of an accident.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to the SLC system do not alter the design, function, or operation of the SLC system. The proposed change in SPB concentration, B–10 enrichment, SPB storage volume, and pump discharge pressure will continue to ensure shutdown of the reactor in the most reactive xenon-free state without taking credit for control rod movement. The proposed change in solution temperature continues to ensure the boron remains in solution and does not precipitate out of the SLC storage tank or in the SLC piping. The change in solution temperature also ensures adequate net positive suction head is available for SLC pump operation.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

In the event of injection, the proposed change results in an increase in the margin between the final B–10 concentration in the reactor vessel and concentration required for shutdown. Thus, the proposed change results in additional safety margin being provided.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Joseph A. Aluise, Associate General Counsel—Nuclear, Entergy Services, Inc., 639 Loyola Avenue, New Orleans, Louisiana 70113.

NRC Branch Chief: Michael T. Markley.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos.: 50–321 and 50–366, Edwin I. Hatch Nuclear Plant (HNP), Units 1 and 2, Appling County, Georgia

Date of amendment request: December 15, 2011.

Description of amendment request: The proposed amendments would revise Technical Specification (TS) Limiting Condition for Operation (LCO) 3.7.2 for the plant service water (PSW) and ultimate heat sink (UHS). Specifically, surveillance requirement (SR) 3.7.2.1 minimum water level in each PSW pump well of the intake structure would be revised from the existing value of 60.7 feet (ft) mean sea level (MSL) to 60.5 ft MSL. This change is based on updated design basis analyses that demonstrate that at the new minimum level of 60.5 ft MSL sufficient water inventory remains available from the Altamaha River for PSW and residual heat removal service water (RHRSW) to handle Loss of Coolant Accident (LOCA) cooling requirements for 30 days post-accident with no additional makeup water source available.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the *Code of Federal Regulation* (10 CFR), Section 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed TS change revises the minimum water level in the PSW pump well, as required by SR 3.7.2.1, from 60.7 ft MSL to 60.5 ft MSL. TS SR 3.7.2.1 verifies that the ultimate heat sink (UHS) is OPERABLE by ensuring the water level in the PSW pump well of the intake structure is sufficient for the PSW, RHRSW, and standby service water pumps to supply post-LOCA cooling requirements for 30 days. The safety function of the UHS is to mitigate the impact of an accident. The proposed TS change does not result in or require any physical changes to HNP systems, structures, and components, including those intended for the prevention of accidents. The potential impact of the lower PSW pump well minimum water level on pump operation requirements, supply of water for 30 days post-LOCA, and potential environmental impact have been evaluated and found to be acceptable.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed TS change revises the minimum water level in the PSW pump well, as required by SR 3.7.2.1, from 60.7 ft MSL to 60.5 ft MSL. TS SR 3.7.2.1 verifies that the UHS is OPERABLE by ensuring the water level in the PSW pump well of the intake structure is sufficient for the PSW, RHRSW and standby service water pumps to supply post-LOCA cooling requirements for 30 days. The proposed TS change does not result in or require any physical changes to HNP systems, structures, and components. The potential impact of the lower PSW pump well minimum water level on pump operation requirements, supply of water for 30 days post-LOCA, and potential environmental impact have been evaluated and found to be acceptable.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed TS change revises the minimum water level in the PSW pump well, as required by SR 3.7.2.1, from 60.7 ft MSL to 60.5 ft MSL. TS SR 3.7.2.1 verifies that the UHS is OPERABLE by ensuring the water level in the PSW pump well of the intake structure is sufficient for the PSW, RHRSW and standby service water pumps to supply post-LOCA cooling requirements for 30 days. The proposed TS change does not result in or require any physical changes to HNP systems, structures, and components. The potential impact of the lower PSW pump well minimum water level on pump operation requirements, supply of water for 30 days post-LOCA, and potential environmental impact have been evaluated and found to be acceptable.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street NW., Washington, DC 20037.

NRC Branch Chief: Nancy Salgado.

Southern Nuclear Operating Company, Inc., Docket No. 50–425, Vogtle Electric Generating Plant, Unit 2, Burke County, Georgia

Date of amendment request: December 19, 2011.

Description of amendment request: The proposed amendments would revise technical specification (TS) 3.7.14 ''Engineered Safety Features (ESF) Room Cooler and Safety-Related Chiller.'' Specifically, the limiting condition of operation (LCO) allowed completion time for TS 3.7.14 Condition A would be extended from 72 hours to 9 days, on a one-time only basis. Also proposed is an editorial change to delete a note added as an emergency change to TS 3.7.14, which had been added in response to an emergency license amendment request dated August 18, 2010 (Agencywide Document Access and Management System Accession No. ML102300574).

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the Code of Federal Regulation (10 CFR) 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed license amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed changes do not alter any plant equipment or operating practices in such a manner that the probability of an accident is increased. The proposed changes will not alter assumptions relative to the mitigation of an accident or transient event. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed license amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed changes do not involve any physical alteration of the plant or significant change in the methods governing normal plant operation. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Based on the operability of the remaining ESF Room Cooler and Safety-Related Chiller Train 2A, the accident analysis assumptions continue to be met with enactment of the proposed changes. The system design and operation are not affected by the proposed changes. The safety analysis acceptance criteria are not altered by the proposed changes. Finally, the proposed compensatory measures will provide further assurance that no significant reduction in a safety margin will occur.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Arthur H. Domby, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308–2216.

NRC Branch Chief: Nancy Salgado.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible online through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* 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 email to *pdr.resource@nrc.gov.*

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant, Van Buren County, Michigan

Date of application for amendment: August 16, 2011, supplemented by letter dated October 6, 2011.

Brief description of amendment: The proposed amendment would revise Technical Specification (TS) Section 5.5.14, ''Containment Leak Rate Testing Program'' to increase the value of the calculated peak containment internal pressure from 53 pounds per square inch gauge (psig) to 54.2 psig. This increase is due to an increase in the calculated mass and energy release during the blowdown phase of the design basis loss-of-coolant accident (LOCA). The increase in the predicted mass and energy release is due to the correction of an error in the calculation of the current value of P_a. The regulations at 10 CFR part 50, Appendix J Option B define P_a as the calculated peak containment internal pressure related to the design basis LOCA as specified in the TS and specifies the requirements for containment leakage rate testing.

Date of issuance: January 19, 2012.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 244.

Facility Operating License No. DPR–20: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: November 15, 2011, (76 FR 70773). The supplemental letters contained clarifying information and did not change the initial no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 19, 2012.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant, Van Buren County, Michigan

Date of application for amendment: March 7, 2011.

Brief description of amendment: The amendment revises the facility's Technical Specifications to add an applicability period of 42.1 effective full-power years to the existing pressure-temperature limit curves and low temperature overpressure protection system requirements for PNP.

Date of issuance: January 19, 2012.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 245.

Facility Operating License No. DPR–20: Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: May 17, 2011, (76 FR 28472).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 19, 2012.

No significant hazards consideration comments received: No.

Northern States Power Company—Minnesota, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: February 7, 2011, as supplemented on December 22, 2011.

Brief description of amendment: The amendment revises the Technical Specifications, Section 3.5.1, ''ECCS [Emergency Core Cooling System]—Operating,'' and 3.5.2, ''ECCS—Shutdown,'' to increase the minimum flow rate of the core spray pumps from ≥2,800 gallons per minute (gpm) to ≥2,835 gpm.

Date of issuance: January 11, 2012.

Effective date: This license amendment is effective as of the date of its issuance, to be implemented within 120 days of issuance.

Amendment No.: 167.

Facility Operating License No. DPR–22: Amendment revised the Renewed Facility Operating License and Appendix A, Technical Specifications.

Date of initial notice in ***Federal Register***: April 19, 2011 (76 FR 21923).

The licensee's supplemental letter contained clarifying information, did not change the scope of the original license amendment request, did not change the NRC staff's initial proposed finding of no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 11, 2012.

No significant hazards consideration comments received: No.

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 27th day of January 2012.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–2594 Filed 2–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0002]

Notice of Sunshine Act Meeting

DATE: Weeks of February 6, 13, 20, 27, March 5, 12, 2012.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of February 6, 2012

Wednesday, February 8, 2012

3:30 p.m.—Briefing on International Issues (Closed—Ex. 1).

Thursday, February 9, 2012

9 a.m.—Briefing on Status of Outreach and Educational Efforts with External Stakeholders Related to the Safety Culture Policy Statement (Public Meeting) (Contact: Diane Sieracki, (301) 415-3297).

This meeting will be Web cast live at the Web address—*www.nrc.gov.*

12 p.m.—Affirmation Session (Public Meeting) (Tentative).

a. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc (Pilgrim Nuclear Power Station). Docket No. 50–293–LR (Tentative).

b. Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), Docket Nos. 52–025–COL & 52–026–COL—Draft Mandatory Hearing Decision (Tentative).

This meeting will be Web cast live at the Web address—*www.nrc.gov.*

Week of February 13, 2012—Tentative

There are no meetings scheduled for the week of February 13, 2012.

Week of February 20, 2012—Tentative

Wednesday, February 22, 2012

9 a.m.—Briefing on Fort Calhoun (Public Meeting) (Contact: Jeff Clark, (817) 860–8147).

This meeting will be Web cast live at the Web address—*www.nrc.gov.*

Week of February 27, 2012—Tentative

Tuesday, February 28, 2012.

9:30 a.m.—Briefing on the Threat Environment Assessment (Closed—Ex. 1).

Week of March 5, 2012—Tentative

There are no meetings scheduled for the week of March 5, 2012.

Week of March 12, 2012—Tentative

There are no meetings scheduled for the week of March 12, 2012.

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*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at (301) 415–6200, TDD: (301) 415–2100, or by email at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 ((301) 415–1969), or send an email to *darlene.wright@nrc.gov.*

Dated: February 2, 2012.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2012–2852 Filed 2–3–12; 4:15 pm]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15g–3; OMB Control No. 3235–0392; SEC File No. 270–346.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) that the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 15g–3—Broker or dealer disclosure of quotations and other information relating to the penny stock market (17 CFR 240.15g–3) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 15g–3 requires that brokers and dealers disclose to customers current quotation prices or similar market information in connection with transactions in penny stocks. The purpose of the rule is to increase the level of disclosure to investors concerning penny stocks generally and specific penny stock transactions.

The Commission estimates that approximately 209 broker-dealers will spend an average of 87 hours annually to comply with this rule. Thus, the total compliance burden is approximately 18,200 burden-hours per year.

Written 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 estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to *PRA_Mailbox@sec.gov.*

Dated: February 2, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2735 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15g–4, OMB Control No. 3235–0393, SEC File No. 270–347.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in the following rule: Rule 15g–4—Disclosure of compensation to brokers or dealers (17 CRF 240.15g–4) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 15g–4 requires brokers and dealers effecting transactions in penny stocks for or with customers to disclose the amount of compensation received by the broker-dealer in connection with the transaction. The purpose of the rule is to increase the level of disclosure to investors concerning penny stocks generally and specific penny stock transactions.

The Commission estimates that approximately 209 broker-dealers will spend an average of 87 hours annually to comply with this rule. Thus, the total compliance burden is approximately 18,200 burden-hours per year.

Written 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 estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor collection of information unless it displays a currently valid control number. No person shall be subject to

any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to *PRA_Mailbox@sec.gov.*

Dated: February 2, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2734 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Regulation BTR, OMB Control No. 3235–0579, SEC File No. 270–521.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Regulation Blackout Trade Restriction (''Regulation BTR'') (17 CFR 245.100–245.104) clarifies the scope and application of Section 306(a) of the Sarbanes-Oxley Act of 2002 (''Act'') (15 U.S.C. 7244(a)). Section 306(a)(6) (15 U.S.C.7244(a)(6)) of the Act requires an issuer to provide timely notice to its directors and executive officers and to the Commission of the imposition of a blackout period that would trigger the statutory trading prohibition of Section 306(a)(1) (15 U.S.C. 7244(a)(1)). The information provided under Regulation BTR is mandatory and is available to the public. Approximately 1,230 issuers file Regulation BTR notices annually. We estimate that it takes 2 hours per response for an issuer to draft a notice to directors and executive officers for a total annual burden of 2,460 hours. The issuer prepares 75% of the 2,460 annual burden hours for a total reporting burden of (1,230 × 2 hrs × 0.75) 1,845 hours. In addition, we estimate that an issuer distributes a notice to five directors and executive officers at an estimated 5 minutes per notice (1,230 blackout period × 5 notices × 5 minutes) for a total reporting burden of 512 hours. The combined annual reporting burden is (1,845 hours + 512 hours) 2,357 hours.

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

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: February 2, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2732 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29942; File No. 812–13950]

Henderson Global Funds, et al.; Notice of Application

February 1, 2012.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 12(d)(1)(A) and (B) of the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act, and under section 6(c) of the Act for an exemption from rule 12d1–2(a) under the Act.

Summary of the Application: The requested order would (a) permit certain registered open-end management investment companies that operate as ''funds of funds'' to acquire shares of certain registered open-end management investment companies and unit investment trusts (''UITs'') that are within and outside the same group of investment companies as the acquiring investment companies, and (b) permit funds of funds relying on rule 12d1–2 under the Act to invest in certain financial instruments.

Applicants: Henderson Global Funds (''Trust''), Henderson Global Investors (North America) Inc. (''Adviser''), and Henderson Investment Management Limited (''HIML'').

DATES: *Filing Dates:* The application was filed on August 30, 2011 and amended on December 21, 2011.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 27, 2012, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: 737 North Michigan Avenue Suite 1700, Chicago, Illinois 60611.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Counsel, at (202) 551–6812, or David P. Bartels, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is an open-end management investment company registered under the Act and organized as a Delaware statutory trust. The Trust currently consists of ten series (''Funds''), which pursue different investment objectives and principal

investment strategies.[1] Initially, Henderson All Asset Fund (''All Asset Fund''), a series of the Trust, intends to rely on the requested order. The All Asset Fund has an investment objective of long-term capital growth and invests in a wide range of asset classes, including equities, bonds, commodities, cash, and other alternative asset classes. The Adviser believes that the All Asset Fund would benefit from the ability to invest in other investment companies, such as those specializing in specific asset classes or specialized strategies. Other Funds may in the future be structured as traditional ''funds of funds'' (each a ''Fund of Funds'') and seek to achieve their objective by investing primarily in other investment companies.[2]

2. The Adviser, a Delaware corporation, is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') and serves as investment adviser to each of the Funds. The Adviser employs HIML, a corporation organized under the laws of the UK, as subadviser to manage the assets of each Fund, with the exception of the Strategic Income Fund and Money Market Fund, each a series of the Trust.[3] HIML is registered as an investment adviser under the Advisers Act. The Adviser and HIML are majority-owned subsidiaries of Henderson Group plc.

3. Applicants request an order to permit (a) a Fund that operates as a Fund of Funds to acquire shares of (i) registered open-end management investment companies that are not part of the same ''group of investment companies,'' within the meaning of section 12(d)(1)(G)(ii) of the Act, as the Fund of Funds (''Unaffiliated Investment Companies'') and UITs that are not part of the same group of investment companies as the Fund of Funds (''Unaffiliated Trusts,'' together with the Unaffiliated Investment Companies, ''Unaffiliated Funds''),[4] or (ii) registered open-end management companies or UITs that are part of the same group of investment companies as the Fund of Funds (collectively, ''Affiliated Funds,'' together with the Unaffiliated Funds, ''Underlying Funds'') and (b) each Underlying Fund, any principal underwriter for the Underlying Fund, and any broker or dealer (''Broker'') registered under the Securities Exchange Act of 1934 (''Exchange Act'') to sell shares of the Underlying Fund to the Fund of Funds. Applicants also request an order under sections 6(c) and 17(b) of the Act to exempt applicants from section 17(a) to the extent necessary to permit Underlying Funds to sell their shares to Funds of Funds and redeem their shares from Funds of Funds.

4. Applicants also request an exemption under section 6(c) from rule 12d1–2 under the Act to permit any existing or future Fund of Funds that relies on section 12(d)(1)(G) of the Act (''Same Group Fund of Funds'') and that otherwise complies with rule 12d1–2 to also invest, to the extent consistent with its investment objective, policies, strategies and limitations, in other financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act (''Other Investments'').

5. Consistent with its fiduciary obligations under the Act, the board of trustees (''Board'') of each Same Group Fund of Funds will review the advisory fees charged by the Same Group Fund of Fund's Adviser to ensure that they are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory agreement of any investment company in which the Same Group Fund of Funds may invest.

Applicants' Legal Analysis

Investments by Funds of Funds in Underlying Funds

A. Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act, in relevant part, prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, and any Broker from selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Applicants seek an exemption under section 12(d)(1)(J) of the Act to permit a Fund of Funds to acquire shares of the Underlying Funds in excess of the limits in section 12(d)(1)(A), and an Underlying Fund, any principal underwriter for an Underlying Fund, and any Broker to sell shares of an Underlying Fund to a Fund of Funds in excess of the limits in section 12(d)(1)(B) of the Act.

3. Applicants state that the terms and conditions of the proposed arrangement will not give rise to the policy concerns underlying sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants submit that the proposed arrangement will not result in the exercise of undue influence by a Fund of Funds or a Fund of Funds Affiliate (as defined below) over the Unaffiliated Funds.[5] To limit the control that a Fund of Funds may have over an Unaffiliated Fund, applicants propose a condition prohibiting the Adviser, any person controlling, controlled by, or under common control with the Adviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act that is advised or

[1] Applicants request that the requested order apply to each existing and future Fund and to each existing and future registered open-end management investment company or series thereof that is advised by the Adviser or any entity controlling, controlled by or under common control with the Adviser and which is part of the same group of investment companies (as defined in section 12(d)(1)(G)(ii)) as the Trust (included in the term ''Funds'').

[2] All entities that currently intend to rely on the requested order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

[3] HIML, together with any other subadviser within the meaning of section 2(a)(20)(B) of the Act, ''Subadviser.''

[4] Certain of the Unaffiliated Funds may be registered under the Act as either UITs or open-end management investment companies and have received exemptive relief to permit their shares to be listed and traded on a national securities exchange at negotiated prices (''ETFs'').

[5] A ''Fund of Funds Affiliate'' is the Adviser, any Subadviser, promoter or principal underwriter of a Fund of Funds, as well as any person controlling, controlled by, or under common control with any of those entities. An ''Unaffiliated Fund Affiliate'' is an investment adviser, sponsor, promoter, or principal underwriter of an Unaffiliated Fund, as well as any person controlling, controlled by, or under common control with any of those entities.

sponsored by the Adviser or any person controlling, controlled by, or under common control with the Adviser (the ''Advisory Group'') from controlling (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Subadviser to a Fund of Funds, any person controlling, controlled by or under common control with the Subadviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Subadviser or any person controlling, controlled by or under common control with the Subadviser (the ''Subadvisory Group''). Applicants propose other conditions to limit the potential for undue influence over the Unaffiliated Funds, including that no Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting'').[6]

5. To further assure that an Unaffiliated Investment Company understands the implications of an investment by a Fund of Funds under the requested order, prior to a Fund of Funds' investment in the shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute an agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (''Participation Agreement''). Applicants note that an Unaffiliated Investment Company (other than an ETF whose shares are purchased by a Fund of Funds in the secondary market) will retain its right at all times to reject any investment by a Fund of Funds.[7]

6. Applicants state that they do not believe that the proposed arrangement will involve excessive layering of fees. The Board of each Fund of Funds, including a majority of the trustees who are not ''interested persons'' (within the meaning of section 2(a)(19) of the Act) (''Independent Trustees''), will find that the advisory fees charged under any investment advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. In addition, the Adviser will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any sales charges and/or service fees, as defined in Rule 2830 of the Conduct Rules of the NASD (''NASD Conduct Rule 2830''),[8] charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

7. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Underlying Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except in certain circumstances identified in condition 11 below.

B. Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3) of the Act defines an ''affiliated person'' of another person to include (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

2. Applicants state that a Fund of Funds and the Affiliated Funds might be deemed to be under common control of the Adviser and therefore affiliated persons of one another. Applicants also state that a Fund of Funds and the Unaffiliated Funds might be deemed to be affiliated persons of one another if the Fund of Funds acquires 5% or more of an Unaffiliated Fund's outstanding voting securities. In light of these and other possible affiliations, section 17(a) could prevent an Underlying Fund from selling shares to and redeeming shares from a Fund of Funds.

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants submit that the proposed transactions satisfy the standards for relief under sections 17(b) and 6(c) of the Act.[9] Applicants state that the terms of the transactions are reasonable and fair and do not involve overreaching. Applicants state that the terms upon which an Underlying Fund will sell its shares to or purchase its shares from a Fund of Funds will be based on the net asset value of the

[6] An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, trustee, member of an advisory board, investment adviser, Subadviser, or employee of the Fund of Funds, or a person of which any such officer, director, trustee, member of an advisory board, investment adviser, Subadviser, or employee is an affiliated person. An Underwriting Affiliate does not include any person whose relationship to an Unaffiliated Fund is covered by section 10(f) of the Act.

[7] An Unaffiliated Investment Company, including an ETF, would retain its right to reject any initial investment by a Fund of Funds in excess of the limit in section 12(d)(1)(A)(i) of the Act by declining to execute the Participation Agreement with the Fund of Funds.

[8] Any references to NASD Conduct Rule 2830 include any successor or replacement FINRA rule to NASD Conduct Rule 2830.

[9] Applicants acknowledge that receipt of any compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by a Fund of Funds of shares of an Underlying Fund or (b) an affiliated person of an Underlying Fund, or an affiliated person of such person, for the sale by the Underlying Fund of its shares to a Fund of Funds may be prohibited by section 17(e)(1) of the Act. The Participation Agreement also will include this acknowledgement.

Underlying Fund.[10] Applicants state that the proposed transactions will be consistent with the policies of each Fund of Funds and each Underlying Fund and with the general purposes of the Act.

Other Investments by Same Group Funds of Funds

1. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquiring company and acquired company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Exchange Act or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G) of the Act.

2. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered unit investment trust that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, government securities, and short-term paper: (1) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (2) securities (other than securities issued by an investment company); and (3) securities issued by a money market fund, when the investment is in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, ''securities'' means any security as defined in section 2(a)(36) of the Act.

3. Applicants state that the proposed arrangement would comply with the provisions of rule 12d1–2 under the Act, but for the fact that a Same Group Fund of Funds may invest a portion of its assets in Other Investments. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Same Group Funds of Funds to invest in Other Investments. Applicants assert that permitting Same Group Funds of Funds to invest in Other Investments as described in the application would not raise any of the concerns that the requirements of section 12(d)(1) were designed to address.

Applicants' Conditions

Investments by Funds of Funds in Underlying Funds

Applicants agree that the relief to permit Funds of Funds to invest in Underlying Funds shall be subject to the following conditions:

1. The members of an Advisory Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The members of a Subadvisory Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of an Unaffiliated Fund, the Advisory Group or a Subadvisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of the Unaffiliated Fund, then the Advisory Group or the Subadvisory Group will vote its shares of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares. This condition will not apply to a Subadvisory Group with respect to an Unaffiliated Fund for which the Subadviser or a person controlling, controlled by, or under common control with the Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act (in the case of an Unaffiliated Investment Company) or as the sponsor (in the case of an Unaffiliated Trust).

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in shares of an Unaffiliated Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or an Unaffiliated Fund Affiliate.

3. The Board of each Fund of Funds, including a majority of the Independent Trustees, will adopt procedures reasonably designed to assure that its Adviser and any Subadviser(s) to the Fund of Funds are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or Fund of Funds Affiliate from an Unaffiliated Fund or an Unaffiliated Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, the Board of the Unaffiliated Investment Company, including a majority of the Independent Trustees, will determine that any consideration paid by the Unaffiliated Investment Company to a Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Investment Company; (b) is within the range of consideration that the Unaffiliated Investment Company would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between an Unaffiliated Investment Company and its investment adviser(s) or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in any Affiliated Underwriting.

6. The Board of an Unaffiliated Investment Company, including a majority of the Independent Trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Unaffiliated Investment Company in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board of the Unaffiliated Investment Company will review these purchases periodically, but no less frequently than

[10] Applicants note that a Fund of Funds generally would purchase and sell shares of an Unaffiliated Fund that operates as an ETF through secondary market transactions rather than through principal transactions with the Unaffiliated Fund. To the extent that a Fund of Funds purchases or redeems shares from an ETF that is an affiliated person of the Fund of Funds in exchange for a basket of specified securities as described in the application for the exemptive order upon which the ETF relies, applicants also request relief from section 17(a) of the Act for those in-kind transactions. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where an ETF could be deemed an affiliated person, or an affiliated person of an affiliated person of a Fund of Funds, because an investment adviser to the ETF is also an investment adviser to the Fund of Funds.

annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Unaffiliated Investment Company. The Board of the Unaffiliated Investment Company will consider, among other things, (a) whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Investment Company; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Unaffiliated Investment Company in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board of the Unaffiliated Investment Company will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

7. Each Unaffiliated Investment Company shall maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and shall maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth the: (a) Party from whom the securities were acquired, (b) identity of the underwriting syndicate's members, (c) terms of the purchase, and (d) information or materials upon which the determinations of the Board of the Unaffiliated Investment Company were made.

8. Prior to its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute a Participation Agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Investment Company in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Unaffiliated Investment Company of the investment. At such time, the Fund of Funds will also transmit to the Unaffiliated Investment Company a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Unaffiliated Investment Company of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Unaffiliated Investment Company and the Fund of Funds will maintain and preserve a copy of the order, the Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. Before approving any advisory contract under section 15 of the Act, the Board of each Fund of Funds, including a majority of the Independent Trustees, shall find that the advisory fees charged under such advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. Such finding and the basis upon which the finding was made will be recorded fully in the minute books of the appropriate Fund of Funds.

10. The Adviser will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any Subadviser will waive fees otherwise payable to the Subadviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received by the Subadviser, or an affiliated person of the Subadviser, from an Unaffiliated Fund, other than any advisory fees paid to the Subadviser or its affiliated person by an Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund made at the direction of the Subadviser. In the event that the Subadviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds.

11. No Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund: (a) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (b) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to (i) acquire securities of one or more investment companies for short-term cash management purposes, or (ii) engage in interfund borrowing and lending transactions.

12. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to fund of funds set forth in NASD Conduct Rule 2830.

Other Investments by Same Group Funds of Funds

Applicants agree that the relief to permit Same Group Funds of Funds to invest in Other Investments shall be subject to the following condition:

13. Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2), to the extent that it restricts any Same Group Fund of Funds from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2733 Filed 2–6–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29941; 812–13634]

Rand Capital Corporation, et al.; Notice of Application

February 1, 2012.

AGENCY: Securities and Exchange Commission (the ''Commission'').

ACTION: Notice of an application for an order under sections 6(c), 12(d)(1)(J), and 57(c) of the Investment Company Act of 1940 (''Act'') granting exemptions from sections 12(d)(1)(A) and (C), 18(a),

21(b), 57(a)(1)–(a)(3), and 61(a) of the Act; under section 57(i) of the Act and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by section 57(a)(4) of the Act; and under section 12(h) of the Securities Exchange Act of 1934 (''Exchange Act'') granting an exemption from section 13(a) of the Exchange Act.

APPLICANTS: Rand Capital Corporation (''Rand'') and Rand Capital SBIC, Inc. (''Rand SBIC'').

SUMMARY OF APPLICATION: Applicants request an order permitting a parent business development company (''BDC'') and its wholly-owned small business investment company (''SBIC'') subsidiary and any future wholly-owned BDC subsidiaries (''Future Subsidiaries'') to engage in certain transactions that otherwise would be permitted if such parent BDC and its subsidiaries were one company and to file certain reports on a consolidated basis, and permitting such parent BDC to adhere to a modified asset coverage requirement.

DATES: *Filing Dates:* The application was filed on February 6, 2009 and amended on August 5, 2009, September 8, 2011 and January 10, 2012.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 pm on February 27, 2012, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants, c/o Allen F. Grum, Rand Capital Corporation, 2200 Rand Building, Buffalo, NY 14203.

FOR FURTHER INFORMATION CONTACT: Keith A. Gregory, Senior Counsel, at (202) 551–6815, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. Rand, a New York corporation, is an internally managed, non-diversified, closed-end investment company that has elected to be regulated as a BDC under the Act.[1] Rand's principal business is to make venture capital investments in small, early-stage and developing enterprises. Rand's principal objective is long-term capital appreciation. Rand typically invests in debt securities and concurrently acquires equity interests in the form of stock, warrants or stock options or the right to convert debt securities into stock. Rand has a six member board of directors (''Rand Board''), five of whom are not ''interested persons'' of Rand within the meaning of section 2(a)(19) of the Act. The Rand Board appoints Rand's president and chief executive officer and its executive vice president and chief financial officer (collectively, the ''Principal Officers''). Subject to the oversight of the Rand Board, the Principal Officers make all investment decisions for Rand.

2. Rand SBIC, a New York corporation, is an SBIC licensed by the Small Business Administration (''SBA'') to operate under the Small Business Investment Act of 1958 (''SBA Act''). Rand SBIC is registered as an investment company under the Act and will elect to be regulated as a BDC prior to relying on the requested order. Rand SBIC has the same investment purposes and will invest in the same kinds of securities as Rand.

3. Rand SBIC is a wholly-owned subsidiary of Rand, which owns all of its outstanding voting stock. The Rand Board annually elects the same persons who comprise the Rand Board to serve on the board of directors of Rand SBIC. Pursuant to a by-law provision required by the SBA, Rand SBIC is required to maintain an investment committee consisting of the Principal Officers that has responsibility for all investment decisions by Rand SBIC. Rand SBIC's operations have been and will be consolidated with those of Rand for financial reporting and tax purposes.

4. Rand may in the future create wholly-owned Future Subsidiaries each of which (i) will be a BDC, and (ii) may be licensed by the SBA to operate as an SBIC (collectively with Rand SBIC, the ''SBIC Subsidiaries'') or may not be an SBIC.[2] Any future SBIC Subsidiary will be operated in the same manner as Rand SBIC and will be subject to the requirements of the SBA Act and the SBA regulations. Rand SBIC, the SBIC Subsidiaries and the Future Subsidiaries are collectively referred to as the ''Subsidiaries.''

Applicants' Legal Analysis

1. Applicants request an order under sections 6(c), 12(d)(1)(J), 57(c) and 57(i) of the Act and rule 17d–1 under the Act granting exemptions from sections 12(d)(1), 18(a), 21(b), 57(a)(1), 57(a)(2), 57(a)(3), 57(a)(4), and 61(a) of the Act to permit Rand, Rand SBIC and any Future Subsidiary to engage in certain transactions that otherwise would be permitted if Rand and its Subsidiaries were one company and to permit Rand to adhere to a modified asset coverage requirement. Applicants also request an exemption under section 12(h) of the Exchange Act for an exemption from section 13(a) of the Exchange Act.

2. Section 12(d)(1)(A) of the Act, made applicable to BDCs by section 60 of the Act, limits the amount of securities a registered investment company or BDC may hold of other investment companies. Section 12(d)(1)(C) of the Act limits the amount of securities of a closed-end investment company that may be acquired by an investment company. Rule 60a–1 exempts a BDC's acquisition of the securities of a wholly-owned SBIC subsidiary from sections 12(d)(1)(A) and (C). Accordingly, the acquisition of Rand SBIC securities by Rand will be exempt from the provisions of sections 12(d)(1)(A) and 12(d)(1)(C) by virtue of rule 60a–1.

3. Applicants state that section 12(d)(1) would prohibit the acquisition by Rand of the debt or equity securities of, or the making of loans by Rand to, Future Subsidiaries that are not SBICs. Applicants state that section 12(d)(1) would also prohibit the acquisition of debt securities of Rand by any such Future Subsidiary since they would each be a BDC and an entity controlled by a BDC. Thus, the making of loans or advances by Rand SBIC or a Future Subsidiary to Rand might be deemed to violate section 12(d)(1) if the loans or

[1] Section 2(a)(48) of the Act defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

[2] All existing entities that currently intend to rely on the order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms [and conditions] of the application.

advances are construed as purchases by the Subsidiary of the securities of Rand.

4. Applicants request an exemption under section 12(d)(1)(J) from section 12(d)(1) to permit: (1) The purchase of debt or equity securities of, or a contribution to capital to, a Future Subsidiary that is not an SBIC by Rand, (ii) the making of loans or advances by any Subsidiary to Rand or to any other Subsidiary, and (iii) the acquisition by the Subsidiaries of any securities of Rand representing indebtedness or any securities representing indebtedness issued by any of the other Subsidiaries. Section 12(d)(1)(J) of the Act provides that the Commission may exempt persons or transactions from any provision of section 12(d)(1) if and to the extent such exception is consistent with the public interest and the protection of investors. Applicants state that the requested relief meets this standard because the Subsidiaries are wholly-owned and this status and the consolidated financial reporting with Rand will eliminate the possibility of overreaching and prevent confusion as to the financial status of Rand to Rand's shareholders, who are the investors that the Act is intended to protect.

5. Section 18(a) prohibits a registered closed-end investment company from issuing any class of senior security or selling any such security of which it is the issuer unless the company complies with the asset coverage requirements set forth in that section. Section 61(a) of the Act makes section 18 applicable to BDCs, with certain modifications. Section 18(k) exempts an investment company operating as an SBIC from the asset coverage requirements of section 18(a)(1)(A) and (B) (with respect to senior securities representing indebtedness).

6. Applicants state that a question exists as to whether Rand must comply with the asset coverage requirements of section 18(a) (as modified by section 61(a)) on a consolidated basis because Rand may be deemed to be an indirect issuer of any class of senior security representing indebtedness issued by any Subsidiary. For Rand to comply with these asset coverage requirements would mean that, with certain exceptions, Rand would treat as its own all assets held directly by Rand and the Subsidiaries and any liabilities of the Subsidiaries, including liabilities of the Subsidiaries with respect to senior securities as to which any of the Subsidiaries is exempt from the asset coverage requirements of section 18(a)(1)(A) and (B) by virtue of section 18(k). Accordingly, applicants request relief under section 6(c) of the Act from sections 18(a) and 61(a) to permit Rand to exclude from its consolidated asset coverage ratio any SBA preferred stock interest in any of the Subsidiaries (if applicable) and any senior security representing indebtedness issued by any Subsidiary.

7. Section 6(c) of the Act, in relevant part, permits the Commission to exempt any transaction or class of transactions from any provision of the Act if, and to the extent that, such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that the requested relief satisfies the section 6(c) standards. Applicants state that, without the requested relief from sections 18(a) and 61(a), the ability of an SBIC Subsidiary to obtain the kind of financing that would be available to Rand if it were to conduct the SBIC operations itself would be restricted. Moreover, the exclusion by Rand from its consolidated asset coverage ratio of any senior security representing indebtedness that is issued by an SBIC Subsidiary would not harm the public interest because the SBA regulates the leverage and capital structure of the SBIC Subsidiaries.

8. Sections 57(a)(1) and (2) of the Act generally prohibit, with certain exceptions, sales or purchases of any security or other property between BDCs and certain of their affiliates as described in section 57(b) of the Act. Section 57(b) includes a person, directly or indirectly, either controlling, controlled by or under common control with the BDC. Applicants state that Rand directly owns all of each Subsidiary's outstanding voting stock. Applicants further state that each of the Subsidiaries and Rand may be deemed to be under the common control of the Rand Board and the Principal Officers. Accordingly, Rand and the Subsidiaries are related to each other in the manner described in section 57(b). In addition, each Subsidiary would also be a person related to each other Subsidiary in a manner described in section 57(b) as long as they remain under the common control of Rand.

9. Applicants state that there may be circumstances when it is in the interest of Rand and its shareholders that one or more of the Subsidiaries invest in securities of an issuer that may be deemed to be a controlled portfolio affiliate of Rand or another Subsidiary or that Rand invest in securities of an issuer that may be deemed to be a controlled portfolio affiliate of a Subsidiary. Applicants therefore request an exemption from sections 57(a)(1) and 57(a)(2) of the Act to permit any transaction between Rand and any Subsidiary, and any transaction between a Subsidiary and any other Subsidiary, with respect to the purchase or sale of securities or other property. Applicants also seek an exemption from these provisions to allow any purchase or sale transaction between Rand and a controlled portfolio affiliate of any Subsidiary, and a purchase or sale transaction between a Subsidiary and a controlled portfolio affiliate of Rand or another Subsidiary. Applicants state that the requested relief is intended only to permit Rand and the Subsidiaries to do that which they otherwise would be permitted to do if they were one company.

10. Section 57(c) provides that the Commission will exempt a proposed transaction from the provisions of section 57(a)(1) and (2) of the Act if the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching of any person concerned, and the proposed transaction is consistent with the policy of the BDC concerned and the general purposes of the Act.

11. Applicants submit that the requested relief from section 57(a)(1) and (2) meets this standard. Applicants represent that the proposed operations as one company will enhance efficient operations of Rand and its wholly owned Subsidiaries, and allow them to deal with portfolio companies as if Rand and such Subsidiaries were one company. Applicants contend that the terms of the proposed transactions are reasonable and fair and do not involve overreaching of Rand or its stockholders or its stockholders by any person, and that the requested order would permit Rand and the Subsidiaries to carry out more effectively their purposes and objectives of investing primarily in small business concerns. Finally, applicants note that the proposed transactions are consistent with the policies of Rand and Rand SBIC as specified in filings with the Commission and Rand's reports to shareholders, as well as consistent with the policies and provisions of the Act.

12. Section 57(a)(3) of the Act makes it unlawful for certain affiliated persons of a BDC, and certain affiliated persons of those persons, to borrow money or other property from such BDC or from any company controlled by the BDC, except as permitted by section 21(b) or section 62. Section 21(b) of the Act (made applicable to BDCs by section 62) provides that it shall be unlawful for a BDC to lend any money or property, directly or indirectly, to any person that controls or is under common control

with the BDC, except for loans to any company that owns all of the outstanding securities of the BDC (other than directors' qualifying shares).

13. Rand is an affiliated person of each of the Subsidiaries by reason of its direct ownership of all of the outstanding voting capital stock of the Subsidiaries. Each of the Subsidiaries is an affiliated person of Rand because they are deemed to be under the control of Rand. Each of the Subsidiaries is an affiliated person of each other Subsidiary because they are deemed to be under the common control of Rand. In addition, each of the directors and Principal Officers of Rand are also or will be the directors and principal officers of Rand SBIC and the Future Subsidiaries, so that Rand and the Subsidiaries may be deemed to be under common control.

14. Applicants state that there may be instances when it would be in the best interests of Rand and its shareholders for Rand to make loans to one of more of the Subsidiaries or for the Subsidiaries to make loans to Rand or each other. Applicants note that, in the case of loans from Rand to the Subsidiaries or loans from the Subsidiaries to each other, the loans may be prohibited by section 21(b) because Rand and the Subsidiaries may be deemed to be under common control. Applicants state that in the case of loans from a Subsidiary to Rand, the loans would be prohibited by section 21(b) and section 57(a)(3) because the borrower controls the lender and the lender may have outstanding securities not owned by the borrower.

15. Accordingly, applicants request an order under section 6(c) to exempt from the provisions of section 21(b) the lending of money or other property by Rand to the Subsidiaries and by the Subsidiaries to Rand or another Subsidiary. Applicants argue that because these transactions are solely between Rand and its wholly-owned Subsidiaries, they will have no substantive economic effect and there will be no basis for overreaching or harm to the public interest. Applicants also request an order under section 57(c) to exempt the borrowing of money or other property by Rand or a Subsidiary from any other Subsidiary from the provisions of section 57(a)(3). Applicants submit that the requested relief meets the standards of section 6(c) and 57(c).

16. Applicants also request relief from section 21(b) under section 6(c) to exempt any lending of money or other property by Rand or a Subsidiary to portfolio companies of any Subsidiary controlled by the Subsidiary or portfolio companies of Rand controlled by Rand. The requested exemption is intended to permit Rand and the Subsidiaries to do that which they otherwise would be permitted to do if they were one company, as opposed to each of the Subsidiaries being a wholly-owned Subsidiary of Rand.

17. Section 17(d) of the Act and rule 17d–1 under the Act (made applicable to BDCs by section 57(i)) prohibit affiliated persons of a registered investment company, or an affiliated person of such person, acting as principal, from participating in any joint transaction or arrangement in which the registered company or a company it controls is a participant, unless the Commission has issued an order authorizing the arrangement. Section 57(a)(4) of the Act imposes substantially the same prohibitions on joint transactions involving any BDC and an affiliated person of such BDC, or an affiliated person of such affiliated person, as specified in section 57(b) of the Act. Section 57(i) of the Act provides that rules and regulations under section 17(d) of the Act will apply to transactions subject to section 57(a)(4) in the absence of rules under that section. The Commission has not adopted rules under section 57(a)(4) with respect to joint transactions and, accordingly, the standards set forth in rule 17d–1 govern applicants' request for relief.

18. Applicants request relief under section 57(i) and rule 17d–1 to permit any joint transaction that would otherwise be prohibited by section 57(a)(4), in which a Subsidiary and Rand or another Subsidiary participate, but only to the extent that the transaction would not be prohibited if the Subsidiaries were deemed to be a part of Rand and not separate companies.

19. In determining whether to grant an order under section 57(i) and rule 17d–1, the Commission considers whether the participation of the BDC in the joint transaction is consistent with the provisions, policies, and purposes of the Act, and the extent to which such participation is on a basis different from or less advantageous than that of other participants. Applicants note that the proposed transactions are consistent with the policy and provisions of the Act and will enhance the interests of Rand and its stockholders while retaining the important protections afforded by the Act. In addition, because the joint participants will conduct their operations as though they comprise one company, the participation of one will not be on a basis different from or less advantageous than the others. Accordingly, applicants believe that the standard for relief under section 57(i) and rule 17d–1 is satisfied.

20. Section 54 of the Act provides that a closed-end company may elect BDC treatment under the Act if the company has either a class of equity securities registered under section 12 of the Exchange Act or has filed a registration statement pursuant to section 12 of the Exchange Act for a class of its equity securities. Section 12(g) of the Exchange Act requires issuers with specified assets and a specified number of security holders to register under the Exchange Act. Rand has elected to be regulated as a BDC and its common stock is deemed registered under section 12(g)(1) of the Exchange Act. Rand SBIC will elect to be regulated as a BDC under the Act prior to relying on the order, and such election will cause Rand SBIC's common stock to be registered under the Exchange Act by operation of rule 12g–2 under the Exchange Act.

21. By filing a registration statement under section 12 of the Exchange Act, absent an exemption, Rand SBIC and each Future Subsidiary would be required by section 13(a) of the Exchange Act to file periodically with the Commission, even though their sole shareholder will be Rand. Accordingly, applicants request an order under section 12(h) of the Exchange Act exempting Rand SBIC and each Future Subsidiary from the reporting requirements of section 13(a) of the Exchange Act to permit the filing of consolidated reports with Rand.

22. Section 12(h) of the Exchange Act provides that the Commission may exempt an issuer from section 13 of the Exchange Act if the Commission finds that by reason of the number of public investors, amount of trading interest in the securities, the nature and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors. Each of the Subsidiaries will have only one investor, which is itself a reporting company, and no public investors. There will be no trading in the Subsidiaries securities, so no public interest or investor protective purpose will be served by separate Subsidiary reporting. Further, applicants state that the nature and extent of the Subsidiaries' activities are such that their activities will be fully reported through consolidated reporting in accordance with normal accounting rules. Accordingly, applicants believe that the requested exemption meets the standards of section 12(h) of the Exchange Act.

Applicants' Conditions

Applicants agree that the requested order will be subject to the following conditions:

1. Rand will at all times own and hold, beneficially and of record, all of the outstanding voting capital stock of each of the Subsidiaries.

2. The Subsidiaries will have investment policies not inconsistent with those of Rand, as set forth in Rand's registration statement.

3. No person shall serve as investment adviser or principal underwriter to Rand SBIC or any Subsidiary unless the Rand Board and the shareholders of Rand shall have taken the same action with respect thereto also required to be taken by the board of directors and the sole shareholder of such Subsidiary.

4. Rand will not itself issue or sell any senior security, and Rand will not cause or permit any Subsidiary to issue or sell any senior security of which Rand or such Subsidiary is the issuer except to the extent permitted by section 18 (as modified for BDCs by section 61) of the Act; provided that immediately after the issuance or sale of any such senior security by either Rand or any Subsidiary, Rand and its Subsidiaries on a consolidated basis, and Rand individually, shall have the asset coverage required by section 18(a) (as modified for BDCs by section 61(a)), except that, in determining whether Rand and its Subsidiaries on a consolidated basis have the asset coverage required by section 61(a), any SBA preferred stock interest in any SBIC Subsidiary and any borrowings by any SBIC Subsidiary shall not be considered senior securities and, for purposes of the definition of ''asset coverage'' in section 18(h), shall be treated as indebtedness not represented by senior securities.

5. No person shall serve as a member of any board of directors of any Subsidiary unless such person shall also serve as a member of the Rand Board. The board of directors of any Subsidiary will be elected by Rand as the sole shareholder of such Subsidiary.

6. Rand and any Subsidiary will acquire securities representing indebtedness of Rand SBIC or any SBIC Subsidiary only if, in each case, the prior approval of the SBA has been obtained. In addition, the SBIC Subsidiaries, on the one hand, and Rand or any other Subsidiary on the other hand, will purchase and sell portfolio securities between themselves only if, in each case, the prior approval of the SBA has been obtained.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2670 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Notice of Sunshine Act Meeting.

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, February 9, 2012 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, February 9, 2012 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

An adjudicatory matter; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: February 2, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–2815 Filed 2–3–12; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66285; File No. SR–Phlx–2011–175]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Granting Approval of Proposed Rule Change Regarding Strike Price Intervals for SLV and USO Options

February 1, 2012.

I. Introduction

On December 7, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change regarding strike price intervals for options on iShares® Silver Trust (''SLV'' or ''SLV Trust'') and United States Oil Fund (''USO'' or ''USO Fund''). The proposed rule change was published for comment in the **Federal Register** on December 22, 2011.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The proposed rule change seeks to amend Commentary .05 of Rule 1012 to allow trading of SLV and USO options at $0.50 strike price intervals where the strike price is less than $75.[4] The Exchange proposed no other changes to SLV and USO strike price intervals.

The Exchange stated that the proposed rule change is designed to address customer demand to hedge the SLV and USO options in smaller intervals and would, in part, allow better tailored investment and hedging opportunities.[5]

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[6] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 65986 (December 16, 2011), 76 FR 79748 (December 22, 2011) (''Notice'').

[4] The Exchange also proposed certain non-substantive changes to Commentary .06 of Rule 1009.

[5] *See* Notice at 79749.

[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Act,[7] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposal strikes a reasonable balance between the Exchange's desire to offer a wider array of strike prices in SLV and USO options while minimizing the unnecessary proliferation of strike prices in such options. The Commission expects the Exchange to monitor the trading volume associated with the additional strike prices listed as a result of this proposal and the effect of these additional strike prices on market fragmentation and on the capacity of the Exchange's, OPRA's, and vendors' automated systems.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–Phlx–2011–175) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2668 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No.34–66287; File No. SR–FINRA–2012–008]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Implementation Date for Amendments to the Trading Activity Fee Rate for Transactions in Covered Equity Securities

February 1, 2012.

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 January 31, 2012, the Financial Industry Regulatory Authority, Inc. (''FINRA'') 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 FINRA. FINRA has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to delay the implementation date of amendments to the Trading Activity Fee (''TAF'') in SR–FINRA–2011–071 approved by the Commission on January 30, 2012.[4]

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

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 December 14, 2011, FINRA filed a proposed rule change to increase FINRA's TAF rate for transactions in covered equity securities.[5] In the Original Filing, FINRA proposed February 1, 2012, as the implementation date for the rate change. The proposed rule change was published for comment in the **Federal Register** on December 30, 2011.[6] The Commission received no comments on the proposed rule change and approved the proposed rule change in an order dated January 30, 2012.[7]

In the Original Filing, FINRA stated that the proposed implementation date of the proposed rule change would be February 1, 2012. Due to the short timeframe between the Commission's approval of the proposed rule change on January 30, 2012, and the proposed implementation date of February 1, 2012, FINRA believes it is appropriate to delay the implementation date by one month to give members adequate time to prepare any necessary changes to their systems to implement the rate change. Consequently, FINRA is proposing to delay the implementation date from February 1, 2012, to March 1, 2012. FINRA believes that this will provide firms with adequate time to prepare for the change in the TAF rate for covered equity securities.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, such that FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[8] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. Because of the short timeframe between the Commission's approval of the proposed rule change and the proposed implementation date of February 1, 2012, FINRA believes that delaying the implementation date from February 1, 2012, to March 1, 2012, will provide firms with adequate time to prepare for the change in the TAF rate for covered equity securities.

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.

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 66276 (January 30, 2012) (Order Approving SR–FINRA–2011–071).

[5] *See* SR–FINRA–2011–071 (''Original Filing'').

[6] *See* Securities Exchange Act Release No. 66050 (December 23, 2011), 76 FR 82334 (December 30, 2011).

[7] *See* Securities Exchange Act Release No. 66276 (January 30, 2012).

[8] 15 U.S.C. 78*o*–3(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

FINRA has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10] Because the 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 if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest. Such waiver will give FINRA's member firms additional time to prepare for the change in the TAF rate for covered equity securities. Therefore, the Commission designates the proposal operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2012–008 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–2012–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for Web site viewing and printing at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–FINRA–2012–008 and should be submitted on or before February 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2680 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires FINRA to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five-day prefiling requirement in this case.

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66284; File No. SR–Phlx–2012–04]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Offer a New Product, TradeInfo PHLX, and Amend the Fee Schedule to Add a Related Subscription Fee

February 1, 2012.

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 January 26, 2012, NASDAQ OMX PHLX LLC (''Exchange'' or ''PHLX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to offer a new product, TradeInfo PHLX, to amend the fee schedule to add a related subscription fee.

The text of the proposed rule change is available from the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to offer a new product, TradeInfo PHLX, and to amend its fee schedule to assess a fee of $95 per user, per month for subscription to the new product.[3] Through a secure Web connection, TradeInfo PHLX will allow a subscribing member to scan for their orders submitted to PHLX. A subscribing member will be able to scan for all orders in a particular security or all orders of a particular type, regardless of their status (open, canceled, executed, etc.). A subscribing member will also be able to cancel open orders at the order, port or firm mnemonic level. For example, after scanning for open orders, a subscribing member is able to select an open order and cancel the order. TradeInfo PHLX will also allow a subscribing member to scan other order statuses, such as executed, cancelled, broken, rejected and suspended orders. A subscribing member will be able to generate reports of execution, order or cancel information, which can be exported into a spreadsheet for review. TradeInfo PHLX will also permit a subscribing member to manage their order flow and mitigate risk by giving them the ability to view their orders and executions, as well as the ability to perform cancels at the port level. Last, TradeInfo PHLX will allow a subscribing member to download records of their orders and executions for record-keeping purposes. The Exchange currently offers PSX TradeInfo data to subscribing members for a fee of $95 per user, per month for member's trading activity on the PSX equities market.[4] Under the proposed rule change, TradeInfo PHLX will be available to PHLX members participating on the PHLX options market.

TradeInfo PHLX is similar to comparable products offered by the The Nasdaq Stock Market (''Nasdaq'') and NASDAQ OMX BX (''BX'').[5] PHLX is proposing to offer the same functionality to its options participants in regard to their PHLX trade activity for the same fee assessed for the similar products offered by Nasdaq and BX.[6]

2. Statutory Basis

The Exchange believes that the proposed fee is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(4) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange believes that the fee is reasonable since the functionally identical product is currently offered for the same subscription fee to PSX participants, as well as Nasdaq and BX members. The Exchange believes that the fee is equitably allocated since subscription to the product is voluntary and the fee is assessed only upon members that elect to subscribe to the product. The fee is based on the number of subscriptions subscribed, so all similarly-situated member firms would be assessed the same amount.

The Exchange believes the proposed rule change is consistent with Section 6(b)(5) of the Act,[9] which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest. The Exchange believes the proposed rule change is consistent with these requirements because the TradeInfo PHLX offers a useful analytical tool with which PHLX members may access information concerning their order and trade activity occurring on PHLX, thus allowing such participants to make informed decisions concerning such activity. The Exchange notes that Nasdaq and BX offer the same type of product to their members. Affording PHLX participants access to the same functionality promotes the goal of perfecting the mechanism of a free and open market by providing a subscriber clearer picture of its market activity and providing it the ability to quickly cancel orders should the participant determine it necessary to do so.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not 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]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal will provide a tool for Exchange members to assist them in the management of their Exchange orders and is substantially similar to those of other exchanges.[12] Therefore, the Commission designates the proposal operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the

[3] The Exchange is creating new Chapter XII ''PHLX Trading Application Services'' of the NASDAQ OMX PHLX LLC Fee Schedule under which it will place the proposed new fee.

[4] *See* NASDAQ OMX PHLX LLC Fee Schedule (January 5, 2012), Chapter VIII NASDAQ OMX PSX FEES, TradeInfo PSX, p. 23.

[5] Securities Exchange Act Release No. 55135 (January 19, 2007), 72 FR 3893 (January 26, 2007) (SR–NASDAQ–2006–062). *See also* Securities Exchange Act Release No. 60826 (October 14, 2009), 74 FR 54605 (October 22, 2009) (SR–BX–2009–062).

[6] NASDAQ Rule 7015(f) and Chapter XV, Section 3(a) of the Nasdaq Options Rules each assess subscribing members a fee of $95 per user, per month for TradeInfo if the subscribing member does not have a subscription to the Nasdaq Workstation (the Nasdaq Workstation includes access to TradeInfo). BX Rule 7015 assesses subscribing members a fee of $95 per user, per month for TradeInfo BX.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[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). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the five-day prefiling requirement.

[12] *See supra* notes 4 and 5.

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2012–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2012–04. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10a.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–Phlx–2012–04 and should be submitted on or before February 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2641 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66288; File No. SR–NASDAQ–2012–017]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Fees Assessed for Subscription to WebLink ACT under Rule 7015(e)

February 1, 2012.

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 January 24, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''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 the Substance of the Proposed Rule Change

NASDAQ is proposing to modify the fees assessed for subscription to WebLink ACT under NASDAQ Rule 7015(e). NASDAQ will implement the proposed fees on February 1, 2012.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.

7015. Access Services

The following charges are assessed by Nasdaq for connectivity to systems operated by NASDAQ, including the Nasdaq Market Center, the FINRA/NASDAQ Trade Reporting Facility, and FINRA's OTCBB Service. The following fees are not applicable to the NASDAQ Options Market LLC. For related options fees for Access Services refer to Rule 7053.

(a)–(d) No change.

(e) Specialized Services Related to FINRA/NASDAQ Trade Reporting Facility

CTCI fee	$575/month.
WebLink ACT or Nasdaq Workstation Post Trade.	[$375.00]*$425*/month (full functionality) or [$200.00]*$225*/month (up to an average of twenty transactions per day each month) (For the purposes of this service only, a transaction is defined as an original trade entry, either on trade date or as-of transactions per month.)
ACT Workstation	$525/logon/month.

(f)–(h) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is proposing to amend the fees assessed under Rule 7015(e) for WebLink ACT. WebLink ACT, also referred to as Nasdaq Workstation Post Trade, is a web-based application used for submission of trade reports. WebLink ACT provides basic front-end access to the Trade Reporting Facility (''TRF'') operated by NASDAQ and the Financial Industry Regulatory Authority, Inc. (''FINRA''),[3] FINRA's OTC Reporting Facility, as well as access to ACT functionality still offered by NASDAQ under authority delegated by FINRA.

NASDAQ proposes to increase the monthly fee assessed for greater than twenty trades per day by $50, so that the fee will be $425, and increase the monthly fee assessed for less than twenty trades a day by $25, so that the

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NASDAQ notes that most FINRA members seeking access to the TRF use a proprietary front-end system developed by the broker-dealer or a product offered by a service bureau. WebLink ACT is designed as a basic front-end system for low volume users.

fee will be $225. NASDAQ notes that the WebLink ACT fees have not increased since September 2006.[4] Over that time, NASDAQ has experienced rising infrastructure and support costs associated with the service, including the addition of useful enhancements. For example, NASDAQ added two new additional levels of permissions, for a total of three (*i.e.,* Full Access, Clearing-Only Access and Read-Only Access), which allows a subscribing member firm to better tailor the subscription commensurate with the role of the intended user. NASDAQ also added a ''Match'' feature to the trade scan window in order to provide contra parties with a matching trade entry to keep for their records.[5] Another enhancement NASDAQ made to WebLink ACT is the addition of three new WebLink scans. The Eligibility scan allows customers to look up a symbol or CUSIP to check whether it is eligible for reporting to ACT. The Clearing scan allows customers to look up a firm and see their clearing firm or whether they are self clearing. The AGU/QSR scan provides a list of all the Automatic Give Up and Qualified Service Representative agreements the customer has on file and with which firm.

Given the increased costs incurred since NASDAQ last increased its fee in September 2006, NASDAQ believes that it is appropriate to now increase the fees assessed for this service to allow recovery of NASDAQ's costs. NASDAQ anticipates that the proposed fees may provide NASDAQ with a profit, in addition to covering costs.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and Section 6(b)(4) of the Act,[7] in particular, because 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 that NASDAQ operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. NASDAQ believes that the proposal constitutes an equitable allocation of fees because all similarly-situated member firms would be charged the same amount. In addition, access to NASDAQ will continue to be offered on fair and non-discriminatory terms.

NASDAQ believes that the proposal is reasonable because the fee increase will realign the cost of administering and enhancing the service with the revenue generated by the fee, which have diverged since the fee was last increased in September 2006. As a consequence of adding enhancements, such as those noted above, the value of the service has incrementally increased over time and NASDAQ believes that it is appropriate to now raise the fees to better align them with the increased value of the service. In addition, NASDAQ believes that the proposed fees will cover the costs associated with responding to customer requests, configuring NASDAQ's systems, programming to user specifications, and administering the service, among other things, and may provide NASDAQ with a profit.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and subparagraph (f)(2) of Rule 19b–4 thereunder.[9] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2012–017 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–2012–017. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room 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 offices 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–2012–017, and should be submitted on or before February 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2681 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

[4] Securities Exchange Act Release No. 54500 (September 25, 2006), 71 FR 58026 (October 2, 2006) (SR–NASDAQ–2006–025) (increasing both the monthly fee assessed for greater than twenty trades per day by $75 and the monthly fee assessed for less than twenty trades a day by $50).

[5] This offers an alternative to the ''Accept Trade'' action, which does not give contra parties a copy of the entry, and provides the contra the ability to edit the trade record.

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(a)(ii). [sic]

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66286; File No. SR–C2–2012–005]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Minor Rule Violation Plan

February 1, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 26, 2012, the C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to incorporate violations of C2's Market-Maker continuous quoting obligations into its Minor Rule Violation Plan. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of 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 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

Chicago Board Options Exchange, Incorporated's (''CBOE'') Minor Rule Violation Plan imposes sanctions for various technical rule violations, including violations of CBOE's Market-Maker quoting obligations.[3] Chapter 17 of the C2 rules incorporates by reference CBOE Chapter XVII, including its Minor Rule Violation Plan (CBOE Rule 17.50). CBOE Rule 17.50(g)(14) applies to violations of CBOE's Market-Maker quoting obligations. As a result, this subparagraph is inapplicable to C2, and C2's Minor Rule Violation Plan does not cover C2's Market-Maker continuous quoting obligations.

C2 Rules 8.5(a)(1) and 8.13(d) require C2 Market-Makers and Preferred Market-Makers (collectively referred to in this filing as ''Market-Makers''), respectively, to meet specified continuous quoting obligations. The purpose of the proposed rule change is to amend C2 Chapter 17 to incorporate violations of these continuous quoting obligations into C2's Minor Rule Violation Plan, which will allow C2 to impose sanctions upon its Market-Makers for failing to meet such obligations. C2 believes that these violations are suitable for incorporation into its Minor Rule Violation Plan because they are generally technical in nature. Further, incorporating these violations into the Minor Rule Violation Plan will allow C2 to carry out its regulatory responsibilities more quickly and efficiently.

C2 is proposing to adopt ranges for the sanction levels to be imposed according to the degree of the violation(s). Specifically, C2 is proposing to assess fines ranging from $2,000 to $4,000 for a first offense and $4,000 to $5,000 for a second offense. Any subsequent offenses will be subject to a fine of $5,000 or referred to C2's Business Conduct Committee. C2 will maintain internal guidelines that will dictate the sanction that will be imposed for a particular violation (based on the degree of the violation). As with all other violations incorporated into C2's Minor Rule Violation Plan, C2 retains the ability to refer a violation of Market-Maker continuous quoting obligations to its Business Conduct Committee should the circumstances warrant such a referral.

In support of this proposal, the Exchange notes that several other self-regulatory organizations impose sanctions on their market-makers for violations of their respective continuous quoting obligations pursuant to their respective minor rule violation plans.[4]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, C2 believes that the proposed rule change will strengthen its ability to carry out its oversight responsibilities as a self-regulatory organization pursuant to the Act and reinforce its surveillance and enforcement functions. This proposed rule change will also promote consistency in the minor rule violation programs and reporting obligations of option exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As indicated above, the Exchange notes that several other self-regulatory organizations impose sanctions on market-makers for violations of their respective quoting obligations pursuant to their respective minor rule violation plans.[7]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the 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) by its terms, become operative for 30 days after the date on which it was filed, or such shorter time as the Commission may designate, it has become effective

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* CBOE Rule 17.50(g)(14).

[4] *See, e.g.,* CBOE Rule 17.50(g)(14); Boston Options Exchange Group LLC (''BOX'') Chapter X, Section 2(d); NYSE Amex LLC (''NYSE Amex'') Rules 476A and 590(g); and NYSE Arca, Inc. (''NYSE Arca'') Rule 10.12(h)(39) and (k)(i)(39).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] *See supra* note 4.

pursuant to Section 19(b)(3)(A)[8] of the Act and Rule 19b–4(f)(6)[9] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2012–005 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–C2–2012–005. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 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–C2–2012–005 and should be submitted on or before February 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2669 Filed 2–6–12; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). Pursuant to Rule 19b–4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 7788]

30-Day Notice of Proposed Information Collection: DS–230, Application for Immigrant Visa and Alien Registration, OMB Number 1405–0015

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Application for Immigrant Visa and Alien Registration.
- *OMB Control Number:* 1405–0015.
- *Type of Request:* Revision of a currently approved collection.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–230.
- *Respondents:* Immigrant Visa Applicants.
- *Estimated Number of Respondents:* 672,000.
- *Estimated Number of Responses:* 672,000.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 1,344,000.
- *Frequency:* Once per applicant.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from February 7, 2012.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov*. You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* (202) 395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Sydney Taylor, Visa Services, Department of State 2401 E Street, NW., L–603, Washington, DC 20522, who may be reached at (202) 663–3721.

SUPPLEMENTARY INFORMATION:

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

Abstract of proposed collection:

The Department of State uses Form DS–230 (Application for Immigrant Visa and Alien Registration), in conjunction with a personal interview, to determine an applicant's eligibility for an immigrant visa. The form requests only information necessary to determine the applicant's eligibility for a requested immigrant visa. An immigrant visa may not be issued without the requested information.

Methodology:

The form is required to be filled out and completed by the applicant. This application can also be collected for free at consular posts worldwide.

Dated: January 25, 2012.

Edward Ramotowski,

Managing Director, Visa Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 2012–2807 Filed 2–6–12; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 7789]

60-Day Notice of Proposed Information Collection: English Language Evaluation Surveys, OMB Control Number 1405–xxxx.

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* English Language Evaluation: Fulbright English Teaching Assistantship (ETA) Program Survey.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V)
- *Form Number:* SV2011–0031.
- *Respondents:* U.S. participants of the ETA program from 2004–2009.
- *Estimated Number of Respondents:* 2,350 annually.
- *Estimated Number of Responses:* 2,350 annually.
- *Average Hours per Response:* 40 minutes.
- *Total Estimated Burden:* 1,567 hours annually.
- *Frequency:* One time.
- *Obligation to Respond:* Voluntary.
- *Title of Information Collection:* English Language Evaluation: English Language Specialist Program Survey.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V)
- *Form Number:* SV2011–0032.
- *Respondents:* Participants of the English Language Specialist Program from 2004–2009.
- *Estimated Number of Respondents:* 250 annually.
- *Estimated Number of Responses:* 250 annually.
- *Average Hours per Response:* 40 minutes.
- *Total Estimated Burden:* 167 hours annually.
- *Frequency:* One time.
- *Obligation to Respond:* Voluntary.
- *Title of Information Collection:* English Language Evaluation: E-Teacher Scholarship Program Survey.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V)
- *Form Number:* SV2011–0033.
- *Respondents:* Participants of the E-Teacher Scholarship Program from 2004–2009.
- *Estimated Number of Respondents:* 800 annually.
- *Estimated Number of Responses:* 800 annually.
- *Average Hours per Response:* 40 minutes.
- *Total Estimated Burden:* 533 hours annually.
- *Frequency:* One time.
- *Obligation to Respond:* Voluntary.

DATES: The Department will accept comments from the public up to 60 days from February 7, 2012.

ADDRESSES: You may submit comments by any of the following methods:

- *Email: HaleMJ2@state.gov*.
- *Mail (paper, disk, or CD–ROM submissions):* ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505.
- *Fax:* 202–632–6320.
- *Hand Delivery or Courier:* ECA/P/V, SA–5, C2 Floor, Department of State, 2200 C Street NW., Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0582, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov*.

SUPPLEMENTARY INFORMATION:

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V, as part of the English Language Evaluation, to conduct surveys of participants in the ETA Program, E-Teacher Scholarship program, and the English Language Specialist Program. Participants are those who went on the programs between the years of 2004 and 2009. Collecting this data will help ECA/P/V assess the impact the programs have had on the respective participants, as well as the effectiveness of these programs in meeting their goals.

Methodology: Evaluation data will be collected via Vovici, an on-line surveying tool.

Dated: January 23, 2012.

Matt Lussenhop,

Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–2810 Filed 2–6–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 7791]

Culturally Significant Objects Imported for Exhibition Determinations: ''John Chamberlain: Choices''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''John Chamberlain: Choices,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Solomon R. Guggenheim Museum, New York, New York, from on or about February 24, 2012, until on or about May 13, 2012, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W.

Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202)632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 30, 2012.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–2806 Filed 2–6–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 7793]

Defense Trade Advisory Group; Notice of Membership

AGENCY: Department of State.

ACTION: Notice.

The U.S. Department of State's Bureau of Political-Military Affairs' Defense Trade Advisory Group (DTAG) is accepting membership applications. The Bureau of Political-Military Affairs is interested in applications from subject matter experts from the United States defense industry, relevant trade and labor associations, academic, and foundation personnel. Originally announced in the **Federal Register** at 76 FR 72745, the Department is now seeking additional membership applications in order to have a more diverse membership for the 2012–2014 DTAG.

The DTAG was established as a continuing committee under the authority of 22 U.S.C. Sections 2651a and 2656 and the Federal Advisory Committee Act, 5 U.S.C. App. (''FACA''). The purpose of the DTAG is to provide the Bureau of Political-Military Affairs with a formal channel for regular consultation and coordination with U.S. private sector defense exporters and defense trade specialists on issues involving U.S. laws, policies, and regulations for munitions exports. The DTAG advises the Bureau on its support for and regulation of defense trade to help ensure that impediments to legitimate exports are reduced while the foreign policy and national security interests of the United States continue to be protected and advanced in accordance with the Arms Export Control Act (AECA), as amended. Major topics addressed by the DTAG include (a) policy issues on commercial defense trade and technology transfer; (b) regulatory and licensing procedures applicable to defense articles, services, and technical data; (c) technical issues involving the U.S. Munitions List (USML); and (d) questions relating to actions designed to carry out the AECA and International Traffic in Arms Regulations (ITAR).

Members are appointed by the Assistant Secretary of State for Political-Military Affairs on the basis of individual substantive and technical expertise and qualifications, and must be representatives of United States defense industry, relevant trade and labor associations, academic, and foundation personnel. DTAG members will represent the views of their organizations. All DTAG members shall be aware of the Department of State's mandate that arms transfers must further U.S. national security and foreign policy interests. DTAG members also shall be versed in the complexity of commercial defense trade and industrial competitiveness, and all members must be able to advise the Bureau on these matters. While members are expected to represent their companies or organizations, national security and foreign policy interests of the United States shall be the basis for all policy and technical recommendations.

DTAG members' responsibilities include:

- Service for a consecutive two-year term which may be renewed or terminated at the discretion of the Assistant Secretary of State for Political-Military Affairs (membership shall automatically terminate for members who fail to attend two consecutive DTAG plenary meetings).
- Making recommendations in accordance with the DTAG Charter and the FACA.
- Making policy and technical recommendations within the scope of the U.S. commercial export control regime as mandated in the AECA, the ITAR, and appropriate directives.

Please note that DTAG members may not be reimbursed for travel, per diem, and other expenses incurred in connection with their duties as DTAG members. An individual who is currently registered, or was registered at any time during the period of January 1, 2010 to the present, as a Federal lobbyist is not eligible to serve on the DTAG.

Individuals who applied for membership in response to the Notice at 76 FR 72745 do not need to reapply. Their applications will be considered in conjunction with any application received as a result of this Notice.

How to apply: Applications in response to this notice must contain the following information: (1) Name of applicant; (2) affirmation of U.S. citizenship; (3) organizational affiliation and title, as appropriate; (4) mailing address; (5) work telephone number; (6) email address; (7) résumé; (8) summary of qualifications for DTAG membership and (9) confirmation that you have not been registered as a Federal lobbyist at any time from January 1, 2010 to the present.

This information may be provided via two methods:

- *Emailed to the following address: SlyghPC@state.gov*. In the subject field, please write, ''DTAG Application.''
- *Send in hardcopy to the following address:* Patricia C. Slygh, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC 20522–0112.

All applications must be postmarked by March 1, 2012.

Dated: January 27, 2012.

Robert S. Kovac,

Designated Federal Official, Defense Trade Advisory Group, Department of State.

[FR Doc. 2012–2803 Filed 2–6–12; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic 8′–0″ high oxidized stainless steel cable net in New York City.

DATES: The effective date of the waiver is February 8, 2012.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via email at *michael.harkins@dot.gov*. Office hours for the FHWA are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government

Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate to use non-domestic 8′–0″ high oxidized stainless steel cable net safety fence for rehabilitation of High Bridge in New York City.

This special fence design is necessary to meet the unique project development requirements associated with the historic High Bridge which was designated an individual New York City landmark in 1970, and listed on the National Register of Historic Places in 1972. The fence design was reviewed and approved by the New York State Historic Preservation Office and the New York City Landmarks Preservation Commission. The New York City Department of Design and Construction (DDC) determined that there are only two domestic manufacturers/distributors of the cable mesh material and system appurtenances. The steel materials which comprise the mesh product will be manufactured domestically. The mesh cable will be certified domestic-melt stainless steel and will be further pulled into wire domestically; however, there are no domestic manufacturers capable of fabricating the cable mesh. The cable mesh assembly that includes spinning of wire into cable mesh, cutting of the cable, sliding of the ferrules onto the cables at regular intervals, and then precision pressing of the ferrules to hold the cables together, must be completed outside of the U.S.

In accordance with Division A, section 123 of the ''Consolidated Appropriations Act, 2010'' (Pub. L. 111–117), the FHWA published a notice of intent to issue a waiver on its Web site for 8′–0″ high oxidized stainless steel cable net in New York City (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=60*) on July 25, 2011. The FHWA received eleven comments in response to the publication. Seven commenters opposed the waiver request but did not provide information about domestic manufacturers. Three other commenters were in support of the waiver and suggested that if the materials are not available in sufficient quantities of satisfactory quality, the waiver should be supported. The New York City DDC responded to each comment received for this waiver request. During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers for the 8′–0″ high oxidized stainless steel cable net. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers of 8′–0″ high oxidized stainless steel cable net.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the New York waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: January 27, 2012.

Victor M. Mendez,

Administrator.

[FR Doc. 2012–2661 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic Motor and Machinery brakes; maximum torque (20,288 ft-lb), Setting (17,000 ft-lb), Brake capacity (17,700 lb) and minimum brake wheel (13″) for rehabilitation of the Congress Parkway Bascule Bridge over the South Branch of the Chicago River in the State of Illinois.

DATES: The effective date of the waiver is February 8, 2012.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via email at *michael.harkins@dot.gov*. Office hours for the FHWA are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara*.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate to use non-domestic Motor and Machinery brakes; maximum torque (20,288 ft-lb), Setting (17,000 ft-lb), Brake capacity (17,700 lb) and minimum brake wheel (13'') in the State of Illinois.

In accordance with Division A, section 123 of the ''Consolidated Appropriations Act, 2010'' (Pub. L. 111–117), the FHWA published a notice of intent to issue a waiver on its Web site for Motor and Machinery brakes; maximum torque (20,288 ft-lb), Setting (17,000 ft-lb), Brake capacity (17,700 lb) and minimum brake wheel (13'') in the State of Illinois (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=61*) on August 11th, 2011. The FHWA received no comments in response to the publication. During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers of Motor and Machinery brakes; maximum torque (20,288 ft-lb), Setting (17,000 ft-lb), Brake capacity (17,700 lb) and minimum brake wheel (13″) in the State of Illinois. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers of Motor and Machinery brakes; maximum torque (20,288 ft-lb), Setting (17,000 ft-lb), Brake capacity (17,700 lb) and minimum brake wheel (13″).

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the Illinois waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: January 27, 2012.

Victor M. Mendez,

Administrator.

[FR Doc. 2012–2663 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 326, and other Federal agencies.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans, and other Federal agencies, that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to a proposed local assistance bridge replacement project on Main Street (former State Route 49) in Amador City, Amador County, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before August 5, 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 that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Jacqueline Wait, Chief, Environmental MPS and Local Assistance Branch (Unit 2576), California Department of Transportation, District 10, 1976 E. Dr. Martin Luther King Jr. Blvd., Stockton, CA 95205, 9 a.m. to 5 p.m. Pacific time, (209) 948–7427, *Jacqueline_Wait@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 326. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: The Amador Creek Bridge Replacement Project on Main Street (former State Route 49) in Amador City, Amador County, California. This project would replace the structurally-deficient Amador Creek Bridge (Bridge No. 26C–0052), a contributing element to the Amador City Historic District, and improve three adjoining road segments. The existing two-lane, two-span, steel stringer/multi-beam bridge would be replaced with a two-lane, single-span, concrete slab bridge. The FHWA project reference number is BRLS–5228(002). The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Individual Section 4(f) Evaluation for the project, approved on August 17, 2011 and in the Categorical Exclusion (CE) issued on October 20, 2011. The Final Individual Section 4(f) Evaluation, CE, and other project records are available by contacting Caltrans District 10 at the address provided above. This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act of 1969, as amended [42 U.S.C. 4321 et seq.]; Section 4(f) of the Department of Transportation Act of 1966, Section 4(f), as amended [49 U.S.C. 303]; Section 6004 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) [Pub. L. 109–59].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Wildlife:* The Endangered Species Act of 1973 [16 U.S.C. 1531–1543)]; Migratory Bird Treaty Act of 1918, as amended [16 U.S.C. 703–711]; Fish and Wildlife Coordination Act of 1934, as amended [16 U.S.C. 661–666].

4. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(aa)–11].

5. *Social and Economic:* Title VI of the Civil Rights Act of 1964, as amended [42 U.S.C. 2000(d) et seq.].

6. *Executive Orders:* E.O. 11988 Floodplain Management; E.O. 13112 Invasive Species.

(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. 39(*l*)(1)

Issued on: February 1, 2012.

Gary Sweeten,

North Team Leader, Local Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. 2012–2699 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0012]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 of the Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards.

In a letter dated January 27, 2011, the Hoosier Valley Railroad Museum, Inc. (HVRM) of North Judson, IN, petitioned for a permanent waiver of compliance for one switching locomotive (HVRM 11) from the requirements of 49 CFR part 223, Railroad Safety Glazing Standards, which require certified glazing in all windows. The request was assigned Docket Number FRA–2011–0012. This 95-ton diesel-electric locomotive, built by General Electric (s/n 31517) in Erie, PA, in May of 1952, is equipped with safety glass that is in good condition, clear and unscratched. The locomotive is used on a semiregular basis to primarily pull excursion trains over trackage owned by the Town of North Judson and operated by the Chesapeake and Indiana Railroad (CKIN). CKIN trackage, over which this locomotive is operated, is in a very rural area (mostly farmland); and there have been no issues with glass vandalism in the past. The maximum speed for movement over CKIN trackage is 15 mph for passenger trains and the locomotive itself is geared to a maximum speed of 25 mph. HVRM states that they are a 501(c)(3) nonprofit organization with the mission to preserve railroad history in northwest Indiana and would very much like to keep the locomotive's as-built appearance. Moreover the expense of

retrofitting the subject locomotive with FRA-certified glazing will impose a high financial burden.

Pursuant to the receipt of the waiver request, FRA is hereby providing the public an opportunity to comment on this waiver. Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (FRA–2011–0012) and must be submitted to the Docket Clerk, Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

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 the U.S. Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on February 2, 2012.

Michael W. Lestingi,

Acting Director for the Office of Safety Assurance and Compliance.

[FR Doc. 2012–2744 Filed 2–6–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Discretionary Bus and Bus Facilities Program and National Research Program Funds.

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Funding Availability (NOFA) of FTA Section 5309 Bus and Bus Facilities Program and Section 5312 National Research Program Funds: Solicitation of Project Proposals for Veterans Transportation and Community Living Initiative II Grants.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of discretionary funds from the Fiscal Year (FY) 2012 Section 5309(b)(3) Bus and Bus Facilities Program and the FY 2011 Section 5312 National Research Program for continuing support of the Federal Interagency Coordinating Council on Access and Mobility's (Coordinating Council or CCAM) Veterans Transportation and Community Living Initiative (VTCLI).

The Surface and Air Transportation Programs Extension Act of 2011 (Temporary Authorization, 2012) continues the authorization of the Federal transit programs of the U.S. Department of Transportation (DOT) through March 31, 2012, and provides contract authority for these programs equal to approximately one half of the amounts available in FY 2011. Under this funding opportunity, subject to funding availability by Congress, FTA will provide approximately $25 million in unallocated discretionary FY 2012 Bus and Bus Facilities Program funds, supplemented by approximately $5 million in unallocated FY 2011 National Research Program funds.

This grant opportunity, referred to as ''VTCLI II'' in this notice, makes funds available to state and local governmental agencies for the capital costs of creating, expanding, or increasing access to local One-Call/One-Click Transportation Resource Centers (One-Call/One-Click Centers), as well as some research costs to demonstrate successful implementation of these capital projects. The One-Call/One-Click Centers simplify access to transportation for the public by providing one place to connect veterans, service members, military families, persons with disabilities and other transportation-disadvantaged populations, such as older adults, low-income families or disadvantaged youth, to rides and transportation options provided in their locality by a variety of transportation providers and programs.

This notice describes the transportation service coordination and simplified customer access priorities established by the Coordinating Council's partnership, the criteria the interagency review panel will use to identify meritorious projects for funding, and how to apply. This announcement is available on the FTA's Web site, on the Veterans Transportation and Community Living Initiative Web page at: *http://www.fta.dot.gov/veterans.* FTA will announce final selections on the FTA Web site and may announce selections in the **Federal Register**. A synopsis of this announcement will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.grants.gov.*

DATES: Complete proposals for VTCLI II grants must be submitted by 11:59 pm EDT on April 19, 2012. Applicants who have not already begun registering on the GRANTS.GOV site should do so immediately to ensure completion of registration before the submission deadline.

ADDRESSES: Proposals must be submitted electronically at *http://www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: For general program information, as well as proposal-specific questions, please send an email to *VeteransTransportation@dot.gov* or contact Erik Weber, (202) 366–0705. A TDD is available at 1–800–877–8339 (TDD/FIRS).

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I. Funding Opportunity Description

A. Authority

The capital funding for VTCLI II is authorized under 49 U.S.C. Section 5309(b), as amended by Section 3011 of SAFETEA–LU:

> The Secretary may make grants under this section to assist State and local governmental authorities in financing * * * capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public

transportation, or private non-profit organizations * * *

Eligible capital projects, as defined in 49 U.S.C. Section 5302(a)(1) include projects for:

''* * * acquiring, constructing, supervising, or inspecting equipment or a facility for use in public transportation * * *. (including designing, engineering * * *), * * * transit-related intelligent transportation systems,''

and,

''the introduction of new technology, through innovative and improved products, into public transportation * * *.''

Funding to demonstrate implementation of VTCLI II projects is authorized under 49 U.S.C. 5312(a) as amended by Section 3014(a) of SAFETEA–LU:

''* * * The Secretary may make grants * * * for research, development, demonstration, and deployment projects * * * that the Secretary determines will improve public transportation service * * *.''

B. Background

President Obama has made the care and support of military families a top policy priority. In a January 2011 report, ''Strengthening Our Military Families: Meeting America's Commitment,'' the White House noted the importance of ''harnessing resources and expertise across the Federal Government [to improve] the quality of military family life [and to help] communities more effectively support military families.''

Reliable mobility has direct and substantial impacts on many of the priorities presented in the report—such as promoting housing security among veterans, developing career and educational opportunities, and reducing barriers to employment. To fulfill the President's objectives on behalf of veterans, active duty service members and their families, representatives of the Coordinating Council came together with Veteran and Military Service Organizations (VSO/MSO) around the country to discuss transportation challenges. They agreed that:

1. When it comes to transportation, more effective and consistent coordination is needed among Federal, state, and community-based programs that already deliver or sponsor services to veterans, military families and persons with disabilities where they live; and,

2. Enhancing veterans' and military families' awareness of, and access to, transportation choices in their communities is integral to successfully reintegrating these men and women and their families.

In order to achieve these outcomes, several CCAM members—the Departments of Transportation, Veterans Affairs, Labor, and Health and Human Services—joined with the Department of Defense to launch the Veterans Transportation and Community Living Initiative. FTA awarded $34.6 million of VTCLI discretionary capital grants in the fall of 2011. Due to the demand for these funds, FTA is making another $25 million of FY 2012 Section 5309 Bus and Bus Facilities funds, as well as approximately $5 million of FY 2011 Section 5312 Research Program funds available under this notice, subject to funding availability. These efforts build upon FTA National Research Program efforts to demonstrate and implement one-call/one-click centers through the Mobility Services for All Americans (MSAA) Program, jointly funded with the Research and Innovative Technology Administration (RITA) ITS Joint Program Office.

With these funds, FTA will continue to help communities address transportation needs of veterans, military families, persons with disabilities and other transportation-disadvantaged populations and enable the communities to acquire technologies to implement One-Call/One-Click Centers.

C. Program Purpose

Building on the success of the MSAA and United We Ride (UWR) ''One-Call Center'' model, the VTCLI II will help communities build or expand local One-Call/One-Click Centers to bring together transportation services available to the general public with those available to customers of human services programs, and especially services for veterans and military families. Coordinating transportation services promotes improved access to community services and employment, and will advance the integration of those with disabilities into their communities.

Based on its mission to care for America's veterans, the Department of Veterans Affairs (VA) provides transportation only to and from VA medical facilities. In the coming years, the country's aging veterans will require increasing levels of medical care. Meanwhile service members are returning from Iraq and Afghanistan and many wounded warriors will be transitioning into the VA system. They need reliable transportation options and services beyond those the VA is able to directly provide in order to maintain or regain an active community life.

In many communities, transportation resources already exist for those who are not able to drive themselves. Yet all too often, members of the veterans and military communities aren't aware of the existing transportation resources, don't know how to access them, or aren't involved in the transportation planning and resource allocation processes. Improving transportation options for America's veterans, service members and their families will help to integrate these valued members of our society.

The VTCLI goal is to increase the availability of community transportation resources, and awareness of them among the military community by:

- Establishing or expanding One-call/One-Click Transportation Resource Centers, to include resources for veterans, service members and military families, and promoting use of the One-Call/One-Click Centers within the military community;
- Creating partnerships between transportation providers and veterans and military communities; and
- Increasing involvement of veterans and military communities in local Coordinated Human Services Transportation Planning process.

Importantly, the One-Call/One-Click infrastructure funded by VTCLI II will be available to all members of the community. Better integration of transportation information and services benefit not only veterans, service members and their families, but all transportation-disadvantaged populations. One-Call/One-Click Centers will enhance communities' ability to integrate individuals with disabilities and prevent institutionalization, in accordance with the President's commitment to the principles of the Supreme Court's Olmstead decision (*Olmstead* v. *L.C.,* 527 U.S. 581 (1999)), which addresses the rights of individuals with disabilities to live independently.

As an initiative of the Coordinating Council, VTCLI II grants should not create narrowly-focused programs or services. Proposals are expected to enhance and/or increase transportation or mobility benefits to other community members, particularly, transportation-disadvantaged populations.

The VTCLI II awards will go to communities whose proposals:

1. Identify transportation and mobility needs of their veterans and military community;

2. Propose to create or increase access to a community One-Call/One-Click Center or expand an existing community One-Call/One-Click Center to include transportation resources and address identified needs of veterans and military families;

3. Demonstrate a community coalition of transportation, military family and veteran service providers which has participated in the proposal writing and will guide the project implementation;

4. Commit to increase involvement of veterans and the military community in locally coordinated transportation planning, including revising the community Coordinated Human Services Transportation Plan, to address the needs of these target groups; and,

5. Lay out a framework for measuring the performance of the project in meeting the goals of the VTCLI.

II. FTA and Other Partnership Award Information

A. FTA Award Information

VTCLI II projects may consist of awards from two discretionary funding sources: FY 2012 Section 5309 Bus and Bus Facilities Program and FY 2011 Section 5312 Research Program.

- FY 2012 Section 5309 Bus and Bus Facilities Program funds. FTA will award a maximum of $2 million of FY 2012 Section 5309 funds for any single project. FTA will fund up to 80% of the project cost, requiring a minimum 20% local match for capital costs.
- FY 2011 Section 5312 Research Program funds. FTA will award a maximum of $50,000 or 50% of the Section 5309 request, whichever is less, in FY 2011 Section 5312 funds for research and demonstration costs directly related to the implementation of the capital project. FTA will fund 100% of the research costs.

FTA funds are available to State or local governmental authorities as recipients and other public, private and non-profit organizations as subrecipients. FTA may partially fund applications based on the number and size of funding requests.

The evaluation process will consider geographical distribution, distribution amongst large urban, small urban and rural areas, as well as distribution of other discretionary program funding in making funding decisions. The FTA Administrator will determine the final selection and amount of funding for each project. FTA will announce selected projects in the summer of 2012.

B. Other Partnership Information

The partnership is supporting the goals of the VTCLI with additional programs and technical assistance. These include:

1. The Department of Labor's Office of Disability Employment Policy, along with FTA, will provide online, collaborative workspaces for communities to use in planning and implementing One-Call/One-Click Centers and further transportation coordination efforts.

2. FTA's Office of United We Ride, through its transportation technical assistance centers, will provide technical assistance to awardees to assist in One-Call/One-Click Center implementation to address customer transportation connections and issues as well as plans to address unmet transportation needs of veterans, service members and their families.

3. The Department of Veterans Affairs continues to support VA medical facilities with its Veterans Transportation Service (VTS). VTCLI II applicants are highly encouraged to partner with existing VTS sites, if nearby, on their applications, or work with their nearby VA facility on a VTS application if it is not already a part of the VTS program. More information on VTS can be found at *www.va.gov/veteranstransportationservice.*

III. Eligibility Information

A. Eligible Applicants

Eligible applicants and eventual grant recipients for VTCLI II awards must be Direct Recipients under FTA's Section 5307 Urbanized Area Formula program, local governments, States, or Indian Tribes. States may submit consolidated proposals for multiple projects.

Proposals may contain projects to be implemented by the recipient or its subrecipients. Eligible subrecipients of FTA funding include: public agencies, private non-profit organizations, including Veterans Service Organizations and Military Family Service Organizations, and private providers engaged in public transportation.

B. Eligible Expenses

Projects eligible for funding under VTCLI II must focus on the implementation of One-Call/One-Click Centers and related transportation coordination. Eligible expenses under the Section 5309(b)(3) portion of VTCLI II are capital expenses related to the establishment of a One-Call/One-Click Center and technologies to ensure transportation service connectivity.

These costs include, but are not limited to: hardware purchases (computers, servers); in-vehicle technology (automatic vehicle location systems, communication devices, mobile data terminals); software (scheduling & dispatching, communications, billing, consumer mobile applications); facility-related capital (purchase, lease, alteration); design and engineering, including consultant costs; and project administration (up to 10% of total capital project costs). Capital items not listed may be eligible if clearly associated with the implementation of a One-Call/One-Click Center. Applicants should check the eligibility of such items by contacting FTA through one of the methods listed in this notice.

FTA will not fund vehicle acquisition, operating assistance or preventive maintenance costs under this grant opportunity. Operation costs of the One-Call/One-Click Center also are not eligible.

Eligible expenses for the Section 5312 portion of VTCLI II include, but are not limited to, coordinated planning, marketing, and public engagement efforts not eligible as capital but directly related to demonstrating the implementation of the proposed VTCLII capital project. FTA is interested in demonstrating how these types of additional efforts can improve the success of the One-Call/One-Click Centers. Under VTCLI II, FTA will not award research funds independent of a related request for Section 5309 capital award in either this competition or a project selected in the previous round of the VTCLI.

C. Cost Sharing

FY 2012 Section 5309 Bus and Bus Facilities funds received under a VTCLI II grant will be shared at the following ratio: 80% FTA/20% local contribution. FY 2011 Section 5312 Research funds will not require a local match. FTA will not approve deferred local match under this program. The local match can be provided from cash or in-kind resources.

III. Proposal Submission Information

A. Proposal Process

Complete proposals for VTCLI II must be submitted electronically through the GRANTS.GOV Web site no later than 11:59 pm EDT on April 19, 2012. Applicants are encouraged to begin the process of registration on the GRANTS.GOV site well in advance of the submission deadline. Registration is a multi-step process, which may take several weeks to complete before a proposal can be submitted.

A complete proposal submission will consist of at least two files: (1) The SF 424 Mandatory form (downloaded from GRANTS.GOV) and (2) the Supplemental Form targeting the relevant FTA program found on the FTA Web site. The supplemental form provides guidance and a consistent format for proposers to respond to the criteria outlined in this NOFA. Once

completed, the supplemental form will be placed in the attachments section of the SF 424 Mandatory form. Proposers must use the correct Supplemental Form and attach it to their submission in GRANTS.GOV to successfully complete the application process. A proposal submission may contain additional supporting documentation as attachments.

Within 24–48 hours after submitting an electronic application, the applicant should receive three email messages from GRANTS.GOV: (1) Confirmation of successful transmission to GRANTS.GOV, (2) confirmation of successful validation by GRANTS.GOV and (3) confirmation of successful validation by FTA. If confirmations of successful validation are not received and a notice of failed validation or incomplete materials is received, the applicant must address the reason for the failed validation, as described in the notice, and resubmit before the submission deadline. If making a resubmission for any reason, include all original attachments regardless of which attachments were updated.

Complete instructions on the application process can be found at *http://www.fta.dot.gov/veterans. Important:* FTA urges applicants to submit their proposal at least 72 hours prior to the due date to allow time to receive the validation message and to correct any problems that may have caused a rejection notification. Submissions received after 11:59 pm EDT on April 19, 2012, will not be accepted. GRANTS.GOV scheduled maintenance and outage times are announced on the GRANTS.GOV Web site *http://www.GRANTS.GOV.* Deadlines will not be extended due to scheduled maintenance or outages.

B. Proposal Content

All pertinent application information and narrative should be submitted electronically through Grants.gov directly in the SF424 and the FTA-required Supplemental Form. Do not submit responses to the evaluation criteria in a separate attachment. Only supporting exhibits such as maps, diagrams, detailed budget documents, or letters of support should be submitted as separate attachments to the SF424 in Grants.gov.

1. Applicant Information

The SF424 and FTA Supplemental Form will ask for the following basic sponsor identifying information:

a. Applicant's name and FTA recipient ID number.

b. Contact Information for notification of project selection (including contact name, title, address, congressional district, email, fax and phone number).

c. Eligibility information.

d. Description of services provided by the agency including areas served.

2. Proposal Information

The FTA Supplemental Form instructs applicants to include the following information (for each project if submitting a consolidated proposal):

a. Subrecipient name and contact (if the project will be performed by a subrecipient).

b. A project title.

c. A project executive summary, including the scope, purpose and goals of the project, not to exceed 250 words.

d. Project type.

e. Requested information and narrative justifications for each of the four evaluation criteria detailed in Section V of this Notice.

f. Basic line-item budgets for the capital and research funds, if requested, describing the various key components of the project and cost.

Note: Proposals may use estimated costs for implementation if exact costs are unknown prior to development. Scalable guidelines for cost estimation of one-call technology are available on the FTA Web site.

g. Capital project scalability detailing minimum funds requires for a smaller project to provide independent utility.

h. The total amount of Federal funds requested, and the amount of matching funds, including source and documentation of the match.

i. An estimated project timeline and major milestones.

j. The congressional district(s) in which the project will be implemented.

V. Proposal Review and Selection

A. Project Evaluation Criteria

Projects will be evaluated by an interagency review team based on the proposals submitted according to: (1) Planning and partnership; (2) Readiness; (3) Technical, legal and financial capacity; (4) Demonstration of need; and (5) Project Development. The FTA Supplemental Form prompts applicants to address these criteria which are detailed below.

Each applicant is encouraged to demonstrate the responsiveness of a project to all of the selection criteria with the most relevant information that the applicant can provide, regardless of whether such information has been specifically requested, or identified, in this notice. The FTA Supplemental Form provides narrative justification sections for each of the criteria. FTA will evaluate the extent to which a project proposal addresses the following criteria:

1. Planning and Partnership

a. Indicate that the project is or can be included in the financially-constrained Transportation Improvement Program (TIP)/Statewide Transportation Improvement Program (STIP). If selected, the project must be in TIP or STIP before the grant can be awarded.

b. Describe applicant's experience with regional coordinated transportation and human services planning, including indicating:

i. When was the most recent coordinated public transit-human services transportation plan (''coordinated plan'') developed?

ii. Have the applicant and/or any proposed subrecipients previously been involved in developing their community's coordinated plan?

c. Indicate prior work on veterans/military family mobility issues, including addressing the following questions:

i. Has the community taken steps prior to the VTCLI to address the mobility needs of local veterans and military families?

ii. Have veterans/military family needs previously been addressed in the coordinated plan?

d. Demonstrate a substantive partnership with the following types of organizations or service providers. In addition to letters of support from partners, outstanding applications will describe how the partners were involved in the proposal development and how they will participate in its implementation. The review committee will look for proof of strong, substantive partnerships. *Proposals without proof of partnerships with all four of the following organization categories or adequate justification for a missing category will not be considered:*

i. *Transportation organizations,* which include, but are not limited to: transit agencies, brokers, taxis, volunteer driver services; planning agencies, such as a Metropolitan Planning Organization (MPO), and local coordinated plan's public transit/human services lead agency;

ii. *Veteran/Military Governmental Service Providers,* which include, but are not limited to: VA medical center networks; Veterans Transportation Service; Department of Defense recovery care programs; Military bases, hospitals, and other medical providers; and/or State, county or city veterans affairs offices;

iii. *Veteran/Military Service Organizations* which include, but are not limited to: Iraq and Afghanistan

Veterans of America, American Legion; and *Military Family Organizations,* which include, but are not limited to: Wounded Warrior Project, Blue Star Families, National Military Family Association; and,

iv. *Existing One-Call/One-Click Service* or *Transportation Centers* in the community, such as 211s or transit customer service center, if any. If the new One-Call/One-Click Center will stand as its own entity, the proposer must indicate that there are either no *existing* One-Call/One-Click Services or Centers in the community OR provide a strong justification why a separate One-Call/One-Click Center will produce the best outcomes for the community.

e. Applicants are encouraged to develop partnerships with additional groups beyond those required above, including:

i. Employers, workforce development and training agencies, etc.

ii. Independent living/aging organizations (*e.g.,* Centers for Independent Living, Senior Centers, Aging and Disability Resource Centers)

iii. Local political officials

f. Applicants may also provide documentation and/or descriptions of any additional partners who participated in the planning and development of their proposal, if applicable.

g. Project partners should be listed in the appropriate section on the Supplemental From. Check the box next to each partner which has submitted a letter of support.

2. Readiness

If the proposal was submitted for the first round of VTCLI funding, and has not been substantially modified, check the box indicating this. Indicate the time in which the grant can be obligated and the time in which the project can be implemented.

While project funds may be expended over the course of design, development, procurement and implementation stages of the One Call/One-Click Center, applicants must indicate that the project can actively initiate upon receiving a grant. The project should be completed in a reasonable period as determined on a case-by-case basis, in order to provide the new or enhanced coordinated services as soon as practicable.

Address all of the following points in the Project Readiness Justification:

a. Indicate the short-term, mid-range and long-term goals for the project.

b. Indicate prior work on One-Call/One-Click Centers, addressing the following questions:

i. Does the community have an existing human service/workforce or transportation One-Call/One-Click Center?

ii. If not, has the community identified the need for a One-Call/One-Click Center in its local coordinated plan?

iii. If so, has the existing One-Call/One-Click Center incorporated any veterans or military transportation services? Can existing one call/one click centers capacity be used in this project, including the ability to use existing shared-space?

iv. Have you conducted any outreach or programs for staffing the One-Call/One-Click Center? Will the center employ any veterans, military family members or individuals with disabilities?

c. Indicate the project is a Categorical Exclusion (CE), or the required environmental work has been initiated or completed for construction projects requiring an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under, among others, the National Environmental Policy Act of 1969, as amended.

d. For facility construction or modification project, indicate project implementation plans are complete, including initial design of facilities projects

e. For applicants who are not existing FTA direct recipients, indicate willingness of an existing grantee to receive funds on behalf of the applicant, or that the applying organization has the capacity to meet all pre-requisites and requirements of becoming an FTA grantee in a timely manner.

3. Technical, Legal & Financial Capacity

Address all of the following points in the justification:

a. Technical capacity: Only applicants who are willing to undertake further coordination of transportation and veterans or military family services and track the project performance under their VTCLI proposals will be selected. Applicants must indicate their commitment to:

i. Update the appropriate state, regional and/or local coordinated human services transportation plan to include a section on the mobility needs of the veteran and military community. If the community has already done this, this should be indicated in the narrative and the plan should be attached to the application.

ii. Address the mobility and transportation challenges of veterans and military families through additional coordinated transportation strategies, such as mobility management, community transportation gap assessment, etc.

iii. Identify local technical assistance needs in order to effectively implement One-Call/One-Click Centers and further address veterans and/or military families' mobility needs in the coordinated plan.

iv. Develop a performance measurement plan to track success of the project relative to desired VTCLI goals outlined in Section I. C. of this notice. This commitment should be indicated by inclusion of preliminary proposed performance measures for the project.

b. Legal capacity: Applicants must indicate that there are no legal issues which would prevent acceptance of FTA funds, their eligibility and authority to apply.

c. Financial capacity: *Leveraging other funds* –Proposals that leverage additional FTA, other Federal, State, or local funds beyond the required local match will be scored favorably. Local match details will be entered in the appropriate section later on the Supplemental Form. For Financial Capacity, indicate the following:

i. A funding plan for long-term sustainability, including the operation of the One Call/One-Click Center;

ii. Additional FTA program funding identified—Mobility management, vehicle purchases, and vehicle modifications will not be eligible expenses under the VTCLI. Applicants are encouraged to update their coordinated plan and identify funds from other FTA grant programs, such as Sections 5310 (Elderly/Disabled), 5316 (Job Access/Reverse Commute) or 5317 (New Freedom), to meet vehicle or mobility management needs;

iii. Additional Federal resources to be leveraged (*e.g.* Aging and Disability Resource Center/Area Agencies on Aging [ADRC/AAA], One-Stop employment, VA, DoD, HHS funds, Vocational Rehabilitation/RSA); and

iv. Other non-Federal funding above and beyond local match (State funding, private donations, etc.).

4. Demonstration of Need

Projects will be selected in part based on demonstrated need of veterans, military families and other transportation-disadvantaged populations for services proposed.

State the size of the local veteran and military population and identify transportation and mobility needs of these populations. When available, provide quantitative support; otherwise, providing narrative description of challenges and needs will suffice.

Each application should address the following questions:

a. How large are the veterans/military communities in the project area to be served by the project?

b. What portion of the veterans/military population in the projects area are persons with disabilities?

c. Where are the nearest veterans and military support services that support the project's area?

d. What are the specific transportation barriers and other challenges facing veterans and military families in the project's area?

e. Identify the community's existing public, non-profit and private transportation providers.

f. Demonstrate how the One-Call/One-Click Center will address the mobility needs of the above identified populations.

g. Describe how veterans, especially disabled veterans, will be engaged in the development and operation of the project.

5. Research

Applicants may request Research funds in addition to the Capital project funds, up to $50,000 or 50% of the amount of Section 5309 funds requested, whichever is smaller. In the Research justification, provide a description of activities to be funded and a justification of the relationship to the capital project.

The Research budget information should be entered separately on the Supplemental Form following the Capital Project Budget.

B. Submission Dates and Time

All proposals must be submitted electronically via GRANTS.GOV no later than 11:59 pm EDT on April 19, 2012.

C. Funding Restrictions

Proposals must be submitted by FTA recipients eligible to receive FTA Section 5309 funds. Due to funding limitations, applicants that are selected for funding may receive less than the amount originally requested.

D. Proposal Selection Process

VTCLI II proposals will first be screened by FTA staff members. Eligible proposals will be then rated by an interagency review panel representing the members of the VTCLI. Members of the interagency review panel and other involved FTA staff reserve the right to:

(1) If a large number of parties apply, FTA may screen and rank the applications it receives, and limit its review to the most promising proposals;

(2) Seek clarification from any applicant about any statement in its application that FTA finds ambiguous. FTA will review applications strictly in light of the common meanings of words used in the proposals, as understood in the transit community.

(3) Conduct discussions with the applicants about their applications; and

(4) Extend the time for applicants to submit or amend their applications.

Final decisions and allocation of FTA funds will be made by the FTA Administrator. Geographic distribution may be a factor in FTA's award decisions. FTA will announce selected projects in the summer of 2012.

VI. Award Administration

A. Award Notices

FTA will announce final VTCLI II project selections on the FTA Web site and may announce selections in the **Federal Register**. FTA will contact successful applicants. After receipt of a complete application, FTA will award grants for the selected projects to the proposer through the FTA Transportation Electronic Award Management (TEAM) System. These grants will be administered and managed by the FTA regional offices in accordance with the Federal requirements of the Section 5309 Bus and Bus Facilities Program and Section 5312 National Research Program. There is no blanket pre-award authority for the selected projects. Once selected for funding, applicants may request pre-award authority which may be granted on a case-by-case basis.

B. Administrative and National Policy Requirements

1. Grant Requirements. If selected, applicants will apply for a grant through TEAM and adhere to the customary FTA grant requirements of the Section 5309 Bus and Bus Facilities program, including those of FTA C 9300.1A Circular and C 5010.1C and Section 5333(b) labor protections. Awards greater than $500,000 will go through a Congressional Notification and Release process. Technical assistance regarding these requirements and processes is available from each FTA regional office.

2. Additional requirements if receiving Section 5312 Research funds. If an applicant has requested and been awarded Section 5312 funds, the applicant will need to apply separately in TEAM for these funds. Research funds must adhere to the requirements of the Section 5312 National Research Program, including those of FTA C 6100.1D Circular. Section 5312 funds require submission of a final report on the results of the demonstration. FTA may waive this requirement by completing an overall assessment collecting information from each awarded project.

3. Planning. Applicants are encouraged to notify the appropriate State Departments of Transportation and MPO in areas likely to be served by the project funds made available under this program. Incorporation of funded projects in the long range plans and transportation improvement programs of States and metropolitan areas is required of all funded projects.

4. Standard Assurances. The Applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The Applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The Applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and that modifications may affect the implementation of the project. The Applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. The Applicant must submit the Certifications and Assurances before receiving a grant if it does not have current Certifications on file.

C. Reporting

Post-award reporting requirements include submission of Financial Status Reports and Milestone reports in TEAM on a quarterly basis for all projects. Documentation of project progress is required for payment. Additional reporting may be required specific to the VTCLI. Recipients may also be expected to participate in events or peer networks related to VTCLI. Grants which include research funds may be required to develop a final report or provide data for a consolidated report on the program.

VII. Agency Contacts

For general program information, as well as proposal-specific questions, please send an email to *VeteransTransportation@dot.gov* or contact Erik Weber at (202) 366–0705. A TDD is available at 1–800–877–8339 (TDD/FIRS). Applicants may also *visit www.fta.dot.gov/veterans* for frequently asked questions and answers.

Issued in Washington, DC, this 2nd day of February, 2012.

Peter Rogoff,

Administrator.

[FR Doc. 2012–2755 Filed 2–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

FY 2012 Discretionary Funding Opportunities: Bus and Bus Facilities Programs (State of Good Repair and Bus Livability Initiatives) and Clean Fuels Grant Program, Augmented With Discretionary Bus and Bus Facilities Program Funds

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Funding Availability for FTA State of Good Repair, Livability, and Environmental Sustainability Initiatives, Clean Fuels Grant Program: Solicitation of Project Proposals.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of Section 5309 Bus and Bus Facilities Program and Section 5308 Clean Fuels Program discretionary funds in Fiscal Year (FY) 2012. There are two initiatives under the Bus and Bus Facilities capital program: (1) State of Good Repair Initiative (SGR) and (2) Bus Livability Initiative. FTA will distribute funds in support of the U.S. Department of Transportation's (DOT) state of good repair, livability, and environmental sustainability efforts.

The Surface and Air Transportation Programs Extension Act of 2011 (Temporary Authorization, 2012) continues the authorization of the Federal transit programs of the U.S. Department of Transportation (DOT) through March 31, 2012, and provides contract authority for these programs equal to approximately one half of the amounts available in FY 2011. Subject to funding availability by Congress, FTA will fund the SGR and Bus Livability Initiatives with approximately $775 million ($650 million for SGR and $125 million for Bus Livability) of unallocated Section 5309 Bus and Bus Facilities Program funds, authorized by 49 U.S.C. 5309(b) as amended by Section 3011 of the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, August 10, 2005 and its extensions. Subject to funding availability, FTA will make available approximately $51.5 million from its FY 2012 Section 5308 Clean Fuels Program to fund projects from non-attainment areas selected through the Clean Fuels competition supplemented with additional Bus and Bus Facilities program resources, as available for attainment areas.

This notice solicits proposals to compete for FY 2012 funding under the aforementioned program and initiatives. Based on the timing of Congressional appropriations and extensions of SAFETEA–LU, FTA may award FY 2013 funding to proposals submitted under this notice.

This notice includes priorities established by FTA for these discretionary funds, the criteria FTA will use to identify meritorious projects for funding, and describes how to apply for funding under each discretionary program. This announcement is available on the FTA Web site at: *http://www.fta.dot.gov.* A synopsis of each funding opportunity will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.GRANTS.GOV.* FTA will announce final selections on the FTA Web site and may also announce selections in the **Federal Register**.

DATES: Complete proposals for each program must be submitted by the following due dates: SGR proposals are due by 11:59 pm EDT on March 22, 2012; Bus Livability proposals are due by 11:59 pm EDT on March 29, 2012; and Clean Fuels proposals are due by 11:59 pm EDT on April 5, 2012. All proposals must be submitted electronically through the GRANTS.GOV APPLY function. Any agency intending to apply should initiate the process of registering on the GRANTS.GOV site immediately to ensure completion of registration before the submission deadline. Instructions for applying can be found on FTA's Web site at *http://www.fta.dot.gov/bus* and *http://fta.dot.gov/cleanfuels* and in the ''FIND'' module of GRANTS.GOV.

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Office found at http://www.fta.dot.gov for proposal-specific information and issues. For program-specific questions about applying for the programs outlined in this notice, please contact the individual listed below.

SGR Bus Initiative

Contact: Adam Schildge, Office of Program Management, (202) 366–0778, email: *adam.schildge@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

Bus Livability Initiative

Contact: Bryce McNitt, Office of Budget and Policy, (202) 366–2618, e-mail: *bryce.mcnitt@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

Clean Fuels Grant Program

Contact: Vanessa Williams, Office of Program Management, (202) 366–4818, email: *vanessa.williams@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

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I. FTA Discretionary Programs Overview

A. Authority

Bus and Bus Facilities Program

Section 5309(b) of Title 49, United States Code, as amended by Section 3011 of SAFETEA–LU, authorizes FTA's Bus and Bus Facilities program as follows:

> The Secretary may make grants under this section to assist State and local governmental authorities in financing * * * capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations.

Clean Fuels

The Clean Fuels Grant Program was first established as the Clean Fuels Formula Program in Section 3008 of the Transportation Equity Act for the 21st Century, Public Law 105–178, and June 9, 1998 (now codified at 49 U.S.C. 5308)). The program is currently authorized as a discretionary program

under Section 5308, as amended by Section 3010 of SAFETEA–LU.

B. Policy Priorities

Maintaining transit assets in a state of good repair, fostering livable communities and promoting sustainable development, and improving our Nation's environment through investments in clean energy sources, have been key strategic goals of the Department of Transportation (DOT) and FTA. By this notice, FTA announces subject to the availability of funds approximately $826.5 million in FY 2012 discretionary resources to: (1) Help growing reinvestment needs and the large backlog of transit assets needing repair or replacement; (2) support tangible livability improvements within existing programs while demonstrating the feasibility and value of such improvements; and (3) promote the usage and development of energy efficient technologies that reduce energy use, greenhouse gas emissions and other pollutants. Projects funded as a result of this notice will further the Department's state of good repair, livability, and environmental sustainability efforts. As each discretionary funding opportunity has separate eligibility and program requirements, FTA encourages proposers to carefully consider which program to apply under. FTA will provide approximately $650 million, subject to funding availability, in unallocated FY 2012 discretionary Bus and Bus Facilities Program funds for the State of Good Repair Initiative, approximately $125 million, subject to funding availability, in unallocated FY 2012 Section 5309 Bus and Bus Facilities Program funds for the Bus Livability Initiative, and approximately $51.5 million, subject to funding availability, for the Clean Fuels Grant Program. FTA also intends to further its environmental sustainability goals by allowing proposers in attainment areas that are not eligible under the Clean Fuels Grant Program to apply for projects which promote the use of clean fuels and fund those projects with Bus and Bus Facilities program funds as appropriate. Please refer to Appendix A for information on additional availability of FTA funds.

State of Good Repair

Maintaining the nation's public transportation fleet, infrastructure, and equipment in a state of good repair is essential to providing reliable, high-quality, and safe transit services to the tens of millions of Americans who depend on it daily. Transit not only provides mobility options for the American public, but contributes to the livability of our nation's communities and to environmental and energy sustainability. However, given recent reductions in State and local resources and the need to meet projected growth in demand for transit service, many local transit agencies are finding it difficult to meet their basic reinvestment needs. FTA's June 2010 National State of Good Repair Assessment Study (National SGR Study) estimated a combined $77.7 billion repair and replacement backlog in our nation's bus and rail systems.

The state of repair of transit infrastructure is an important issue for both large and small systems across the country. FTA's National SGR Study indicates that roughly one-third of the nation's transit assets are in either marginal or poor condition, implying that these assets are near or have already exceeded their expected useful life. While most of the $77.7 billion backlog is attributed to rail transit, more than 40 percent of the nation's buses are also in poor to marginal condition. The Study also estimates that an annual average of $14.4 billion in normal replacement expenditures by all levels of government nationwide would be required to keep the backlog from getting larger.

This is the third year FTA has provided funding to support this key strategic goal. To date, FTA has allocated over $1.5 billion to over 300 projects aimed at replacing or rehabilitating transit infrastructure and for transit asset management systems.

Livable Communities and Sustainable Development

FTA has long fostered livable communities and sustainable development through its various transit programs and activities. Public transportation supports the development of communities, providing effective and reliable transportation options that increase access to jobs, recreation, health and social services, entertainment, educational opportunities, and other activities of daily life, while also improving mobility within and among these communities. Through various initiatives and legislative changes over the last fifteen years, FTA has allowed and encouraged projects that help integrate transit into a community through neighborhood improvements and enhancements to transportation facilities or services; make improvements to areas adjacent to public transit facilities that may facilitate mobility needs of transit users; or support other infrastructure investments that enhance the use of transit and other transportation options for the community.

On June 16, 2009, DOT Secretary Ray LaHood, U.S. Department of Housing and Urban Development (HUD) Secretary Shaun Donovan, and U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson announced a new partnership to help American families in all communities—rural, suburban and urban—gain better access to affordable housing, more transportation options, and lower transportation costs. DOT, HUD, and EPA created this high-level interagency partnership to better coordinate federal transportation, environmental protection, and housing investments.

Bus Livability will invest in projects that fulfill the following six livability principles that serve as the foundation for the DOT–HUD–EPA Partnership for Sustainable Communities:

- *Provide more transportation choices:* Develop safe, reliable, and economical transportation choices to decrease household transportation costs, reduce our nation's dependence on foreign oil, improve air quality, reduce greenhouse gas emissions and promote public health.
- *Promote equitable, affordable housing:* Expand location- and energy-efficient housing choices for people of all ages, incomes, races and ethnicities to increase mobility and lower the combined cost of housing and transportation.
- *Enhance economic competitiveness:* Improve economic competitiveness through reliable and timely access to employment centers, educational opportunities, services and other basic needs by workers as well as expanded business access to markets.
- *Support existing communities:* Target Federal funding toward existing communities—through such strategies as transit-oriented, mixed-use development and land recycling—to increase community revitalization, improve the efficiency of public works investments, and safeguard rural landscapes.
- *Coordinate policies and leverage investment:* Align policies and funding to remove barriers to collaboration, leverage funding and increase the accountability and effectiveness of all levels of government to plan for future growth, including making smart energy choices such as locally generated renewable energy.
- *Value communities and neighborhoods:* Enhance the unique characteristics of all communities by investing in healthy, safe and walkable neighborhoods—rural, urban or suburban.

Environmental Sustainability

A goal of the Obama Administration is to improve our Nation's environment and to secure its energy future. The effective provision of public transportation is a key part of this goal. The Administration believes that we must commit ourselves to an economic future in which the strength of our economy is not tied to the unpredictability of oil markets.

FTA advances these energy and environmental goals by funding projects that:

- Enhance the quality of public transportation services.
- Assist nonattainment and maintenance areas in achieving or maintaining the National Ambient Air Quality standards for ozone and carbon monoxide.
- Support emerging clean fuel and advanced propulsion technologies for transit buses and markets for those technologies.
- Reduce greenhouse gas emissions of public transportation systems.

II. Discretionary Programs Information

A. Bus and Bus Facilities Program: State of Good Repair (SGR) Initiative

1. Program Description and Purpose

Improving and maintaining America's buses and bus facilities so that the nation's public transportation systems are in good physical condition and successfully accomplish their performance objectives is a key strategic goal of DOT and FTA. This dimension of the SGR Initiative is intended to contribute to the improvement of the condition of transit capital assets by providing financial assistance for recapitalization of buses and bus facilities. As part of the program, FTA will prioritize the replacement and rehabilitation of intermodal facilities that support the connection of bus service with multiple modes of transportation, including but not limited to: Rail, ferry, intercity bus and private transportation providers. In order to be eligible for funding, intermodal facilities must have adjacent connectivity with bus service. In addition, FTA will prioritize funding for the development and implementation of new, or improvement of existing, transit asset management systems. Public transportation asset management means a strategic and systematic process of operating, maintaining, and improving physical assets with a focus on both engineering and economic analysis to identify a structured sequence of maintenance, repair, rehabilitation, and replacement actions that will achieve and sustain a desired state of good repair over the lifecycle of the assets at minimum possible cost.

2. Eligibility Information

i. Eligible Proposers

''Direct Recipients'' within the meaning of FTA's Section 5307 Urbanized Area Formula program, States, or Indian Tribes are eligible to submit proposals for this initiative. Proposals for funding eligible projects in rural (nonurbanized) areas must be submitted as part of a consolidated State proposal with the exception of nonurbanized projects to Federally recognized Tribes. States and Direct Recipients may also submit consolidated proposals for projects in urbanized areas.

Proposals shall contain projects to be implemented by the Recipient or its subrecipients. Eligible subrecipients include public agencies, private non-profit organizations, and private providers engaged in public transportation.

ii. Eligible Expenses

Pursuant to 49 U.S.C. 5309(b)(3), FTA is authorized to make grants to assist State and local governmental authorities in financing capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct or rehabilitate bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations.

Projects eligible for funding under the SGR Bus initiative are capital projects. Eligible projects include, but are not limited to, the purchase, replacement, or rehabilitation of, buses and vans and related equipment (including Intelligent Transportation Systems (ITS), fare equipment, and communication devices that are compliant with the FCC's mandatory narrow-banding requirements); replacement or the modernization of bus maintenance and revenue service (passenger) facilities; replacement or modernization of intermodal facilities; and the development and implementation of transit asset management systems. This year, FTA will also consider expansion requests for bus maintenance facilities and/or new equipment requests to the extent the expansion or equipment is necessary to address current capacity constraints that are limiting the agency's ability to maintain vehicles and equipment in a state of good repair. All proposals must address the objectives identified in the Program Purpose subsection above.

Funds made available under this initiative may not be used to fund operating expenses, preventive maintenance, or any other expanded capital eligibility items (for example, security drills, debt service reserve, mobility management). Funds also may not be used to reimburse projects that have incurred previous expenses absent evidence that FTA issued a Letter of No Prejudice (LONP) for the project before the costs were incurred. There is no blanket pre-award authority for projects to be funded under this announcement before their identification in the **Federal Register** of selected projects.

iii. Cost Sharing

Costs will be shared at the following ratio: 80 percent FTA/20 percent local contribution. FTA will not approve deferred local share requests under this program. The Federal share may exceed 80 percent for certain projects related to the Americans with Disabilities Act (ADA) and the Clean Air Act (CAA) as follows: ADA—The Federal share is 90 percent for the cost of vehicle-related equipment or facilities attributable to compliance with the ADA. (42 U.S.C. 12101 *et seq.*); CAA—The Federal share is 90 percent for the cost of vehicle related equipment or facilities (including clean-fuel or alternative-fuel vehicle related equipment or facilities) attributable to compliance with the CAA (42 U.S.C. 7401 *et seq.*). For administrative simplicity, FTA allows recipients to compute the Federal share at 83 percent for eligible ADA and CAA vehicle purchases. The 83 percent Federal share does not apply to facilities. The award recipient must itemize the cost of specific, discrete, facility-related items being purchased to be in compliance with the ADA or the CAA in order to qualify for the Federal share of 90 percent of the cost for these itemized elements.

A Federal share of 90 percent may also be applied to projects to provide access for bicycles to public transportation facilities, to provide shelters and parking facilities for bicycles in or around public transportation facilities, or to install equipment for transporting bicycles on public transportation vehicles.

3. Evaluation Criteria, Review and Selection

i. Project Evaluation Criteria

FTA will evaluate projects based on the proposals submitted according to the following criteria. Each proposer is encouraged to demonstrate the

responsiveness of a project to all of the selection criteria with the most relevant information that the proposer can provide, regardless of whether such information has been specifically requested or identified in this notice. FTA will assess the extent to which a project addresses the following criteria.

a. *Demonstration of Need:* FTA will evaluate each project to determine its needs for resources. In addition to the project-specific criteria below, this will include evaluating the project's impact on service delivery and whether the project represents a one-time or periodic need that cannot reasonably be funded from FTA program formula allocations or State and/or local resources. This is the most important criterion. To be recommended for funding under this initiative, a proposal must receive a recommended or higher rating in this criterion.

1. For bus replacement or rehabilitation projects:

- The age of the asset to be replaced or rehabilitated by the proposed project, relative to its useful life.
- The degree to which the proposed project addresses a demonstrated and verifiable backlog of deferred maintenance.
- Consistency with the proposer's bus fleet management plan.
- Condition and performance of the asset to be replaced by the

proposed project, as ascertained through field inspections or otherwise, if available.

- The project conforms to FTA's spare ratio guidelines.
- The project improves energy efficiency or reduces energy consumption/green house gas emissions. Proposers are encouraged to provide information regarding the expected use of clean or alternative sources of energy. Examples include the use or implementation of energy efficient transit vehicles and retrofitting of existing vehicles with energy efficient technologies which could also reduce direct emissions such as electronic accessories, anti-idle technologies, and clean fuels.

2. For bus facility and equipment projects (replacement and/or expansion):

- The age of the asset to be rehabilitated or replaced relative to its useful life.
- The degree to which the proposed project addresses a demonstrated and verifiable backlog of deferred maintenance.
- The degree to which the proposed project will enable the agency to improve the maintenance and condition of the agency's fleet and/or other related transit assets.
- For expansion requests, the degree to which the proposed project addresses a current capacity constraint that is limiting ability of the agency to maintain vehicles and equipment in a state of good repair.
- The project supports emerging or advanced technologies and green building initiatives for transit facilities and equipment.

3. For transit asset management system projects:

If asset management system development or upgrades are proposed, the proposal shall describe, as applicable, the system element(s) the proposer is seeking to improve; including:

- How asset management plans/ systems will be developed or upgraded.
- How asset inventories will be maintained physically and fiscally.
- How assets initial condition will be assessed.
- How assets will be inspected and monitored, and at what frequency.
- How logistical decision support tools (including options and tradeoff analysis) will be used in the proposer's day-to-day operations.
- Demonstrated long-term financial and management commitment of the proposer to using the asset management system.

b. *Planning and Local/Regional Prioritization:* The extent to which the proposed project is consistent with planning documents and local priorities. This will involve assessing whether:

1. Project is consistent with the transit priorities identified in the long range plan and/or contingency/illustrative projects. Proposer should note if project could not be included in the financially constrained Transportation Improvement Program (TIP)/Statewide Transportation Improvement Program (STIP) due to lack of funding (if selected, project must be in TIP and STIP before grant award).

2. Local support is demonstrated by availability of local match and letters of support for the project.

3. In an area with more than one transit operator, the proposal demonstrates coordination with, and support of, other transit operators, or other related projects within the proposer's Metropolitan Planning Organization (MPO) or the geographic region within which the proposed project will operate.

c. *Project Readiness:* The extent to which the project is ready to implement. FTA will assess whether:

1. Project is a Categorical Exclusion (CE) or the required environmental work has been initiated or completed for construction projects requiring an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under, among others, the National Environmental Policy Act of 1969, as amended.

2. Project implementation plans are complete, including initial design of facilities projects.

3. TIP/STIP can be amended (evidenced by MPO/State endorsement).

4. Project funds can be obligated and the project implemented quickly, if selected.

5. Applicant demonstrates the ability to carry out the proposed project successfully.

d. *Technical, legal, and financial capacity to implement the particular project proposed:* FTA will evaluate whether:

1. The proposer has the technical capacity to administer the project.

2. For fleet replacement, the acquisition is consistent with the bus fleet management plan.

3. There are no outstanding legal, technical, or financial issues with the grantee that would make this a high-risk project to implement quickly.

4. The proposer has adequate financial systems in place and has identified the source of local match if selected (no deferred local share will be allowed).

5. The grantee is in fundable status for grant-making purposes.

ii. Review and Selection Process

In addition to other FTA staff that may review the proposals, a technical evaluation committee will review proposals under the project evaluation criteria. Members of the technical evaluation committee and other involved FTA staff reserve the right to screen and rate the applications it receives and to seek clarification from any applicant about any statement in its application that FTA finds ambiguous and/or request additional documentation to be considered during the evaluation process to clarify information contained within the proposal.

After consideration of the findings of the technical evaluation committee, the FTA Administrator will determine the final selection and amount of funding for each project. Geographic diversity and the applicant's receipt of other discretionary awards may be considered in FTA's award decisions. FTA expects to announce the selected projects and notify successful applicants in July 2012.

B. Bus and Bus Facilities Program: Bus Livability Initiative

1. Program Description and Purpose

The Bus Livability Initiative makes funds available to public transportation providers to finance capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations.

Improving mobility and shaping America's future by ensuring that the Nation's public transportation systems are accessible, integrated, and efficient, while offering flexibility of choices is a key strategic goal of the DOT. FTA is committed to creating livable communities that improve the quality of life for all Americans. Public transportation provides transportation options that connect communities and fosters sustainability and the development of urban and rural land use. Through Bus Livability Initiative grants, FTA will invest in projects that fulfill the six livability principles that serve as the foundation for the DOT–HUD–EPA Partnership for Sustainable Communities.

2. Eligibility Information

i. Eligible Proposers

Eligible proposers and eventual grant applicants under this initiative are Direct Recipients under the Section 5307 Urbanized Area Formula program, States, and Indian Tribes. Proposals for funding eligible projects in rural (nonurbanized) areas must be submitted as part of a consolidated State proposal with the exception of nonurbanized projects to Federally Recognized Tribes. States, Direct Recipients, and Tribes may also submit consolidated proposals for projects in urbanized areas.

Proposals shall contain projects to be implemented by the Recipient or its subrecipients. Eligible subrecipients include public agencies, private non-profit organizations, and private providers engaged in public transportation.

ii. Eligible Expenses

Pursuant to 49 U.S.C. 5309(b)(3), FTA is authorized to make grants to assist State and local governmental authorities in financing capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects for assistance to subrecipients that are public agencies, private companies engaged in public transportation, or private non-profit organizations.

Projects eligible for funding under the Bus Livability Initiative are capital projects such as: purchase and rehabilitation of buses and vans, bus related equipment (including ITS, fare equipment, communication devices); and construction and rehabilitation of bus-related facilities (including administrative, maintenance, transfer, and intermodal facilities, including facilities consistent with FTA's Joint Development and Bike/Pedestrian policies, which are available at *http://www.fta.dot.gov/livability*). FTA will prioritize the replacement and rehabilitation of intermodal facilities that support the connection of bus service with multiple modes of transportation such as: rail, ferry, intercity bus, and private transportation providers. In order to be eligible for funding, intermodal facilities must have adjacent connectivity with bus service.

Funds made available under this initiative may not be used to fund operating expenses, preventive maintenance, or any other expanded capital eligibility items (for example, security drills, debt service reserve, mobility management). Funds also may not be used to reimburse projects that have incurred previous expenses absent evidence that FTA issued a Letter of No Prejudice (LONP) for the project before the costs were incurred. There is no blanket pre-award authority for projects to be funded under this announcement before their identification in the **Federal Register** of selected projects.

iii. Cost Sharing

Costs will be shared at the following ratio: 80 percent FTA/20 percent local contribution. FTA will not approve deferred local share requests under this program. The Federal share may exceed 80 percent for certain projects related to the Americans with Disabilities Act (ADA) and the Clean Air Act (CAA) as follows: ADA—The Federal share is 90 percent for the cost of vehicle-related equipment or facilities attributable to compliance with the ADA (42 U.S.C. 12101 *et seq.*); CAA—The Federal share is 90 percent for the cost of vehicle related equipment or facilities (including clean-fuel or alternative-fuel vehicle related equipment or facilities) attributable to compliance with the CAA (42 U.S.C. 7401 *et seq.*). For administrative simplicity, FTA allows recipients to compute the Federal share at 83 percent for eligible ADA and CAA vehicle purchases. The 83 percent Federal share does not apply to facilities. The award recipient must itemize the cost of specific, discrete, facility-related items being purchased to be in compliance with the ADA or the CAA. The Federal share is 90 percent of the cost for these itemized elements.

A Federal share of 90 percent may also be applied to projects to provide access for bicycles to public transportation facilities, to provide shelters and parking facilities for bicycles in or around public transportation facilities, or to install equipment for transporting bicycles on public transportation vehicles.

3. Evaluation Criteria, Review, and Selection

i. Project Evaluation Criteria

Projects will be evaluated according to the following criteria. Each proposer is encouraged to demonstrate the responsiveness of a project to any and all of the selection criteria with the most relevant information that the proposer can provide, regardless of whether such information has been specifically requested, or identified, in this notice. FTA will assess the extent to which a project addresses the criteria below and produces a livability or sustainability outcome.

a. *Linkage to Livability Principles:* Livability investments are projects that deliver not only transportation benefits, but also are designed and planned in such a way that they have a positive impact on qualitative measures of community life. This element delivers benefits that are inherently difficult to measure. However, it is implicit to livability that its benefits are shared and therefore magnified by the number of potential users in the affected community. Therefore, descriptions of how projects enhance livability should include a description of the affected community and the scale of the project's impact. To determine whether a project improves the quality of the living and working environment of a community, FTA will qualitatively assess whether the project:

1. Will significantly enhance user mobility through the creation of more convenient transportation options for travelers;

2. The degree to which the proposed project contributes significantly to broader traveler mobility through intermodal connections, or improved connections between residential and commercial areas.

3. Will improve existing transportation choices by enhancing points of modal connectivity or, in urban areas, by reducing congestion on existing transit systems or roadways.

4. Will improve accessibility and transport services for economically

disadvantaged populations, non-drivers, senior citizens, and persons with disabilities.

5. Is the result of a planning process which coordinated transportation and land-use planning decisions and encouraged community participation in the process.

Note: Special consideration may be given to those proposers that serve a community that holds HUD Preferred Sustainability Status. A list of these communities can be found via *http://www.hud.gov/sustainability.*

b. *Linkage to Environmental Sustainability:* In order to determine whether a project promotes a more environmentally sustainable transportation system, *i.e.,* reducing reliance on automobile travel, improving the pedestrian environment of a community or, use of environmental design techniques in the planning, construction, and operation of the project, FTA will assess the project's ability to:

1. Improve energy efficiency or reduce energy consumption/green house gas emissions. Proposers are encouraged to provide information regarding the expected use of clean or alternative sources of energy; for example through the use or implementation of energy efficient transit vehicles or retrofitting of existing vehicles with energy efficient technologies which could also reduce direct emissions such as electronic accessories, anti-idle technologies, and clean fuels.

2. Maintain, protect or enhance the environment, as evidenced by environmentally friendly policies and practices utilized in the project design, construction, and operation that exceed the requirements of the National Environmental Policy Act, including but not limited, items such as: whether the project uses a Leadership in Energy and Environmental Design (LEED)-certified design; the vehicles or facilities are rated with the energy-star; the project re-uses a brownfield; construction equipment is retrofitted with catalytic converters; the project utilizes recycled materials; the project includes elements to conserve energy, such as passive solar heating, solar panels, wind turbines, reflective roofing or paving materials; or, other advanced environmental design elements such as green roofs, *etc.*

c. Leveraging of public and private investments.

1. *Jurisdictional and Stakeholder Collaboration:* To measure a project's alignment with this criterion, FTA will assess the project's involvement of non-Federal entities and the use of non-Federal funds, including the scope of involvement and share of total funding. FTA will give priority to projects that receive financial commitments from, or otherwise involve, State and local governments, other public entities, or private or nonprofit entities, including projects that engage parties that are not traditionally involved in transportation projects, such as nonprofit community groups or the private owners of real property abutting the project. FTA will assess the amount of co-investment from State, local or other non-profit sources.

2. *Disciplinary Integration:* To demonstrate the value of partnerships across government agencies that serve the various public service missions and to promote collaboration of the objectives outlined in this notice, FTA will give priority to projects that are supported, financially or otherwise, by non-transportation public agencies that are pursuing similar objectives. Special consideration will be given to those projects that leverage or provide services that support projects funded under the DOT–HUD–EPA Partnership for Sustainable Communities. For example, FTA will give priority to transportation projects that are supported by relevant public housing or human service agencies, or transportation projects that encourage energy efficiency or improve the environment and are supported by relevant public agencies with energy or environmental missions.

d. *Demonstrated Need for Resources:* FTA will evaluate each project to determine its need for resources. This determination will be made by examining the proposal to determine if:

1. The project represents a one-time or periodic need that cannot reasonably be funded from FTA program formula allocations or State and/or local revenues.

2. The project or applicant did not receive sufficient Federal funding in previous years.

3. The project will have a significant impact on service delivery.

e. *Planning and Prioritization at Local/Regional Level:* FTA will examine each Bus Livability project proposal for consistency with the area's planning documents and local priorities. This examination will involve assessing whether:

1. The project is consistent with the transit priorities identified in the long-range plan and/or contingency/illustrative projects.

2. The MPO endorses the project, if in a UZA, and the State, if for a rural area.

3. Local support is demonstrated by availability of local match for this and/or related projects and letters of support.

4. Capital projects are consistent with service needs of the area.

i. *Example:* vehicle expansion proposal shows evidence of the need for additional capacity.

f. *Project Readiness:* The extent to which the project is ready to implement. This will involve assessing whether:

1. Any required environmental work has been initiated for construction projects requiring an Environmental Assessment (EA), Environmental Impact Statement (EIS), or documented Categorical Exclusion (CE).

2. Implementation plans are ready, including initial design of facilities projects.

3. TIP/STIP can be amended (evidenced by MPO/State endorsement).

4. Local share of funding is in place.

5. Project can be obligated and implemented quickly if selected.

6. The applicant demonstrates the ability to carry out the proposed project successfully.

7. If the project is multimodal in nature, the proposal demonstrates coordination with and support of other transportation modes and partners.

g. Technical, legal, and financial capacity to implement the particular project proposed:

1. The proposer has the technical capacity to administer the project.

2. For fleet replacement, the acquisition is consistent with the bus fleet management plan.

3. There are no outstanding legal, technical, or financial issues with the grantee that would make this a high-risk project to implement quickly.

4. The proposer has adequate financial systems in place and has identified the source of local match if selected (no deferred local share will be allowed).

5. The grantee is in fundable status for grant-making purposes.

ii. Review and Selection Process

An interagency evaluation committee will review proposals under the project evaluation criteria. Members of the technical evaluation committee and other involved FTA staff reserve the right to screen applications and to seek clarification from any applicant about any statement in its application that FTA finds ambiguous and/or request additional documentation to be considered during the evaluation process to clarify information contained within the proposal. After consideration of the findings of the technical evaluation committee, the FTA Administrator will determine the final selection and amount of funding for each project. Geographic diversity and other discretionary awards may be considered in FTA's award decisions. FTA expects to announce the selected

projects and notify successful applicants in July 2012.

C. Clean Fuels/Bus and Bus Facilities Program

1. Program Description and Purpose

The Clean Fuels Grant Program assists non-attainment or maintenance areas in achieving or maintaining the National Ambient Air Quality Standards for ozone and carbon monoxide (CO). Additionally, the program supports emerging clean fuel and advanced propulsion technologies for transit buses and markets for those technologies. FY 2012 unallocated funding provides $51.5 million dollars in discretionary Clean Fuels Grant Program resources. Additionally, FTA is expanding the eligible applicant pool and may fund projects that meet the Clean Fuels Grant Program objectives in attainment areas using a portion of discretionary Bus and Bus Facilities Program resources that are available.

2. Eligibility Information

i. Eligible Applicants

Eligible applicants under this program are designated recipients in maintenance or non-attainment areas for ozone or CO under section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)), that are entities designated to receive Federal urbanized formula funds under 49 U.S.C. 5307. Tribes, States and Designated Recipients may submit consolidated proposals for projects in non-urbanized areas. FTA will also accept applications from direct recipients, Tribes, and State Departments of Transportation in attainment areas for projects that meet eligibility criteria under the Bus and Bus Facilities Program.

ii. Eligible Projects

Section 5308 authorizes FTA to make grants under this section to assist recipients to finance eligible projects such as the following: (1) Purchasing or leasing clean fuel buses, including buses that employ a lightweight composite primary structure and vans for use in revenue service; (2) Constructing or leasing clean fuel bus facilities or electrical recharging facilities and related equipment for such buses; or (3) Projects relating to clean fuel, biodiesel, hybrid electric, or zero emissions technology buses that exhibit equivalent or superior emissions reductions to existing clean fuel or hybrid electric technologies.

Funds made available under this program cannot be used to fund operating expenses or preventive maintenance; to purchase or lease non-revenue vehicles; or to reimburse projects that have incurred prior eligible expenses without a Letter of No Prejudice (LONP) issued by FTA for the project before the costs are incurred.

iii. Cost Sharing or Matching

For projects awarded funding, costs will be shared as follows:

a. Vehicles—90 percent FTA/10 percent local contribution for the *net incremental* cost of the *clean fuels* component (not the whole vehicle). For administrative simplicity, FTA allows recipients to apply an 83 percent Federal share for the whole vehicle. The 83 percent share is a blended figure representing 80 percent of the vehicle and 90 percent of the vehicle-related equipment to be acquired in compliance with the Clean Air Act (CAA) 42 U.S.C. 7401 *et seq.*

b. Facilities—The 83 percent Federal share does *not* apply to facilities, for which the costs are more variable. The Federal share is 90 percent of the cost for the CAA elements of the facility.

c. FTA will not approve deferred local share.

3. Evaluation Criteria, Review, and Selection

i. Project Evaluation Criteria

Projects will be evaluated according to the following criteria:

a. Demonstration of benefits: Proposers should explain how the proposed project will reduce transportation related pollutants.

b. Demonstration of clean fuels/advanced technologies: Proposers should explain how the project supports emerging clean fuels technologies or advanced technologies for transit buses.

c. Demonstration of Need:

1. Project represents a one-time or periodic need that cannot reasonably be funded from formula allocations or State and/or local revenues.

2. Other Federal funds have not been made available for this project.

3. The project will have a positive impact on air quality.

4. The project is consistent with the applicant's bus fleet management plan.

5. The project is a transportation control measure in an approved State Implementation Plan (if applicable).

d. *Planning and Local/Regional Prioritization:* The extent to which the proposed project is consistent with planning documents and local priorities. This will involve assessing whether:

1. Project is consistent with the transit priorities identified in the long range plan and/or contingency/illustrative projects. Proposer should note if project could not be included in the financially constrained Transportation Improvement Plan (TIP)/Statewide Transportation Improvement Program (STIP) due to lack of funding (if selected, project must be in federally approved STIP before grant award).

2. Local support is demonstrated by availability of local match for this and/or related projects and letters of support.

3. In an area with more than one transit operator, the proposal demonstrates coordination with and support of, other transit operators, or other related projects within the proposer's Metropolitan Planning Organization (MPO) or the geographic region within which the proposed project will operate.

e. *Project readiness:* The extent to which the project is ready to implement. This will involve assessing whether:

1. Project is a Categorical Exclusion (CE) or requires environmental work has been initiated or completed for construction projects requiring an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

2. Project implementation plans are ready, including initial design of facilities projects.

3. TIP/STIP can be amended (evidenced by MPO/State endorsement).

4. Project funds can be obligated and the project implemented quickly, if selected.

5. Applicant demonstrates the ability to carry out the proposed project successfully.

f. Technical, legal, and financial capacity to implement the particular project proposed:

1. The proposer has the technical capacity to administer the project.

2. For fleet replacement, the acquisition is consistent with the bus fleet management plan.

3. There are no outstanding legal, technical, or financial issues with the grantee that would make this a high-risk project to implement quickly.

4. The proposer has adequate financial systems in place and has identified the source of local match if selected (no deferred local share will be allowed).

5. The grantee is in fundable status for grant-making purposes.

ii. Review and Selection Process

In addition to other FTA staff that may review the proposals, a technical evaluation committee will review proposals under the project evaluation criteria. Members of the technical evaluation committee and other involved FTA staff reserve the right to screen applications and seek clarification from any applicant about

any statement in its application that FTA finds ambiguous and/or request additional documentation to be considered during the evaluation process to clarify information contained within the proposal.

After consideration of the findings of the technical evaluation committee, the FTA Administrator will determine the final selection and amount of funding for each project. Geographic diversity and the applicant's receipt of other discretionary awards may be considered in FTA's award decisions. FTA expects to announce the selected projects in July 2012 and notify successful applicants.

III. Proposal and Submission Information for All Programs and Initiatives

A. Proposal Submission Process

Project proposals must be submitted electronically through *http://www.GRANTS.GOV* by the established due date. Mail and fax submissions will not be accepted.

A complete proposal submission will consist of at least two files: (1) The SF 424 Mandatory form (downloaded from *GRANTS.GOV*) and (2) the supplemental form targeting the relevant FTA program found on the FTA Web site at the program Web site: *http://www.fta.dot.gov/bus* and *http://fta.dot.gov/cleanfuels.* The supplemental form provides guidance and a consistent format for proposers to respond to the criteria outlined in this NOFA. Once completed, the supplemental form must be placed in the attachments section of the SF 424 Mandatory form. Proposers must use the correct supplemental form and attach it to their submission in *GRANTS.GOV* to successfully complete the application process. A proposal submission may contain additional supporting documentation as attachments.

Within 24–48 hours after submitting an electronic application, the applicant should receive three email messages from *GRANTS.GOV*: (1) Confirmation of successful transmission to GRANTS.GOV, (2) confirmation of successful validation by *GRANTS.GOV* and (3) confirmation of successful validation by FTA. If confirmations of successful validation are not received and a notice of failed validation or incomplete materials is received, the applicant must address the reason for the failed validation, as described in the notice, and resubmit before the submission deadline. If making a resubmission for any reason, include all original attachments regardless of which attachments were updated and check the box on the supplemental form indicating this is a resubmission.

Complete instructions on the application process can be found *http://www.fta.dot.gov/bus* and *http://fta.dot.gov/cleanfuels.* Important: FTA urges proposers to submit their applications at least 72 hours prior to the due date to allow time to receive the validation message and to correct any problems that may have caused a rejection notification. Submissions after the stated submission deadlines will not be accepted. *GRANTS.GOV* scheduled maintenance and outage times are announced on the *GRANTS.GOV* Web site *http://www.GRANTS.GOV.* Deadlines will not be extended due to scheduled maintenance or outages.

B. Proposal Content

Proposers may submit one proposal for each project or one proposal containing multiple projects. Proposers submitting multiple projects in one proposal must be sure to clearly define each project by completing a supplemental form for each project. Supplemental forms must be added within the proposal by clicking the ''add project'' button in Section II of the supplemental form.

Information such as proposer name, federal amount requested, local match amount, description of areas served, *etc.* may be requested in varying degrees of detail on both the SF 424 form and supplemental form. All fields are required unless stated otherwise on the forms. Use both the ''Check Package for Errors'' and the ''Validate Form'' validation buttons on both forms to check all required fields on the forms. Ensure that the federal and local amounts specified are consistent.

1. Applicant Information

This provides basic sponsor identifying information:

i. Applicant name and FTA recipient ID number.

ii. Applicant eligibility information, including Air Quality status (for the Clean Fuels Program only).

iii. A general description of services provided by the agency including ridership, fleet size, areas served, *etc.*

2. Project Information/Evaluation Criteria

For complete and up to date guidance on the project information and project evaluation criteria that must be documented, refer to the applicable program on the FTA Web site: *http://fta.dot.gov/bus* and *http://fta.dot.gov/cleanfuels.* At a minimum, every proposal must:

i. Submit an SF–424 with the correct supplemental form attached.

ii. Describe concisely, but completely, the project scope to be funded. As FTA may elect to fund only part of some project proposals. If applicable, the scope should be declared as ''scalable'' with specific components of independent utility clearly identified.

iii. Address each of the evaluation criteria separately, demonstrating how the project responds to each criterion.

iv. Provide a line-item budget for the total project, with enough detail to indicate the various key components of the project. As FTA may elect to fund only part of some project proposals, the budget should provide for the minimum amount necessary to fund specific project components of independent utility.

v. Provide the Federal amount requested.

vi. Document the matching funds, including amount and source of the match, demonstrating strong local or private sector financial participation in the project.

vii. Provide support documentation, including financial statements, bond-ratings, and documents supporting the commitment of non-federal funding to the project, or a timeframe upon which those commitments would be made.

viii. Provide a project time-line, including significant milestones such as the date anticipated to issue a request for proposals for vehicles, or contract for purchase of vehicle(s), and actual or expected delivery date of vehicles, or notice of request for proposal and notice to proceed for capital construction/rehabilitation projects.

C. Submission Dates and Times

Complete proposals for the State of Good Repair Initiative must be submitted electronically through the *GRANTS.GOV* Web site by 11:59 p.m. EDT on March 22, 2012. Complete proposals for the Bus Livability Initiative must be submitted electronically through *GRANTS.GOV* by 11:59 p.m. EDT March 29, 2012. Complete proposals for the Clean Fuels Grant Program must be submitted electronically through *GRANTS.GOV* by 11:59 p.m. EDT April 5, 2012. Proposers are encouraged to begin the process of registration on the *GRANTS.GOV* site well in advance of the submission deadline. Registration is a multi-step process, which may take several weeks to complete before an application can be submitted. Registered proposers may still be required to take steps to keep their registration up to date before submissions can be made successfully: (1) Registration in the Central Contractor

Repository (CCR) is renewed annually and (2) persons making submissions on behalf of the Authorized Organization Representative (AOR) must be authorized in *GRANTS.GOV* by the AOR to make submissions.

D. Award Information

Federal transit funds are available to State or local governmental authorities as recipients and other public transportation providers as subrecipients. There is no monetary floor or upper limit for any single grant award; however, FTA intends to fund as many meritorious projects as possible. In addition, geographic diversity and the applicant's receipt of other discretionary awards may be considered in FTA's award decisions.

Consistent with 49 U.S.C. Section 5309(m)(8), the Secretary shall consider the age and condition of buses, bus fleets, and bus-related facilities and equipment of proposers in its award of State of Good Repair, Bus Livability and Clean Fuels grants.

E. Funding Restrictions

Only proposals from eligible recipients for eligible activities will be considered for funding. Due to funding limitations, proposers that are selected for funding may receive less than the amount originally requested.

IV. Award Administration

A. Award Notices

At the time the project selections are announced, FTA will extend pre-award authority for the selected projects. There is no blanket pre-award authority for these projects before announcement.

B. Administrative and National Policy Requirements

1. Grant Requirements

If selected, applicants will apply for a grant through TEAM and adhere to the customary FTA grant requirements of the Section 5309 Bus and Bus Facilities program, including those of FTA Circular 9300.1B, Circular 5010.1D, and the labor protections of 49 U.S.C. 5333(b). All discretionary grants, regardless of award amount, will be subject to the Congressional Notification and release process. Technical assistance regarding these requirements is available from each FTA regional office.

2. Planning

FTA encourages proposers to notify the appropriate State Departments of Transportation and MPO in areas likely to be served by the project funds made available under these initiatives and programs. Selected projects must be incorporated into the long-range plans and transportation improvement programs of States and metropolitan areas before they are eligible for FTA funding.

3. Standard Assurances

The applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and may affect the implementation of the project. The applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. The applicant must submit the Certifications and Assurances before receiving a grant if it does not have current certifications on file.

4. Reporting

Post-award reporting requirements include submission of Federal Financial Reports and Milestone Reports in TEAM on a quarterly basis for all projects. Documentation is required for payment. In addition, project sponsors receiving grants for asset management systems and innovative technologies may be required to report on the performance of these systems and technologies.

V. Agency Contacts and Technical Assistance

Contact the appropriate FTA Regional Office at *http://www.fta.dot.gov* for proposal-specific information and issues. For general program information, please use the contacts for each program identified in the front of this notice.

For additional technical assistance, FTA will post answers to commonly asked questions about the SGR and Bus Livability Initiatives at *http://www.fta.dot.gov/bus,* and for the Clean Fuels Grant Program at *http://www.fta.dot.gov/cleanfuels.* FTA also expects to conduct Webinars during the application period and will post this information on its Web site.

Issued in Washington, DC, this 2nd day of February, 2012.

Peter Rogoff,

Administrator.

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Appendix A
FY 2012 Discretionary Programs PROPOSED Schedule

Statutory Program	2012 Program Amounts, Subject to Funding	Anticipated NOFA Publication	Application Deadlines	Anticipated Public Announcement of Allocation
Bus and Bus Facilities Program - (Section 5309(m)(1)c)				
Bus & Bus Facilities - State of Good Repair	**$650,000,000**	Feb. 2012	11:59 pm EDT March 22, 2012	Early July 2012
Bus & Bus Facilities - Livability	**$125,000,000**	Feb. 2012	11:59 pm EDT March 29, 2012	Late July 2012
Bus & Bus Facilities - Veteran Transportation and Community Living Initiative	**$25,000,000**	Feb. 2012	11:59 pm EDT April 19, 2012	Early July 2012
Clean Fuels (Section 5308)				
Clean Fuels (5308)	**$51,500,000**	Feb. 2012	11:59 pm EDT April 5, 2012	Late July 2012
Other				
Alternatives Analysis (5339)	**$25,000,000**	Feb. 2012	TBD	August 2012
Tribal Transit (5311(c))	**$15,000,000**	Feb. 2012	TBD	August 2012
Over-the-Road-Bus (3038)	**$8,800,000**	Mar. 2012	TBD	August 2012

Appendix B

FEDERAL TRANSIT ADMINISTRATION - PROGRAM MATRIX

Program	Clean Fuels Grant Program	Bus and Bus Facilities Program (SGR and Bus Livability)
Program Purpose	Assist nonattainment and maintenance areas in achieving or maintaining the National Ambient Air Quality Standards for ozone and CO and to support emerging clean fuel and advanced propulsion technologies for transit buses and markets for those technologies. * FTA will also accept applications from attainment areas and may fund these projects using Bus and Bus Facilities funds.	The **SGR Initiative** Program is intended to contribute to the improvement of the condition of transit capital assets by providing financial assistance for recapitalization of buses and bus facilities. The **Bus Livability Initiative** makes funds available to public transportation providers to finance capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities, including programs of bus and bus-related projects
Amount Available	approximately $51.5 million	**SGR**: approximately $650 million **Bus Livability**: approximately $125 million
Eligible Applicants	Eligible applicants are designated recipients, which are entities designated to receive Federal urbanized formula funds under 49 U.S.C. 5307. Applicants must be in areas that are maintenance or non-attainment for ozone or CO. * FTA will also accept applications from attainment areas and may find these projects using Bus and Bus Facilities funds.	**SGR and Bus Livability:** Direct Recipients under the Section 5307 Urbanized Area Formula program, States, and Indian Tribes. Proposals for funding eligible projects in rural (nonurbanized) areas must be submitted as part of a consolidated State proposal with the exception of nonurbanized projects to Indian Tribes. States, Direct Recipients, and Tribes may also submit consolidated proposals for projects in urbanized areas.
Eligible Activities	1) Purchasing or leasing clean fuel buses, including buses that employ a lightweight composite primary structure and vans for use in revenue service. The purchase or lease of non-revenue vehicles is not an eligible project. (2) Constructing or leasing clean fuel bus facilities or electrical recharging facilities and related equipment. (3) Projects relating to clean fuel, biodiesel, hybrid electric, or zero emissions technology buses that exhibit equivalent or superior emissions reductions to existing clean fuel or hybrid electric technologies.	**SGR:** Eligible projects include, but are not limited to, the: purchase, replacement, or rehabilitation of, buses and vans and related equipment (including Intelligent Transportation Systems (ITS), fare equipment, communication devices that are FCC mandatory narrow-banding compliant), replacement or the modernization of bus maintenance and revenue service (passenger) facilities; expansion of bus maintenance facilities; replacement or modernization of intermodal facilities; and, the development and implementation of transit asset management systems. **Bus Livability:** The same as SGR with the addition of expansion projects and bike facility projects. Transit asset management systems are not eligible under this competition.

Appendix B - Continued
FEDERAL TRANSIT ADMINISTRATION - PROGRAM MATRIX

Program	Clean Fuels Grant Program	Bus and Bus Facilities Program (SGR and Bus Livability)
Minimum and Maximum	Not Applicable	
Cost Sharing or Matching	• Vehicles - 90 percent FTA/10 percent local contribution for the net incremental cost of the clean fuels component (not the whole vehicle). For administrative simplicity, FTA allows recipients to apply a 83 percent Federal share for the whole vehicle. The 83 percent share is a blended figure representing 80 percent of the vehicle and 90 percent of the vehicle-related equipment to be acquired in compliance with the Clean Air Act. • Facilities - The 83 percent Federal share does not apply to facilities, for which the costs are more variable. The eligibility of facility-related cost elements at the 90 percent share will be reviewed on a case-by-case basis as part of the grant application process. •FTA will not approve deferred local share.	• Vehicles - 80 percent FTA/20 percent local contribution. The Federal share may exceed 80 percent for certain projects related to the Americans with Disabilities Act (ADA) and the Clean Air Act (CAA) as follows: ADA - The Federal share is 90 percent for the cost of vehicle-related equipment attributable to compliance with the ADA of 1990 CAA - The Federal share is 90 percent for the cost of vehicle related equipment or facilities (including clean-fuel or alternative-fuel vehicle related equipment or facilities) attributable to compliance with the CAA. For administrative simplicity, FTA allows recipients to compute the Federal share at 83 percent for eligible ADA and CAA vehicle purchases. • Facilities - The 83 percent Federal share does not apply to facilities. The award recipient must itemize the cost of specific, discrete, facility-related items being purchased to be in compliance with the ADA or the CAA. The Federal share is 90 percent of the cost for these itemized elements. • Bicycle Projects - A Federal share of 90 percent may also be applied to projects to provide access for bicycles to public transportation facilities, to provide shelters and parking facilities for bicycles in or around public transportation facilities, or to install equipment for transporting bicycles on public transportation vehicles. • FTA will not approve deferred local share.
Application Procedures	Go to: http://www.fta.dot.gov/cleanfuels	Go to: http://www.fta.dot.gov/bus
Application Deadline	11:59 pm EDT on April 5, 2012	**SGR**: 11:59 pm EDT on March 22, 2012 **BLIV**: 11:59 pm EDT on March 29, 2012

[FR Doc. 2012–2752 Filed 2–6–12; 8:45 am]
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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2012–0003; Notice 1]

Spartan Motors Chassis, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Receipt of Petition.

SUMMARY: Spartan Motors Chassis, Inc.,[1] (Spartan), has determined that model year 2011 and 2012 model MM, K2, K3, and SU incomplete vehicles manufactured between January 28, 2011 and June 28, 2011, do not fully comply with paragraph S5.1.4 of Federal Motor Vehicle Safety Standard (FMVSS) No. 121, *Air Brake Systems.* Spartan has filed an appropriate report pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports* (dated July 13, 2011).

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Spartan has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Spartan's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 312 model year 2011 and 2012 model MM, K2, K3, and SU incomplete vehicles manufactured between January 28, 2011 and June 28, 2011.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, these provisions only apply to the subject 312[2] model year 2011 and 2012 incomplete vehicles that Spartan no longer controlled at the time it determined that the noncompliance existed.

Paragraph S5.1 of FMVSS No. 121 requires in pertinent part:

S5.1 *Required equipment for trucks and buses.* Each truck and bus shall have the following equipment: * * *

S5.1.4 Pressure gauge. A pressure gauge in each service brake system, readily visible to a person seated in the normal driving position, that indicates the service reservoir system air pressure. The accuracy of the gauge shall be within plus or minus 7 percent of the compressor cut-out pressure. * * *

Spartan explains that the noncompliance is that the accuracy of the air gauges used in the air brake systems on the subject vehicles do not meet the accuracy requirements identified in FMVSS No. S5.1.4.

Spartan explains that the air brake systems operate as designed and meet all other applicable requirements of FMVSS No. 121. In this case, the operator may not be able to detect, by way of the air gauges, the variation between the physical cut out pressure of the air compressor versus what is shown on the gauge. Air pressure within the air systems is controlled by an air governor that is independent of the gauges therefore rendering the gauges as only an indicator to the operator.

Spartan additionally states that it has corrected the gauge calibration so that future production will not contain the subject noncompliance.

In summation, Spartan believes that the described noncompliance of its vehicles is inconsequential to motor vehicle safety, and that its petition, to exempt from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

Comments: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. *By mail addressed to:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 am to 5 pm except Federal Holidays.

c. *Electronically:* by logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/*. Follow the online instructions for submitting comments. Comments may also be faxed to 1–(202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Documents submitted to a docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets. DOT's complete Privacy Act Statement is available for review in the **Federal Register** published on April 11, 2000, (65 FR 19477–78).

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: March 8, 2012.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: January 30, 2012.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2012–2664 Filed 2–6–12; 8:45 am]
BILLING CODE 4910–59–P

[1] Spartan Motors Chassis, Inc., is a manufacturer of incomplete vehicles and is registered under the laws of the state of Michigan.

[2] Spartan's petition, which was filed under 49 CFR Part 556, requests an agency decision to exempt Spartan as a vehicle manufacturer from the notification and recall responsibilities of 49 CFR part 573 for 312 of the affected vehicles. However, a decision on this petition cannot relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Spartan notified them that the subject noncompliance existed.

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of four individuals and three entities whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of the four individuals and three entities identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on February 1, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, U.S. Department of the Treasury, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site at *http://www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on-demand service at (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the imposition of sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury, in consultation with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security may designate and block the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On February 1, 2012, the Director of OFAC designated the following four individuals and three entities whose property and interests in property are blocked pursuant to section 805(b) of the Kingpin Act:

Individuals:

1. AKBULUT, Cerkez (a.k.a. MURAT, Cernit; a.k.a. MURAT, Altig), DOB 18 Nov 1965; Alt. DOB 31 Oct 1971; POB Bingol, Turkey; Alt. POB Deric, Turkey; citizen Turkey; Passport TR–J 565114 (Turkey) issued 10 Sep 1997; Driver's License No. 04900377 (Moldova) issued 2 Jul 2004; Stateless Person Passport C000375 (Moldova) issued 9 Sep 2000; Refugee ID Card A88000043 (Moldova) issued 16 Dec 2005; Stateless Person ID Card CC00200261 (Moldova) issued 9 Sep 2000 (individual) [SDNTK].

2. BOZTEPE, Omer, DOB 01 Jan 1966; POB Bozova, Sanliurfa, Turkey; nationality Turkey; (individual) [SDNTK].

3. GELERI, Zeyneddin, c/o MEGA GROUP S.R.L.; c/o GELERI IMPORT EXPORT S.R.L.; DOB 13 Oct 1973; Alt. DOB 13 Oct 1977; POB Mardin, Turkey; citizen Turkey; nationality Turkey (individual) [SDNTK].

4. GELERI, Omer, c/o GELRO IMPEX S.R.L.; c/o MEGA GROUP S.R.L.; Prundeni, Valcea, Romania; DOB 01 Mar 1946; POB Mardin, Turkey; nationality Turkey; CNP (Personal Numerical Code) 7460301380011 (Romania); Romanian Permanent Resident CAN 0125477 (Romania) issued 13 Jul 2007 (individual) [SDNTK].

Entities:

1. GELERI IMPORT EXPORT S.R.L., 3 Str. Clinceni Depozitul, C10, Ilfov 70000, Romania; Romanian C.R. J23/242/2004 (Romania) [SDNTK].

2. GELRO IMPEX S.R.L., Cart. Cring, Bloc 2C, Ap. 16, Municipiul Buzau, Buzau 120164, Romania; C.R. No. J10/623/1997 (Romania); Fiscal Code 9896460 (Romania) [SDNTK].

3. MEGA GROUP S.R.L., No. 3, Commune Bragadiru, Clinceni, Ilfov 77060, Romania; C.R. No. J23/863/2002 (Romania); Romanian Tax Registration 14637977 (Romania) [SDNTK].

Dated: February 1, 2012.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2012–2729 Filed 2–6–12; 8:45 am]

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Part II

Bureau of Consumer Financial Protection

12 CFR Part 1005
Electronic Fund Transfers (Regulation E); Final Rule and Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

[Docket No. CFPB–2011–0009]

RIN 3170–AA15

Electronic Fund Transfers (Regulation E)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau of Consumer Financial Protection is amending Regulation E, which implements the Electronic Fund Transfer Act, and the official interpretation to the regulation, which interprets the requirements of Regulation E. The final rule provides new protections, including disclosures and error resolution and cancellation rights, to consumers who send remittance transfers to other consumers or businesses in a foreign country. The amendments implement statutory requirements set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: The rule is effective February 7, 2013.

FOR FURTHER INFORMATION CONTACT: Mandie Aubrey, Dana Miller, or Stephen Shin, Counsels, or Krista Ayoub or Vivian Wong, Senior Counsels, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006, at (202) 435–7000.

SUPPLEMENTARY INFORMATION:

I. Overview

The Bureau of Consumer Financial Protection (Bureau) is publishing this final rule to implement section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[1] which creates a comprehensive new system of consumer protections for remittance transfers sent by consumers in the United States to individuals and businesses in foreign countries. Consumers transfer tens of billions of dollars from the United States each year. However, these transactions were generally excluded from existing Federal consumer protection regulations in the United States until the Dodd-Frank Act expanded the scope of the Electronic Fund Transfer Act (EFTA) [2] to provide for their regulation.

The new protections will significantly improve the predictability of remittance transfers and provide consumers with better information for comparison shopping. First, the statute requires consistent, reliable disclosures about the price of a transfer, the amount of currency to be delivered to the recipient, and the date of availability. Consumers must receive pricing information before they make payment, and under the final rule will generally have 30 minutes after making payment to cancel a transaction. Second, the new requirements also increase consumer protections where transfers go awry by requiring providers to investigate disputes and remedy errors. Because the statute defines ''remittance transfers'' broadly, most electronic transfers of funds sent by consumers in the United States to recipients in other countries will be subject to the new protections.

Authority to implement the new Dodd-Frank Act provisions amending the EFTA transferred from the Board of Governors of the Federal Reserve System (Board) to the Bureau effective July 21, 2011. The Dodd-Frank Act requires that regulations to implement certain of these provisions be issued by January 21, 2012. To ensure compliance with this deadline, the Board issued a Notice of Proposed Rulemaking in May 2011 (May 2011 Proposed Rule) with the expectation that the Bureau would complete the rulemaking process.[3]

The Bureau is now issuing the final rule to define standards and provide initial guidance to industry. The final rule provides for a one-year implementation period. The Bureau is also publishing elsewhere in today's **Federal Register** a Notice of Proposed Rulemaking (January 2012 Proposed Rule) to further refine application of the final rule to certain transactions and remittance transfer providers. The Bureau expects to complete any further rulemaking on matters raised in the January 2012 Proposed Rule on an expedited basis before the end of the one-year implementation period.

The Bureau will work actively with consumers, industry, and other regulators in the coming months to follow up on the final rule. For instance, the Bureau has begun discussions with other Federal and state regulators concerning the fact that Congress's decision to regulate remittance transfers under the EFTA affects the application of certain State laws and Federal anti-money laundering regulations, as discussed further below. In coming months, the Bureau also expects to develop a small business compliance guide and engage in dialogue with industry regarding implementation issues. Finally, as the implementation date approaches, the Bureau expects to conduct a public awareness campaign to educate consumers about the new disclosures and their other rights under the Dodd-Frank Act.

II. Background

A. Scope and Regulation of Remittance Activities

The term ''remittance transfer'' has been used in other contexts to describe consumer-to-consumer transfers of low monetary value, often made via non-depository companies known as ''money transmitters'' by migrants supporting friends and relatives in their home countries.[4] But while this likely is the single largest category of electronic transfers of funds by consumers in the United States to recipients in foreign countries, it is not the only one. For instance, transfers can be sent abroad by any consumers in the United States, not just immigrants. In addition to using money transmitters, consumers can transfer funds to recipients in foreign countries through depository institutions or credit unions, for instance through wire transfers or automated clearing house (ACH) transactions. Furthermore, consumers in the United States may transfer funds to businesses as well as to individuals in foreign countries, for instance to pay bills, tuition, or other expenses. Although a number of studies of certain sets of consumers' international funds transfers have shown that transactions average several hundred dollars per transfer,[5] average transfer sizes vary significantly among subsets of the market, *e.g.,* among sets of consumer transfers sent to particular destination regions, or among consumer transfers

[1] Public Law 111–203, 124 Stat. 1376, section 1073 (2010).

[2] 15 U.S.C. 1693 *et seq.* EFTA section 919 is codified in 15 U.S.C. 1693o–1.

[3] 76 FR 29902 (May 23, 2011).

[4] *See, e.g.,* Committee on Payment and Settlement Systems and the World Bank, *General Principles for International Remittance Services* 6 (Jan. 2007), available at: siteresources.worldbank.org/INTPAYMENTREMMITTANCE/Resources/New_Remittance_Report.pdf (''*CPSS Principles''*).

[5] *See, e.g.,* Ole E. Andreassen, *Remittance Service Providers in the United States: How Remittance Firms Operate and How They Perceive Their Business Environment* 15–16 (June 2006), available at: siteresources.worldbank.org/INTPAYMENTREMMITTANCE/Resources/Businessmodels FSEseries.pdf) (''Andreassen''); Manuel Orozco, Inter-American Dialogue, *Migration and Remittances in Times of Recession: Effects on Latin American and Caribbean Economies* 13–14 (Apr. 2009), available at: www.oecd.org/dataoecd/48/8/42753222.pdf; Bendixen & Amandi, *Survey of Latin American Immigrants in the United States* 23 (Apr. 30, 2008), available at: *idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35063818.* (''*Bendixen Survey''*)

sent via particular methods or for particular purposes.[6]

As described further below, the Dodd-Frank Act defines ''remittance transfer'' broadly to include most electronic transfers of funds sent by consumers in the United States to recipients in other countries. There is no available data regarding the volume of remittance transfers using the statutory definition, but a number of studies regarding related financial flows indicate that consumers in the United States transfer tens of billions of dollars abroad annually. Globally, the World Bank estimates that the worldwide volume of certain cash, asset, and in-kind transfers made by migrants to developing countries reached $325 billion in 2010, and that the United States was the source of the greatest number of such transfers.[7] The U.S. Bureau of Economic Analysis estimates that in 2010, $37.1 billion in cash and in-kind transfers were made from the United States to foreign households by foreign-born individuals who had spent one or more years here.[8] Similarly, a private consulting firm estimates that in 2005, $42 billion in international transfers were made by money transmitters in the United States.[9] The U.S. Census Bureau, in contrast, estimates that monetary transfers from U.S. households to family and friends abroad totaled approximately $12 billion in 2008.[10] The available data suggest that the majority of consumers' international transfers from the United States are sent to the Caribbean and Latin America, and primarily to Mexico. Significant sums are also sent to Asia, and to the Philippines in particular.[11]

In the United States, remittance transfers sent by non-bank ''money transmitters,'' depository institutions, and credit unions are generally subject to Federal anti-money laundering laws and restrictions on transfers to or from certain persons. Money transmitters are also subject to State licensing and (in some cases) State regulatory regimes. However, consumer protections for remittance and other funds transfers vary widely at the State level, and international money transfers fall largely outside the scope of existing Federal consumer protections. For instance, the EFTA was enacted in 1978 to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. As implemented by Regulation E (12 CFR part 1005),[12] the EFTA governs transactions such as transfers initiated through automated teller machines, point-of-sale terminals, automated clearing house systems, telephone bill-payment plans, or remote banking services. However, prior to the new Dodd-Frank Amendments, Congress had specifically structured the EFTA to exclude wire transfers,[13] and transfers sent by money transmitters also generally fall outside the scope of existing Regulation E. As described in more detail below, these categories of transfers are believed to compose the majority of the remittance transfer market.

B. Specific Methods of Consumer Remittance and Other Money Transfers

Consumers can choose among several methods of transferring money to foreign countries, as detailed below. Information on the volume of certain methods, particularly consumer wire transfers, is very limited, but the Bureau believes that transactions by non-bank ''money transmitters'' and wire transfers by depository institutions and credit unions make up the majority of the remittance transfer market.

The various methods of remittance transfer can generally be categorized as involving either closed network or open network systems, although new hybrids between open and closed networks are developing. In closed networks, a principal remittance transfer provider offers a service through a network of agents or other partners that help collect funds in the United States and disburse funds abroad. Through the provider's own contractual arrangements with those agents or other partners, or through the contractual relationships owned by the provider's business partner, the principal provider can exercise some control over the transfer from end-to-end.

In contrast, in an open network, no single provider has control over or relationships with all of the participants that may collect funds in the United States or disburse funds abroad. A number of principal providers may access the system. National laws, individual contracts, and the rules of various messaging, settlement, or payment systems may constrain certain parts of transfers sent through an open network system. But any participant, such as a U.S. depository institution, may use the network to send transfers to unaffiliated institutions abroad with which it has no contractual relationship, and over which it has limited authority or ability to monitor or control.[14]

Remittance Transfers Through Money Transmitters

Historically, many consumers have sent remittance transfers through non-depository institutions called ''money transmitters.''[15] Money transmitters generally operate through closed networks, receiving and disbursing funds through their own outlets or through agents, such as grocery stores, neighborhood convenience stores, or depository institutions. Money

[6] For example, one study found that 52% of total worldwide transfers to India from Indians living abroad were made in amounts of $1,100 and above, and of that category, 63% exceeded $2,200. Muzaffar Chishti, Migration Policy Institute, *The Rise in Remittances to India: A Closer Look* (February 2007), available at: http://www.migrationinformation.org/Feature/display.cfm?ID=577 (citing to 2006 study by the Reserve Bank of India; study was not limited to transfers from the United States); *see also* Manuel Orozco, Inter-American Dialogue, *Worker Remittances in an International Scope* 10 (Feb. 28, 2003), available at: www.iadb.org/document.cfm?id=35076501.

[7] World Bank, *Migration and Remittances Factbook 2011* 15, 17 (2d ed. 2011). The World Bank estimates include cash and in-kind transfers by migrants to their native countries, earnings of temporary workers, and certain asset transfers.

[8] Bureau of Economic Analysis (BEA''), *Personal Transfers, 1992:I–2011:III* (Dec. 15, 2011). For more on the BEA's methodology, *see* Mai-Chi Hoang and Erin M. Whitaker, BEA, ''Annual Revision of the U.S. International Transaction Accounts,'' *Surv. of Current Bus,* vol. 91, no. 7 (July 2011) at 47–61; Christopher L. Bach, BEA, ''Annual Revision of the U.S. International Accounts, 1991–2004,'' *Surv. of Current Bus.* vol. 85, no. 7 (July 2005) at 64–66.

[9] KPMG LLP Economic and Valuation Services, *2005 Money Services Business Industry Survey Study for Financial Crimes Enforcement Network* 5 (Sept. 26, 2005), available at: *www.fincen.gov/news_room/rp/reports/pdf/FinCEN_MSB_2005_Survey.pdf* (''*KPMG Report''*) (Volume estimates included fees charged, as well as principal transferred. It is unclear whether estimate includes inbound, as well as outbound, transfers).

[10] Elizabeth M. Grieco, Patricia de la Cruz et al., *Who in the United States Sends and Receives Remittances? An Initial Analysis of the Monetary Transfer Data from the August 2008 CPS Migration Supplement,* U.S. Census Bureau Working Paper No. 87 (Nov. 2010), available at http://www.census.gov/population/www/documentation/twps0087/twps0087.html. The report recognizes the substantial difference between its estimate and that of the BEA and offers several possible explanations, but does not reach a conclusion about the difference between the estimates.

[11] U.S. Gov't Accountability Office, GAO–06–204, *International Remittances: Information on Products, Costs, and Consumer Disclosures* 7 (November 2005) (''*GAO Report''*); *see also* Cong. Budget Office, *Migrants' Remittances and Related Economic Flows* 7 (Feb. 2011).

[12] In light of the transfer of the rulemaking authority for the EFTA (other than Section 920 of the EFTA) from the Board to the Bureau, the Bureau published for public comment an interim final rule establishing a new Regulation E at 12 CFR part 1005. *See* 76 FR 81020 (Dec. 27, 2011). Consequently, provisions in the Board's Regulation E at 12 CFR part 205 were republished as the Bureau's Regulation E at 12 CFR part 1005.

[13] *See* EFTA section 903(7), which has been implemented in 12 CFR 1005.3(c).

[14] *See generally* CPSS Principles at 9–10.

[15] Federal law requires money transmitters to register with the Financial Crimes Enforcement Network of the U.S. Department of the Treasury. 31 U.S.C. 5330; 31 CFR 1022.380. Most states also require money transmitters to be licensed by the State.

transmitters have traditionally dominated the market for transfers from consumers in the United States to relatives or other households abroad.[16] These businesses, in turn, have tended to focus on modest-sized transfers. Many cap the size of individual transfers,[17] and some evidence suggests that for some destination markets, money transmitters' prices for transfers of several hundred dollars tend to be lower than depository institutions' prices.[18]

For a remittance transfer conducted through a money transmitter, a consumer typically provides basic identifying information about himself and the recipient, and pays cash sufficient to cover the transfer amount and any transfer fees charged by the money transmitter. The consumer is often provided a confirmation code, which the consumer relays to the recipient. The money transmitter sends an instruction to a specified payout location or locations in the recipient's country where the recipient may pick up the transferred funds in cash, often in local currency, on or after a specified date, upon presentation of the confirmation code and/or other identification. These transfers are generally referred to as cash-to-cash remittances.

Although most money transmitters focus on cash-to-cash remittance transfers, many have also broadened their product offerings, with respect to both the methods for sending and the methods for receiving remittance transfers. For example, money transmitters may permit transfers to be initiated using credit cards, debit cards, or bank account debits, through Web sites, dedicated telephone lines at agent locations, at stand-alone kiosks, or by telephone. Abroad, money transmitters and their partners may allow funds to be deposited into recipients' bank accounts, or distributed directly onto prepaid cards. Funds can also be transferred among consumers' ''virtual wallets,'' through accounts identified by individuals' email addresses or mobile phone numbers. A recent survey of companies sending funds from the United States to Latin America showed that approximately 75% permit consumers to send transfers of funds that can be deposited directly into recipients' bank accounts, and about 15% offer internet-based transfers.[19]

The cost of a transfer sent through a money transmitter generally has two components, in addition to any governmental taxes. The first component is fees. In general, money transmitters charge up-front fees at the time that a transaction is sent. Though it is possible that agents that disburse funds may charge additional fees, the contractual relationships that money transmitters hold with their agents—or with intermediaries that manage such agents—may allow money transmitters, as a condition of network participation, to forbid such fees.

The second component is the exchange rate applied to the transfer, which determines how much money a consumer will have to pay in order for a recipient to receive a certain amount of local currency. Money transmitters also often set the exchange rates that apply to the transfers they send, at or before the time that a consumer tenders payment. However, some money transmitters offer floating rate products where the exchange rate is not determined until the recipient picks up the funds. In either scenario, the exchange rate that applies to a transfer usually reflects a spread: a percentage difference between that exchange rate (the ''retail'' rate) and some ''wholesale'' exchange rate.[20] Spreads can be used to generate revenue for the money transmitter or its partners. Spreads are also one of several mechanisms that money transmitters or their partners may use to manage exchange rate risk, which arises due to the frequent fluctuations in most wholesale currency markets and the time lags between when transfers are initiated, when destination market currency is bought, when transfers are picked up by recipients, and when the parties settle their transactions.

Funds sent through a money transmitter are generally available in one to three business days, although same day delivery may be available, often for a higher fee. At the time of the transaction, transmitters generally set a date (and possibly time) when funds will be available. Based on the contractual relationships among network participants, money transmitters may require agents in the recipient country to make funds available to recipients before accounts are settled among the agent in the United States, the money transmitter, the agent abroad, and any other entities involved. But the processes and methods that agents in the United States, money transmitters, agents abroad, and other entities communicate with each other, transfer funds among each other, and settle accounts can vary widely.[21]

Because money transmitters generally work through closed networks, even those that do not operate their own retail outlets often have direct contractual relationships with agents in the United States through which consumers initiate transfers, as well as agents abroad, which make funds available to recipients. Alternatively, money transmitters may have direct relationships with intermediaries that, in turn, contract with and manage individual agents. In either scenario, money transmitters can use the terms of their contractual relationships to restrict the terms under which agents or other network partners can operate and to obtain information from the agents or other networks to monitor their compliance with contractual and legal requirements.

International Wire Transfers

Depository institutions and credit unions have traditionally offered consumers remittance transfer services by way of wire transfers, which are certain electronically transmitted orders that direct receiving depository institutions to pay identified beneficiaries.[22] Unlike closed network

[16] Bureau, *Report on Remittance Transfers* 6 (July 20, 2011), available at: http://www.consumerfinance.gov/wp-content/uploads/2011/07/Report_20110720_RemittanceTransfers.pdf (''*Bureau 2011 Report*'').

[17] *KPMG Report* at 47.

[18] *See, e.g., Remittance Prices Worldwide: Making Markets More Transparent, Sending Money FROM United States,* at: http://remittanceprices.worldbank.org/Country-Corridors/from-United-States (tracking select providers' prices for sending $200 and $500 transfers from the United States to select countries).

[19] Manuel Orozco, Elizabeth Burgess et al, Inter-American Dialogue, *A Scorecard in the Market for Money Transfers: Trends in Competition in Latin American and the Caribbean* 6 (June 18, 2010) (''*Scorecard*''). Like cash-to-cash remittances, many of these new offerings rely on closed networks, though others rely on open networks or reflect some characteristics of both open and closed network transactions. The primary means of open network transfers are wire transfers and international ACH transfers, discussed in more detail below.

[20] There are a variety of ways to measure the wholesale exchange rate. For example, researchers may rely on publicly available interbank exchange rates, which are the rates available to large financial institutions exchanging very large quantities of currency with each other. *By* contrast, in calculating their revenues due to spread, money transmitters generally rely on the rates at which they buy currency, which may be different from interbank rates.

[21] *See generally Andreassen* at 3–5; *CPSS Principles* at 41–42.

[22] Wire transfers can, in fact, be composed of a sequence of payment orders, each of which are settled using different payment systems. For instance, an international wire transfer may be composed, in part, by a domestic wire transaction between the sending institution in the United States and an intermediary also operating in the United States; a ''book transfer'' between two accounts held by the intermediary institution; and a transaction between that intermediary and the receiving institution (that may be conducted through the domestic wire system in the receiving country).

transactions, which generally can only be sent to agents or other entities that have signed on to work with the specific provider in question, wire transfers are generally open network transactions that can reach virtually any bank worldwide through national payment systems that are connected through correspondent and other intermediary bank relationships.[23] Historically, while money transmitters have focused on modest-sized transfers between persons who may not use depository institutions or credit unions, wire transfers have generally been used for large transactions sent by consumers with deposit accounts to recipients with deposit accounts. Wire transfers are generally not capped on the amount that can be sent, and individual transactions can involve thousands or millions of dollars. Because flat fees are common, the price of a wire transfer, as a percent of the transaction amount, often decreases as the size of the transfer increases. Information on the volume of consumer wire transfers is very limited.

To initiate a wire transfer, a consumer typically provides the sending depository institution or credit union not only information about himself and the recipient of the transfer, but also technical information about the recipient's financial institution and the account into which money will be received. The fees charged by the sending institution and the principal amount to be transferred are deducted from the consumer's account. No access code or similar device is typically required because the funds will be deposited into the designated recipient's account in the foreign country.

Like money transmitters, providers of wire transfers usually charge up-front fees at the time of the transaction. In some cases, intermediary institutions impose additional fees (sometimes referred to as ''lifting fees'') and recipient institutions may also charge fees for converting funds into local currency and/or depositing them into recipients' accounts. Often, intermediary and recipient institutions charge fees to the consumer by deducting them from the principal amount transferred, although sometimes fees are charged to the sending institution instead.

For wire transfers that will be received in a foreign currency, the mechanics of the currency exchange may depend on the circumstances. A sending depository institution or credit union that participates in foreign exchange markets may exchange the currency at the time of transfer, using an exchange rate that the sending institution sets. In such cases, the principal amount will be then transferred in the foreign currency. Even if the funds are to be received in a foreign currency, however, the sending financial institution may not conduct the foreign exchange itself. Some financial institutions, particularly smaller institutions, may not participate in any foreign currency markets. In other cases, a depository institution or credit union may choose not to trade an illiquid currency or a consumer may request that the financial institution send the transfer in U.S. dollars. In these cases, the sending institution's correspondent institution, the first cross-border intermediary institution in the recipient's country, or the recipient's institution, may set the exchange rate that applies to the transfer. Like exchange rates applied to closed network transfers, exchange rates applied to wire transfers may reflect a spread between the retail rate and the wholesale rate; this spread can be used to generate revenue or to help manage exchange rate risk.

Funds that are sent by wire transfers are usually not available on the same day that the transaction is initiated. Because of time zone differences, and because payment is often not made before funds are settled among the various parties, wire transfers generally take at least one day for delivery. They may take longer, depending on the number of institutions involved in the transmittal route, the payment systems used, and individual institutions' business practices.

Communications within the open network can be complicated. Where a sending institution has no contractual, account, or other relationships with a recipient institution, it may communicate indirectly by sending funds and payment instructions to a correspondent institution, which will then transmit the instructions and funds to the recipient institution directly or indirectly through other intermediary institutions. In some cases the sending institutions may not know the identity of the intermediary institution prior to initiating the transfer because more than one transfer route may be possible. Institutions may learn about each other's practices through any direct contractual or other relationships that do exist, through experience in effectuating wire transfers over time, through reference materials, or through information provided by the consumer. However, as open networks operate today, there is no global practice of communications by intermediary and recipient institutions that do not have direct relationships with a sending institution regarding fees deducted from the principal amount or charged to the recipient, exchange rates that are set by the intermediary or recipient institution, or compliance practices. Furthermore, even among contractual partners, communication practices could vary.

International ACH

More recently, some depository institutions and credit unions have begun to offer other methods for initiating remittance transfers, such as through the automated clearing house system (ACH), which provides for batched electronic fund transfers generally on a nightly basis. To reach a foreign recipient, transfers initiated through the ACH system must generally pass through a ''gateway operator'' in the United States, to an entity in the recipient country (such as a foreign financial institution) according to the terms of an agreement between the two; the transfers are then cleared and settled through a payment system in the recipient country. Individual financial institutions can serve as gateway operators, and through a set of branded services called FedGlobal ACH Payments, the Federal Reserve Banks also offer international ACH gateway services.[24]

Similar to the typical money transmitter services, the FedGlobal ACH Payments services have been designed for modest sized transfers. They have been marketed, at least in part, to serve migrants sending money to their countries of origin, and some of the FedGlobal services include transaction limits.[25] Unlike some money transmitters, FedGlobal does not offer transfers that can be picked up on the same day on which they are sent.[26]

Development of the FedGlobal system has occurred in the last decade. In 2001, the Federal Reserve Banks began offering cross-border ACH services to Canada. In 2004, the Federal Reserve Banks launched an interbank mechanism in partnership with the central bank of Mexico, later branded

[23] A correspondent relationship is generally one in which a financial institution has a contractual arrangement to hold deposits and provide services to another financial institution, which has limited access to certain financial markets.

[24] Board, *Report to the Congress on the Use of the Automated Clearinghouse System for Remittance Transfers to Foreign Countries* 4–6, 7, 9 (July 2011), available at: *http://www.federalreserve.gov/boarddocs/rptcongress/ACH_report_201107.pdf* (''*Board ACH Report*'').

[25] *Board ACH Report* at 4, 10; Fed. Reserve Bank Services, *FedGlobal® ACH Payments Service Origination Manual* 23, 48, available at: *http://www.frbservices.org/files/serviceofferings/pdf/fedach_global_service_orig_manual.pdf* (''*FedGlobal Originations Manual*'').

[26] *FedGlobal Originations Manual* at 11, 49.

''Directo a México,'' to carry out cross-border ACH transactions between the United States and Mexico. The Federal Reserve Banks now offer international ACH services to 35 countries in Europe, Canada, and Latin America through agreements with private-sector or government entities.[27] In each case, the Federal Reserve and the entity or entities with which the Federal Reserve has an agreement receive, process, and distribute ACH payments to financial institutions or recipients within the respective domestic payment systems, and in accordance with the terms of the FedGlobal ACH service.[28] Depending on the recipient country, institutions may offer customers account-to-account transfers, or allow customers to send transfers that may be picked up in cash at a participating institution or other payout location abroad.[29]

The Federal Reserve provides U.S. financial institutions access to its FedGlobal ACH Payments Service for a fee. Financial institutions, in turn, offer the product to their customers for a fee.[30] For the purposes of this discussion, international ACH transactions will be considered open network transactions. However, depending in part on the nature of the agreements between U.S. gateway operators and the foreign entities involved, international ACH transfers also share some characteristics of closed network transfers. For example, like wire transfers, international ACH transfers can involve payment systems in which a large number of sending and receiving institutions may participate, such that the sending institution and the receiving institution may have no direct relationship. Agreements formed by the gateway operator with foreign entities may, however, restrict some terms of the service and the participants in the system. For example, unlike institutions that receive wire transfers, institutions that receive FedGlobal ACH transfers are generally restricted, by the terms of the service, from deducting a fee from the principal amount (though the service may permit recipient institutions to charge certain other fees, such as fees for receiving a transfer).[31]

In some instances, the financial institution originating a FedGlobal ACH transfer can choose to conduct the foreign exchange, and send the transfer in the foreign currency. In other cases, however, transfers are sent in U.S. dollars and any applicable exchange rate is determined afterward, by the foreign ACH counterpart, either directly or through foreign depository institutions.[32] For such transfers, the terms of the FedGlobal service can determine how and when the applicable rate is set. For instance, for FedGlobal transfers to Mexico, the exchange rate is based on rate published by the Bank of Mexico on the date the transfer is credited to the beneficiary's account, minus a fixed spread.[33] Funds are deposited into the recipient's account or made available to be picked up, in accordance with a delivery schedule that is established by the rules applicable to each FedGlobal service, and the practice of receiving financial institutions.[34]

International ACH transfers sent through the FedGlobal service or other mechanisms likely account for a small share of the remittance transfers sent annually. In July 2011, the Board reported that about 410 financial institutions had enrolled in the FedGlobal ACH Payments Service, and that only about one-third of those initiated transfers in a typical month. The Board further reported that some enrolled institutions do not offer the service for consumer-initiated transfers; a large portion of the transfers sent through the FedGlobal's Canadian and European services were commercial payments; and the volume of transfers through the FedGlobal's Latin America service was negligible.[35]

The FedGlobal ACH services account for only about 20 percent of cross-border transactions that are processed through the U.S. ACH networks.[36] The Bureau believes that remittance transfers account for only a small portion of these additional transactions, which include not only outbound, consumer-initiated transfers, but also inbound transfers and transfers initiated by government and businesses.[37] Section 1073 of the Dodd-Frank Act directs the Board to work with the Federal Reserve Banks and the Department of the Treasury to expand the use of the ACH system and other payment mechanisms for remittance transfers to foreign countries.

Other Transfer Methods

Over the last decade, some depository institutions and credit unions have independently developed other remittance transfer products, or have directly partnered with or joined other networks of financial institutions or other payout locations. Often designed with a focus on modest-sized transfers, these products include account-to-account, account-to-cash, and cash-to-account products that may be offered through closed network systems and resemble those offered by money transmitters.[38] Services may be offered to non-account holders, as well as accountholders.

In addition, depository institutions, credit unions, money transmitters, and other entities, including brokerages, may directly, or in partnership with others, offer consumers other closed network, open network, and other models for sending money abroad. Some of these other models relying on prepaid and debit cards can be used to deliver funds to a person located abroad. For example, consumers may send funds to recipients abroad using prepaid cards. In one model, a consumer in the United States purchases a prepaid card, loads funds onto the card, and has it sent to a recipient in another country. The recipient may then use the prepaid card at an ATM or at a point of sale, at which time any currency exchange typically occurs. The consumer can reload the recipient's prepaid card through the provider's Web site.[39]

A consumer may also add a recipient in another country as an authorized user on his or her checking or savings account based in the United States, which could be denominated in dollars or in a foreign currency. A debit card linked to the consumer's account is provided to the recipient, who can use it to withdraw funds at an ATM or at a point of sale.[40]

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[27] *Board ACH Report* at 9, 14; Fed. Reserve Bank Services, *FedGlobal ACH Payments,* available at: *http://www.frbservices.org/serviceofferings/fedach/fedach_international_ach_payments.html* (''*FedGlobal ACH Payments''*).

[28] *FedGlobal Originations Manual.*

[29] *FedGlobal ACH Payments, http://www.frbservices.org/serviceofferings/fedach/fedach_international_ach_payments.html.*

[30] *See, e.g.,* Lenora Suki, *Competition and Remittances in Latin America: Lower Prices and More Efficient Markets,* Working Paper at 27 (Feb. 2007), available at: *http://www.oecd.org/dataoecd/31/52/38821426.pdf* (''*Competition and Remittances''*).

[31] *FedGlobal Originations Manual* at 13, 27, 37, 42, 51. For transfers to Europe, the terms of the service provide for reimbursement of any fees deducted from the principal.

[32] *Board ACH Report* at 10–11.

[33] *See Foreign Exchange Rate,* available at: *http://directoamexico.com/en/tipodecam.html.*

[34] *Board ACH Report* at 11; *FedGlobal Originations Manual* at 11, 13.

[35] *Board ACH Report* at 12 & n.53, 14–15.

[36] *Board ACH Report* at 5 & n.20, 9.

[37] *Board ACH Report* at 6.

[38] *See, e.g., Scorecard* at 7, 25–26.

[39] Depending on the business model, a prepaid card could also be reloaded at in-person locations or through other reload mechanisms.

[40] Consumers may also use informal methods to send money abroad, such as sending funds through the mail or with a friend, relative, or courier traveling to the destination country. *See, e.g., Bendixen Survey* 24 (estimating about 12% of Latin American migrants' transfers from the United States to their families are sent through mail, courier, or friends traveling abroad).

C. Consumer Choice, Pricing, and Disclosure

Research suggests that consumers choose a particular remittance transfer provider or product over another for a number of reasons. Significant factors include price, trust in the provider, security, reliability (*i.e.,* having specified funds available at the specified time), and convenience, particularly in markets with limited locations for recipients to pick up funds.[41] The relative importance of these factors can vary. For instance, some studies indicate that consumers are willing to pay higher prices to ensure that recipients receive the entire amount promised at the promised delivery time, and that consumers also tend to continue using a service provider once it proves reliable.[42] Though the available information is limited, similar factors may also affect some consumers' decisions about whether to send money at all, or how much money to send. For instance, one study showed that small decreases in fees charged led to significant increases in the number of transfers made by migrant consumers sending remittances to their home countries.[43]

In recent years, studies suggest that increasing competition and other factors have contributed to downward market pressure on prices in some remittance markets.[44] One study shows that the average price for sending $200 transfers to Latin America dropped by nearly half between 2001 and 2008, although prices have risen slightly since.[45] Furthermore, a recent survey of Latin American immigrants in the United States indicated that a majority were satisfied with the ease of use, inexpensiveness, and exchange rate and fee transparency of the companies that they used to send money, though fewer than half were satisfied with those companies' overall value.[46]

However, this information is limited, in both its scope and its applicability. For instance, not all remittance transfer markets are as competitive as the market for modest-sized transfers to Latin America. Furthermore, across markets, a number of concerns with regard to the clarity and reliability of information provided to consumers have been identified.[47]

First, pricing for remittance transfers is complex. The overall price of the transaction depends on three components (fees, taxes, and exchange rates). As a result, determining what amount of funds will actually be received and which provider offers the lowest price requires arithmetic that can be challenging for consumers.[48]

Second, pricing models can vary widely and change frequently, making it even more difficult for consumers to compare transfer options. Fees may be charged to senders up front or deducted from the principal amount. Because wholesale currency markets can fluctuate constantly over the course of the day, the exchange rates applied to individual remittance transfers may also change over the course of the day, depending on how frequently remittance transfer providers update their retail rates. Remittance transfer providers may also vary their exchange rates and fees charged based on a range of factors, such as the sending and receiving locations, and size and speed of the transfer.[49] Taxes may vary depending on the type of remittance transfer provider, the type of recipient institution, and various other factors.[50] These variations can also make it difficult for consumers to compare prices across providers or among remittance products.

Third, disclosure practices have varied in the absence of a consistent Federal regime. In the last decade, the number of states that require provision of post-transaction receipts stating fees and/or exchange rates has increased, and several class action lawsuits against large money transmitters also resulted in settlement agreements requiring disclosure of certain pricing information. However, the legal requirements vary and coverage is limited. Moreover, many of the State requirements do not require pre-transaction disclosures or disclosure of the amount of foreign currency to be received.[51]

Finally, the reliance of many remittance senders on foreign languages can further complicate consumers' ability to obtain and understand transaction information from various remittance transfer providers.[52]

Congressional hearings prior to enactment of the Dodd-Frank Act focused on the need for standardized and reliable pre-payment disclosures, suggesting that disclosure of the amount of money to be received by the designated recipient is particularly critical.[53] As discussed above, research suggests that consumers place a high value on reliability to ensure that the promised amount is made available to recipients.[54] In addition, the amount to

[41] Marianne A. Hilgert, Jeanne M. Hogarth, *et al.* ''Banking on Remittances: Extending Financial Services to Immigrants.'' 15 *Partners* No. 2 at 18 (2005); *Competition and Remittances* at 25; May 2011 Proposed Rule, 76 FR 29905 (summarizing results of consumer research conducted by the Board in connection with development of the proposed rule).

[42] *GAO Report* at 8; May 2011 Proposed Rule, 76 FR 29905. *See also* Appleseed, *The Fair Exchange: Improving the Market for International Remittances* 7 (Apr. 2007).

[43] Dean Yang, ''Migrant Remittances,'' *Journal of Economic Perspectives,* Vol. 25, No. 3 (Summer 2011) at 129–152.

[44] Manuel Orozco, Inter-American Dialogue, *International Flow of Remittances: Cost, Competition and Financial Access in Latin America and the Caribbean—Toward an Industry Scorecard* 4 (2006), available at: *www.iadb.org/news/docs/internationalflows.pdf* (Technology may also be a driving factor). *See also,* The World Bank, *Global Economic Prospects: Economic Implications of Remittances and Migration* 137–38 (2006), available at: *http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/11/14/000112742_20051114174928/Rendered/PDF/343200GEP02006.pdf.*

[45] *Scorecard* at 2, 13 (price includes upfront fee plus spread between exchange rate applied to the transfer and the wholesale exchange available at the time); *see also* Inter-American Development Bank, Multilateral Investment Fund, *Ten Years of Innovation in Remittances: Lessons Learned and Models for the Future* 8 (2010).

[46] *Scorecard* at 10.

[47] *See generally* S. Rep. 111–176, at 179–80 (2010); *Remittances: Regulation and Disclosure in a New Economic Environment,* Hearing Before House Subcomm. on Fin. Insts. and Cons. Credit, House Comm. on Fin. Servs., No. 111–39 (June 3, 2009) (''*2009 House Hearing''*); *Remittances: Access, Transparency, and Market Efficiency—A Progress Report,* Hearing Before House Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Technology, House Comm. on Fin. Servs., No. 110–32 (May 17, 2007) (''*2007 House Hearing''*).

[48] *See, e.g., Bureau 2011 Report* at 17–20; Testimony of Annette LoVoi, Appleseed, *2009 House Hearing* at 8–9, 13, 24; Testimony of Manuel Orozco, Inter-American Dialogue, *2009 House Hearing* at 61–63; Testimony of Mark A. Thompson, The Western Union Company, *2009 House Hearing* at 20; Testimony of Beatriz Ibarra, National Council of La Raza, *2007 House Hearing* at 41.

[49] *See, e.g., Bureau 2011 Report* at 13–14, 17–20; Testimony of Tom Haider, MoneyGram International, *2007 House Hearing* at 14.

[50] Okla. Stat. § 63–2–503.1j; Letter from Bobi Shields-Farrelly, United Nations Federal Credit Union, to Board of Governors of the Federal Reserve System, June 29, 2011.

[51] *Bureau 2011 Report* at 14–16; *see also* Testimony of Annette LoVoi, Appleseed, *2007 House Hearing* at 19; Testimony of Beatriz Ibarra, National Council of La Raza, *2007 House Hearing* at 42.

[52] *See generally,* Catalina Amuedo-Dorantes, Cynthia Bansak, and Susan Pozo, ''On the Remitting Patterns of Immigrants: Evidence from Mexican Survey Data,'' *Economic Review* (First Quarter 2005) 37–58 at 41, *CPSS Principles* at 3.

[53] *See, e.g.,* S. Rep. 111–176, at 179–80 (2010); Testimony of Annette LoVoi, Appleseed, *2009 House Hearing* at 8–9, 13, 24; Testimony of Mark A. Thompson, The Western Union Company, *2009 House Hearing* at 20; Testimony of Tom Haider, MoneyGram, *2007 House Hearing* at 9; Testimony of Annette LoVoi, Appleseed, *2007 House Hearing* at 3, 49; Testimony of James C. Orr, Microfinance International Corporation, *2007 House Hearing* at 59.

[54] *See also, e.g.,* Testimony of Annette LoVoi, Appleseed, *2009 House Hearing* at 8 (''[C]onsumers value, above all, understanding the amount of money that will be delivered to their family member upon pick-up.''); Testimony of Annette LoVoi, Appleseed, *2007 House Hearing* at 3, 21

Continued

be received can facilitate cost comparisons because it factors in both the exchange rate used and charges deducted from the principal amount to be transferred.[55] Consumer advocates also argued that requiring error resolution mechanisms where funds are not received as expected is also important.[56] Industry advocates emphasized the need for consistency, arguing that the current patchwork of regulatory approaches leads to unnecessary administrative costs that make remittances more expensive for consumers.[57]

III. Summary of Statute and Rulemaking Process

A. Overview of the Statute

The Dodd-Frank Act creates a comprehensive system of consumer protections across various types of remittance transfers. The statute: (i) Mandates disclosure of the exchange rate and the amount to be received, among other things, by the remittance transfer provider, prior to and at the time of payment by the consumer for the transfer; (ii) provides for Federal rights regarding consumer cancellation and refund policies; (iii) requires remittance transfer providers to investigate disputes and remedy errors regarding remittance transfers; and (iv) establishes standards for the liability of remittance transfer providers for the acts of their agents and authorized delegates. The statute also contains other provisions to encourage provision and use of low-cost remittance transfers, including directing the Bureau and other agencies to assist in the execution of a national financial empowerment strategy, as it relates to remittances.

The requirements apply broadly. Congress defined ''remittance transfer'' to include all electronic transfers of funds to designated recipients located in foreign countries that are ''initiated by a remittance transfer provider'' upon the request of consumers in the United States; only very small dollar transfers are excepted by the statute. The statute thus expands the scope of the EFTA, which has historically focused on electronic fund transfers involving ''accounts'' held at financial institutions, which include depository institutions, credit unions, and other companies that directly or indirectly hold checking, savings, or other assets accounts. The remittance transfer provisions, in contrast, apply regardless of whether the consumer holds an account with the remittance transfer provider or whether the remittance transfer is also an ''electronic fund transfer'' as defined under the EFTA.

Congress also provided a specific accommodation for depository institutions and credit unions, in apparent recognition of the fact they would need time to improve communications with foreign financial institutions that conduct currency exchanges or impose fees on certain open network transactions. The statute creates a temporary exception to permit insured depository institutions and credit unions to provide ''reasonably accurate estimates'' of the amount to be received where the remittance transfer provider is ''unable to know [the amount], for reasons beyond its control'' at the time that the sender requests a transfer to be conducted through an account held with the provider. The exception sunsets five years from the date of enactment of the Dodd-Frank Act (*i.e.,* July 21, 2015), but the statute authorizes the Bureau to extend that date for no more than five years if it determines that termination of the exception would negatively affect the ability of depository institutions and credit unions to send remittances to locations in foreign countries.

Thus, once the temporary exception expires, the statute will generally require all remittance transfer providers to disclose the actual amounts to be received by designated recipients. The statute creates a permanent exception authorizing the Bureau to issue rules to permit use of reasonably accurate estimates where the Bureau determines that a recipient nations' laws or the methods by which transfers are made to a recipient nation do not permit remittance transfer providers to know the amount of currency to be received.

The statute further mandates that all remittance transfer providers investigate and remedy errors that are reported by the sender within 180 days of the promised date of delivery, specifically including situations in which the amount of currency designated in the disclosures was not in fact made available to the designated recipient in the foreign country. Under the statute, senders may designate whether funds should be refunded to them or made available to the designated recipient at no additional cost, or any other remedy determined by the Bureau. The statute also directs the Bureau to issue rules concerning appropriate cancellation and refund policies, as well as appropriate standards or conditions of liability for providers with regard to the acts of agents and authorized delegates.

B. Outreach and Consumer Testing

Both the Board and the Bureau have conducted extensive outreach and research on remittances issues in preparation for the rulemaking process. Starting in fall 2010, Board staff conducted outreach with various parties regarding remittances and implementation of the statute. Board staff met with representatives from a variety of money transmitters, financial institutions, industry trade associations, consumer advocates, and other interested parties to discuss current remittance transfer business models, consumer disclosure and error resolution practices, operational issues, and specific provisions of the statute.[58]

In addition, the Board engaged a testing consultant, ICF Macro (Macro), to conduct focus groups and one-on-one interviews regarding remittance transfers. Participants were all consumers who had made at least one remittance transfer and represented a range of ages, education levels, amount of time lived in the United States, and country or region to which remittances were sent. In December 2010, Macro conducted a series of six focus groups with eight to ten participants each, to explore current remittance provider practices and attitudes about remittance disclosures. Three focus groups were held in the Washington, DC metro area (specifically Bethesda, Maryland), and three were held in Los Angeles, California. At each location, two of the three focus groups were conducted in English, and the third in Spanish. In early 2011, Macro conducted a series of one-on-one interviews in New York City, Atlanta, Georgia, and the Washington, DC metro area (Bethesda, Maryland), with nine to ten participants in each city. During the interviews, participants were given scenarios in which they completed hypothetical remittance transfers and received one or

(''[P]redictability of transfer is of paramount importance. The senders want to know how much money will be received in a foreign country.''); Testimony of Tom Haider, MoneyGram, *2007 House Hearing* at 9 (describing the amount of local currency to be received as ''most important to the consumer'' among other items disclosed).

[55] Testimony of Mark A. Thompson, The Western Union Company, *2009 House Hearing* at 20; Testimony of James C. Orr, Microfinance International Corporation, *2007 House Hearing* at 59.

[56] Testimony of Annette LoVoi, Appleseed, *2009 House Hearing* at 9, 48, 49; Testimony of Annette LoVoi, Appleseed, *2007 House Hearing* at 51; Testimony of Beatriz Ibarra, National Council of La Raza, *2007 House Hearing* at 5, 43, 44; *see also* S. Rep. 111–176, at 179–80 (2010).

[57] Testimony of Tom Haider, MoneyGram, *2007 House Hearing* at 8, 32–33; *see also* Testimony of Mark A. Thompson, The Western Union, *2007 House Hearing* at 11, 67 (arguing that legislation should not create an unlevel playing field between different types of providers).

[58] Summaries of these meetings are available on the Board's Web site at: *http://www.federalreserve.gov/newsevents/reform_consumer.htm.*

more disclosure forms. For each scenario, participants were asked specific questions to test their understanding of the information presented in the disclosure forms.

The Bureau has also conducted additional outreach and research on remittances issues. Section 1073 of the Dodd-Frank Act required the Bureau to provide a report regarding the feasibility of and impediments to the use of remittance history in the calculation of a consumer's credit score, and recommendations on the manner in which maximum transparency and disclosure to consumers of exchange rates for remittance transfers may be accomplished.[59] The Bureau has also conducted further outreach on remittance transfers with representatives from industry and consumer groups after closing of the comment period on the Board proposal and transfer of the rulewriting authorities.[60] The Bureau also held multiple meetings with appropriate Federal agencies to consult with them regarding the May 2011 Proposed Rule and the January 2012 Proposed Rule, as discussed further below.

C. Summary of the Board's Proposal

The Board published the May 2011 Proposed Rule to amend Regulation E and the official staff commentary to implement the Dodd-Frank Act remittance transfer provisions.[61] Under the May 2011 Proposed Rule, a remittance transfer provider was generally required to provide a written pre-payment disclosure to a ''sender,'' as defined in the statute and the proposed regulation, containing information about the specific transfer, such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. The remittance transfer provider was also generally required to provide a written receipt at the time the sender pays for the remittance transfer. The receipt would have included the information provided on the pre-payment disclosure, as well as the date of availability, the recipient's contact information, and information regarding the sender's error resolution and cancellation rights. Alternatively, the May 2011 Proposed Rule permitted remittance transfer providers to provide senders a single written pre-payment disclosure containing all of the information required on the receipt. Consistent with the statute, the May 2011 Proposed Rule would have required that these disclosures generally be provided in English and in each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services at a particular office.[62]

The May 2011 Proposed Rule also contained provisions to implement two statutory exceptions to permit disclosure of reasonably accurate estimates of the amount of currency to be received. The first proposed exception would have implemented the temporary exception for insured depository institutions and credit unions to estimate exchange rates or fees that are determined by persons with which the financial institution has no correspondent banking relationship. The proposed rule stated that the exception would expire on July 21, 2015, as specified in the statute. The second proposed exception defined the circumstances in which providers could use estimates because the amount of currency to be received could not be determined due to: (i) The laws of a recipient country; or (ii) the method by which transactions are made in the recipient country.

Additionally, the May 2011 Proposed Rule included error resolution standards, including recordkeeping standards, similar to those that currently apply to a financial institution under Regulation E with respect to errors involving electronic fund transfers. The proposal also would have provided a one business day period for consumers to cancel their transactions and obtain a full refund. Finally, the May 2011 Proposed Rule set forth two alternative approaches for implementing the standards of liability for remittance transfer providers that act through an agent. Under the first proposed alternative, a remittance transfer provider would have been liable for violations by an agent when such agent acts for the provider. Under the second proposed alternative, a remittance transfer provider would have been liable for violations by an agent acting for the provider, unless the provider established and maintained policies and procedures for agent compliance, including appropriate oversight measures, and the provider corrected any violation reported by a particular consumer, to the extent appropriate.

D. Overview of Public Comments

The Board received more than 60 comment letters on the May 2011 Proposed Rule. These comment letters were received by the Board and subsequently transferred to the Bureau. The majority of the comment letters were submitted by industry commenters, including banks, credit unions, money transmitters, and industry trade associations. In addition, letters were submitted by individual consumers and academics, consumer groups, State banking and money transmitter regulators, two Federal Reserve Banks, and two members of Congress.[63]

Many industry commenters, particularly financial institution commenters, argued that the scope of the May 2011 Proposed Rule was overbroad and would have unintended consequences. Many commenters asserted that the regulation should not apply to transfers where the originating institution does not control the transfer from end to end, such as international wire transfers and international ACH transfers. Commenters stated that compliance with the disclosure requirements, particularly the disclosure of fees charged by intermediary institutions handling the transfer and taxes levied in the recipient country, would be difficult or impossible for open network transfers. Commenters suggested that subjecting open network transfers to these requirements would cause financial institutions to withdraw from the market or restrict where such transfers may be sent, which would either decrease consumer access or increase costs to consumers. Commenters asserted that the Bureau should extend the temporary exception allowing use of estimates to 2020 or that the Bureau had and should use exception authority to make the exemption provision permanent. Several commenters also asserted that remittances to businesses and large-value consumer transactions should be exempted from the rule.

Consumer group commenters, on the other hand, supported the May 2011 Proposed Rule as faithfully implementing the statutory mandates, asserting that Congress had specifically intended the disclosure regime to change business practices by depository

[59] *See Bureau 2011 Report.* The Bureau is currently engaged in quantitative research to explore further the potential relationships between consumers' remittance histories and credit scores.

[60] Summaries of these meetings are available at: *http://www.regulations.gov.*

[61] 76 FR 29902 (May 23, 2011).

[62] Pursuant to EFTA section 919(a)(6), the Board in the months prior to issuing the proposal studied whether requiring storefront and Internet notices would facilitate the ability of consumers to compare prices and understand the types and amounts of fees or costs imposed on remittance transfers. Based on the results of this analysis, the Board decided not to propose rules that would require posting of such notices.

[63] While some commenters addressed their comments to the Board, the Bureau is assuming that all comments regarding this rulemaking are directed to the Bureau.

institutions and credit unions that allow undisclosed exchange rates and fees. The commenters urged the Bureau not to extend the sunset date for the temporary exception allowing depository institutions and credit unions to use estimates under certain circumstances, and to publish a list of countries in which the laws or transfer methods prevent remittance transfer providers from determining the amount to be provided in order to prevent the exception from being abused. Furthermore, consumer group commenters asserted that the required disclosures would provide information that consumers currently lack about the foreign exchange rate, fees, and the date of delivery associated with a transfer. However, the commenters criticized the proposed disclosures as providing inadequate information regarding error resolution rights and failing to make clear when pricing information was estimated. They also urged the Bureau to reject combined disclosure forms because they did not provide clear proof that a contract had been formed and payment rendered.

Regarding the proposed foreign language disclosure requirements, industry commenters recommended that the rule provide limits on the number or type of languages in which disclosures must be provided. These commenters stated that the May 2011 Proposed Rule would provide a disincentive for remittance transfer providers to provide a wide range of foreign language services to customers. Consumer group commenters and a Congressional commenter believed that the proposed foreign language provisions were appropriate and that the final rule should ensure that non- and limited-English speaking consumers have access to meaningful remittance transaction disclosures.

Industry commenters also generally objected to proposed error resolution provisions that place liability on remittance transfer providers for errors caused by parties other than the provider. These commenters believed that these provisions inappropriately shifted liability to remittance transfer providers that did not err or control the circumstances that caused the error. Some commenters suggested that remittance transfer providers may not have the ability to recover funds from third parties involved in the transfer and that the financial impact of losses experienced by the provider as a result of errors by another party could be significant enough for remittance transfer providers to exit the market. Furthermore, industry commenters generally did not agree with the proposed refund and cancellation provisions, arguing, among other things, that the proposed cancellation period was too long. Consumer group commenters generally supported the proposed error resolution and refund and cancellation provisions, though some consumer group commenters also suggested that the cancellation period could be shortened.

Finally, with respect to agent liability, consumer group commenters, State regulator commenters, and a Federal Reserve Bank commenter supported proposed Alternative A under the May 2011 Proposed Rule. This alternative would make the remittance transfer provider liable for violations by an agent, when such agent acts for the provider. Industry commenters, on the other hand, supported proposed Alternative B. This alternative would impose liability on a remittance transfer provider for violations by an agent acting for the provider, unless the provider established and maintained policies and procedures for agent compliance, including appropriate oversight measures, and the provider corrected any violation, to the extent appropriate.

IV. Summary of Final Rule and Concurrent Proposal

A. Introduction

As described in more detail below, the final rule implements the Dodd-Frank Act by largely adopting the proposal as published in May 2011, with several amendments and clarifications based on commenters' suggestions and further analysis by the Bureau. In the concurrent proposal, the Bureau is seeking public comment and data that would permit the Bureau to develop clearer and more appropriately tailored standards for: (i) Setting a specific numeric threshold as a safe harbor for determining which providers of remittance services are excluded from compliance with the new requirements because they do not provide remittance transfers ''in the normal course of business''; and (ii) applying the disclosure and cancellation requirements where senders request one or more transfers several days in advance of the transfer date.

The Bureau takes seriously concerns raised by commenters, particularly implementation challenges in the open network context.[64] The Bureau believes that a number of providers likely do not currently possess or have easy access to the information needed to satisfy the new disclosure requirements for every transaction. For these providers, as well as their operating partners, compliance may require modification of current systems, protocols, and contracts. Nevertheless, the Bureau believes that it would be premature to make a determination about extending the temporary exception allowing depository institutions and credit unions to estimate disclosure information. The statute specifies a very narrow role for the Bureau by according it discretion only to extend the exception for a limited time period upon a specific finding regarding the ability of depository institutions and credit unions to send remittance transfers. Forecasting how the market will evolve in response to the final rule is difficult prior to the rule's release and more than three years in advance of the sunset date set by the statute. It is not clear how providers, and in particular small companies and companies that send remittance transfers only infrequently, may react to the new requirements and potential implementation costs. Nor is it clear what new models and systems may be developed to enable these and other companies to comply more easily with the statutory and regulatory requirements. The remittances market has already undergone significant evolution over the last two decades, in response to increasing transaction flows, new technology, new business models, and other factors. New products and partnerships have been developing, and may be further spurred by implementation of the Dodd-Frank Act requirements.

The final rule therefore generally tracks the language and structure of the Dodd-Frank Act and the May 2011 Proposed Rule, with some additional tailoring to provide guidance on complying with the requirements in particular circumstances such as transactions conducted by mobile applications or text message and transactions in which a sender preauthorizes remittance transfers to recur at substantially regular intervals. Going forward, the Bureau expects to develop a small business compliance guide, engage in a dialogue with both industry and consumer groups to monitor implementation issues, and consider what data will be useful to monitor the effect of the new regime on consumer access and market competition over time.

[64] The analyses below under section 1022 of the Dodd-Frank Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act detail the Bureau's attempts to assess various categories of benefits, costs, and impacts upon various categories of stakeholders.

B. Summary of the Final Rule

The final rule incorporates the definitions of ''remittance transfer,'' ''sender,'' ''remittance transfer provider,'' and ''designated recipient'' generally as set forth in the statute. As in the May 2011 Proposed Rule, remittance transfer is defined broadly to include international wire and ACH transfers, consistent with the statutory language. In response to commenters' comments, the final rule also provides guidance for assessing whether a company qualifies as a ''remittance transfer provider'' under the statute by providing remittance transfers in the ''normal course of its business.'' Further guidance is also provided to describe the circumstances in which loading funds to a prepaid card may be considered a remittance transfer.

Consistent with the statute and the May 2011 Proposed Rule, the final rule requires a remittance transfer provider to provide a written pre-payment disclosure to a sender containing information about the specific transfer, such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. Under the final rule, the remittance transfer provider is also generally required to provide a written receipt when payment is made. The receipt must include the information provided on the pre-payment disclosure, as well as additional information, such as the date of availability, the recipient's contact information, and information regarding the sender's error resolution and cancellation rights. Alternatively, the final rule permits remittance transfer providers to give senders a single written disclosure prior to payment containing all of the information required on the receipt, so long as the provider also provides proof of payment such as a stamp on the earlier document.

The final rule generally requires that these disclosures be provided in English and in each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services at a particular office. Language in the model disclosure forms has been modified slightly to clarify and provide additional detail that may be useful to consumers, as well as to reflect substantive changes in the final rule regarding the period to exercise cancellation rights. The final rule also contains additional guidance on how the required disclosures may be provided when the remittance transfer is made using text message or a mobile application. Moreover, in light of the timing and disclosure challenges for preauthorized remittance transfers, which are authorized in advance to recur at substantially regular intervals, the final rule sets forth alternative disclosure requirements for such transfers. In particular, while the disclosures requirements for the first transfer in a preauthorized remittance transfer are the same as for single remittance transfers, for subsequent transfers in a series of preauthorized remittance transfers, a provider must provide a pre-payment disclosure within a reasonable time prior to the scheduled date of the transfer. The receipt for each subsequent transfer generally must be provided no later than one business day after the date on which the transfer is made.

The final rule also implements the two statutory exceptions that permit a remittance transfer provider to disclose an estimate of the amount of currency to be received, rather than the actual amount. As discussed above, the final rule provides that the first exception, which applies to insured depository institutions and insured credit unions that cannot determine certain disclosed amounts for reasons beyond their control, expires on July 21, 2015. The second exception applies when the provider cannot determine certain amounts to be disclosed because of: (i) The laws of a recipient country; or (ii) the method by which transactions are made in the recipient country. The Bureau expects to issue a safe harbor list of countries to which the second exception applies prior to the effective date of the final rule and to update it periodically thereafter to facilitate compliance and enforcement. The final rule also provides clarification on use of particular estimate methodologies.

Consistent with the May 2011 Proposed Rule, the error resolution procedures for remittance transfers set forth in the final rule are similar to those that currently apply to financial institutions under Regulation E with respect to errors involving electronic fund transfers. The Bureau is adopting certain modifications to the proposed error resolution provisions in response to commenters' concerns, including defining additional circumstances that would not be considered errors. The final rule also provides senders specified cancellation and refund rights. In response to commenters' concerns, the Bureau is reducing the cancellation period from one business day to 30 minutes. Furthermore, the Bureau is adopting a different cancellation and refund procedure for any remittance transfer scheduled by the sender at least three business days before the date of the transfer. For these transfers scheduled in advance, senders may generally cancel the transfer as long as the request to cancel is received by the provider at least three business days before the scheduled date of the remittance transfer. Finally, the Bureau is adopting a standard of liability under which a remittance transfer provider will be liable for violations by an agent, when such agent acts for the provider.

C. Summary of Concurrent Proposal

The Bureau is also issuing a concurrent proposal (January 2012 Proposed Rule), published elsewhere in today's **Federal Register**. This proposal has two parts. First, it seeks comment on the addition of a possible safe harbor to the definition of the term ''remittance transfer provider'' to make it easier to determine when certain companies are excluded from the statutory scheme because they do not provide remittance transfers in ''the normal course of business.'' Second, it seeks comment on a possible safe harbor and other refinements to disclosure and cancellation requirements for certain transfers scheduled in advance, including ''preauthorized'' remittance transfers that are scheduled in advance to recur at substantially regular intervals. The Bureau believes that further tailoring of the final rule may be warranted both to reduce compliance burden for providers and to increase the benefits of the disclosure and cancellation requirements to consumers. The Bureau believes that these issues would benefit from further public comment.

Regarding the first part of the January 2012 Proposed Rule, the Bureau is soliciting comment on a safe harbor for determining whether a person is providing remittance transfers in the ''normal course of business,'' and thus is a ''remittance transfer provider.'' Under the proposed safe harbor, if a person makes no more than 25 remittance transfers in the previous calendar year, the person would not be deemed to be providing remittance transfers in the normal course of business for the current calendar year if it provides no more than 25 remittance transfers in the current calendar year. The Bureau is soliciting comment on whether the threshold number for the safe harbor should be higher or lower than 25 transfers, such as 10 or 50 transfers.

Regarding the second part of the January 2012 Proposed Rule, the Bureau is also seeking comment on a possible safe harbor and other refinements to disclosure and cancellation requirements for certain transfers scheduled in advance, including

preauthorized remittance transfers. Specifically, the proposal solicits comment whether use of estimates should be permitted in the pre-payment disclosure and receipt given at the time the transfer is requested and authorized in the following two circumstances: (i) A consumer schedules a one-time transfer or the first in a series of preauthorized transfers to occur more than 10 days after the transfer is authorized; or (ii) a consumer enters into an agreement for preauthorized remittance transfers where the amount of the transfers can vary and the consumer does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. The January 2012 Proposed Rule is also requesting comment on whether a provider that uses estimates in the pre-payment disclosure and receipt given at the time of the transfer is requested and authorized in the two situations described above should be required to provide a second receipt disclosure with accurate information within a reasonable time prior to the scheduled date of the transfer.

The January 2012 Proposal Rule also solicits comment on possible refinements to the disclosure rules applicable to subsequent preauthorized remittance transfers. Specifically, the Bureau is soliciting comment on two alternative approaches to the disclosures rules for subsequent preauthorized remittance transfers: (i) Whether the Bureau should retain the requirement that a provider give a pre-payment disclosure for each subsequent transfer, and should provide a safe harbor interpreting the ''within a reasonable time'' standard for providing this disclosure; or (ii) whether the Bureau instead should eliminate the requirement to provide a pre-payment disclosure for each subsequent transfer.

The January 2012 Proposed Rule also seeks comment on possible changes to the cancellation requirements for certain remittance transfers that a sender schedules in advance, including preauthorized remittance transfers. The January 2012 Proposed Rule solicits comment on whether the three-business-day deadline to cancel such remittances transfers in the final rule should be changed to be earlier or later than three business days. Furthermore, the January 2012 Proposed Rule solicits comment on three issues related to the disclosure of the deadline to cancel as set forth in the final rule: (i) Whether the three-business-day deadline to cancel transfers scheduled in advance should be disclosed more clearly to consumers, such as requiring a provider to disclose in the receipt the specific date the deadline to cancel will expire; (ii) whether a provider should be allowed on a receipt to describe both the three-business-day and 30 minute deadline-to-cancel time frames and either describe to which transfers each deadline to cancel is applicable, or alternatively, use a check box or other method to indicate which deadline is applicable to the transfer; and (iii) whether the disclosure of the deadline to cancel should be disclosed in the pre-payment disclosure for each subsequent transfer, rather than in the receipt given for each subsequent transfer.

V. Legal Authority

Section 1073 of the Dodd-Frank Act creates a new Section 919 of the EFTA and requires remittance transfer providers to provide disclosures to senders of remittance transfers, pursuant to rules prescribed by the Bureau. In particular, providers must give senders a written pre-payment disclosure containing specified information applicable to the sender's remittance transfer. The remittance transfer provider must also provide a written receipt that includes the information provided on the pre-payment disclosure, as well as additional specified information. EFTA section 919(a).

In addition, EFTA section 919 provides for specific error resolution procedures. The Act directs the Bureau to promulgate error resolution standards and rules regarding appropriate cancellation and refund policies. EFTA section 919(d). Finally, EFTA section 919 requires the Bureau to establish standards of liability for remittance transfer providers, including those that act through agents. EFTA section 919(f). Except as described below, the remittance transfer rule is finalized under the authority provided to the Bureau in EFTA section 919, and as more specifically described in this **SUPPLEMENTARY INFORMATION**.

In addition to the statutory mandates set forth in the Dodd-Frank Act, EFTA section 904(a) authorizes the Bureau to prescribe regulations necessary to carry out the purposes of the title. The express purposes of the EFTA, as amended by the Dodd-Frank Act, are to establish ''the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems'' and to provide ''individual consumer rights.'' EFTA section 902(b). EFTA section 904(c) further provides that regulations prescribed by the Bureau may contain any classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of electronic fund transfers or remittance transfers that the Bureau deems necessary or proper to effectuate the purposes of the title, to prevent circumvention or evasion, or to facilitate compliance.

As described in more detail in the **SUPPLEMENTARY INFORMATION**, the following provisions are adopted in part or in whole pursuant to the Bureau's authority in EFTA sections 904(a) and 904(c) include: §§ 1005.30(e)(2)(ii), 1005.31(a)(2), (a)(5), (b)(1)(i), (b)(1)(ii), (b)(1)(iii), (b)(1)(iv), (b)(1)(v), (b)(1)(vi), (b)(2)(i), (b)(3), (e)(2), (g)(1)(ii), (g)(2), 1005.32(a) and (b), 1005.33(c)(1), and 1005.36. [65] The proposed Model Forms in Appendix A are also adopted pursuant to EFTA section 904(a).[66]

VI. Section-by-Section Analysis

Section 1005.1 Authority and Purpose

Section 1005.1(b) addresses the purpose of Regulation E, which is to carry out the purpose of the EFTA. The Dodd-Frank Act revised EFTA section 902(b) to state in part that the purpose of the EFTA is to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund *and remittance* transfer systems. * * * '' (emphasis added). Accordingly, the final rule makes a technical amendment to § 1005.1(b) to incorporate this revision. Furthermore, because remittance transfers can be offered by persons other than financial institutions, the final rule also makes a technical amendment to § 1005.1(b) to include a reference to other persons.

Section 1005.2 Definitions

Section 1005.2 generally sets forth the definitions that apply to Regulation E. One commenter suggested that the Bureau clarify the applicability of the definitions contained in § 1005.2, which have been placed in a new subpart A, to the remittance provisions in subpart B. Section 1005.2 is prefaced with: ''For purposes of this part. * * *.'' ''This part'' refers to the entirety of part 1005, including all subparts. Therefore, except

[65] Throughout the **SUPPLEMENTARY INFORMATION**, the Bureau is citing its authority under both EFTA section 904(a) and EFTA section 904(c) for purposes of simplicity. The Bureau notes, however, that with respect to some of the provisions referenced in the text, use of only one of the authorities may be sufficient.

[66] The consultation and economic impact analysis requirement previously contained in EFTA sections 904(a)(1)–(4) were not amended to apply to the Bureau. Nevertheless, the Bureau consulted with the appropriate prudential regulators and other Federal agencies and considered the potential benefits, costs, and impacts of the rule to consumers and covered persons as required under section 1022 of the Dodd-Frank Act, and through these processes would have satisfied the requirements of these EFTA provisions if they had been applicable.

as modified or limited by subpart B (which modifications or limitations apply only to subpart B), the definitions in § 1005.2 apply to all of Regulation E, including subpart B. The final rule adopts comment 30–1 to clarify the applicability of the definitions contained in § 1005.2 to subpart B. The final rule also amends § 1005.2 to cross reference subpart B to make clear that the definitions in § 1005.2 apply to subpart B unless otherwise provided in subpart B.

Section 1005.3 Coverage

Currently, § 1005.3(a) states that Regulation E generally applies to financial institutions. Section 1005.3(a) is revised to state that the requirements of subpart B apply to remittance transfer providers. The revision reflects the fact that the scope of the Dodd-Frank Act's remittance transfer provisions is not limited to financial institutions. Specifically, EFTA section 919(g)(3) defines a remittance transfer provider as ''*any person* that provides remittance transfers for a consumer in the normal course of its business, whether or not the consumer holds an account with such person'' (emphasis added). Thus, subpart B applies to non-financial institutions, such as non-bank money transmitters, that send remittance transfers. This revision is adopted as proposed.

Section 1005.30 Remittance Transfer Definitions

EFTA section 919(g) sets forth several definitions applicable to the remittance transfer provisions in subpart B. As discussed in more detail below, many commenters requested clarification on specific definitions, and also urged the Bureau to consider a number of revisions and exemptions to limit the application of the rule to different types of transactions. Final § 1005.30 incorporates the statutory definitions generally as proposed, with additional interpretations and clarifications in response to specific concerns raised by commenters. The final rule revises the definition of ''business day'' in § 1005.30(b) to more closely track the definition of ''business day'' in § 1005.2(d) of Regulation E. In addition, the final rule adds a new definition of ''preauthorized remittance transfer.''

30(a) Agent

Proposed § 205.30(a) stated that an ''agent'' means an agent, authorized delegate, or person affiliated with a remittance transfer provider under State or other applicable law, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider. The final rule adopts the definition as proposed in renumbered § 1005.30(a).

EFTA section 919 does not use consistent terminology concerning agents of remittance transfer providers. For example, EFTA section 919(f)(1) uses the phrase ''agent, authorized delegate, or person affiliated with a remittance transfer provider,'' when that person ''acts for that remittance transfer provider,'' while other provisions use the phrase ''agent or authorized delegate'' (EFTA section 919(f)(2)) or simply ''agent'' (EFTA section 919(b)). The Bureau does not believe that these statutory wording differences are intended to establish different standards across the rule. Therefore, the rule generally refers to ''agents,'' as defined in § 1005.30(a), to provide consistency across the rule.

Commenters suggested that the Bureau provide further clarity on the definition of ''agent,'' including clarifying that financial institutions' relationships with intermediary and correspondent institutions are not agency relationships unless an agreement creates such a relationship as a matter of law. The final rule does not contain these suggested clarifications. The Bureau believes that because the concept of agency has historically been defined by common law, it is appropriate for the definition to defer to applicable law regarding agents, including with respect to what creates or constitutes an agency relationship.

30(b) Business Day

Several provisions in the final rule use the term ''business day.'' *See, e.g.,* §§ 1005.31(e)(2) and 1005.33(c)(1). Because the definition of ''business day'' in § 1005.2(d) of Regulation E applies only to financial institutions and includes inapt commentary, the Board proposed an alternative definition of ''business day'' applicable to remittance transfer providers. The proposed rule stated that ''business day'' means any day on which a remittance transfer provider accepts funds for sending remittance transfers.

Commenters generally objected to the proposed definition. In particular, financial institution commenters expressed concern that the date on which an institution ''accepts funds'' is unclear, because it could be interpreted either as the date on which funds are deposited into an account, or when the institution accepts a sender's order to transfer funds. Other commenters suggested replacing the proposed definition with a definition closer to the definition of ''business day'' in § 1005.2(d) Regulation E. Upon further review, and for greater consistency among definitions, the Bureau is adopting a revised ''business day'' definition in renumbered § 1005.30(b) as explained in related commentary that more closely tracks the general definition of ''business day'' in § 1005.2(d), but that is tailored to the particular aspects of remittance transfers.

Specifically, § 1005.30(b) states that ''business day'' means any day on which the offices of a remittance transfer provider are open to the public for carrying on substantially all business functions. Similar to proposed comment 30(b)–1, final comment 30(b)–1 clarifies that with respect to subpart B, a business day includes the entire 24-hour period ending at midnight, and a notice given under any section of subpart B is effective even if given outside of normal business hours. However, comment 30(b)–1 states that a remittance transfer provider is not required under subpart B to make telephone lines available on a 24-hour basis.

Comment 30(b)–2 explains that ''substantially all business functions'' include both the public and the back-office operations of the provider. For example, if the offices of a provider are open on Saturdays for customers to request remittance transfers, but not for performing internal functions (such as investigating errors), then Saturday is not a business day for that provider. In this case, Saturday does not count toward the business-day standard for subpart B for purposes of determining the number of days for resolving errors, processing refunds, etc.

Comment 30(b)–3 clarifies that a provider may determine, at its election, whether an abbreviated day is a business day. For example, if a provider engages in substantially all business functions until noon on Saturdays instead of its usual 3 p.m. closing, it may consider Saturday a business day. Finally, comment 30(b)–4 states that if a provider makes a telephone line available on Sundays for cancelling the transfer, but performs no other business functions, Sunday is not a business day under the ''substantially all business functions'' standard.

30(c) Designated Recipient

EFTA section 919(g)(1) provides that ''designated recipient'' means ''any person located in a foreign country and identified by the sender as the authorized recipient of a remittance transfer to be made by a remittance transfer provider, except that a designated recipient shall not be deemed to be a consumer for purposes of [the EFTA].'' Proposed § 205.30(c)

implemented EFTA section 919(g)(1), with several edits for clarity. First, the Board proposal noted that a remittance transfer provider will generally only know the location where funds are to be sent, rather than where a designated recipient is physically located. For instance, although the sender may indicate that funds are to be sent to the recipient in Mexico City, the recipient could actually be in the United States at the time of the transfer. Thus, the Board stated that the statutory reference to a ''person located in a foreign country'' should be read with a view to the location where funds are to be sent. Additionally, the statute references a remittance transfer ''to be made by a remittance transfer provider.'' As discussed below, the definition of ''remittance transfer'' requires that it be sent by a remittance transfer provider, so this language is unnecessary. Accordingly, proposed § 205.30(c) stated that a designated recipient is any person specified by the sender as an authorized recipient of a remittance transfer to be received at a location in a foreign country. The final rule adopts the proposed rule as proposed in renumbered § 1005.30(c), but with additional explanatory commentary to address issues raised by commenters.

Proposed comment 30(c)–1 stated that a designated recipient can be either a natural person or a business. Several commenters argued that transfers to entities other than natural persons should be excluded, so that the rule would cover only consumer-to-consumer transfers. However, the statute clearly anticipates covering consumer-to-business transfers, as it defines ''designated recipient'' to include transfers to ''persons,'' and does not limit its application to consumer recipients. *See* 15 U.S.C. 1693p(g)(1). The EFTA defines ''consumer'' to mean a natural person, but does not define the term ''person.'' Nonetheless, the EFTA uses the term ''person'' in many provisions, and the context of how the term ''person'' is used in those EFTA provisions indicates that it includes entities that are natural persons, as well as organizations. For example, the EFTA defines the term ''financial institution'' to mean ''a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any *other* person who, directly or indirectly, holds an account belonging to a consumer.'' (emphasis added). As a result, Regulation E has long defined ''person'' to mean a natural person or an organization. *See* § 1005.2(j). The Bureau believes that the statute by using the term ''person'' intended to cover remittance transfers sent by consumers not just to family members, but also directly to businesses abroad to pay tuition, mortgage, medical, utilities, or other bills or to fulfill other obligations. Accordingly, the final rule does not generally exclude consumer-to-business transfers where a remittance transfer provider is acting as an electronic intermediary. Instead, the Bureau is adopting comment 30(c)–1 to state that a designated recipient can be either a natural person or an organization, such as a corporation.

Proposed comment 30(c)–2 explained that a remittance transfer is received at a location in a foreign country if funds are to be received at a location physically outside of any State.[67] One money transmitter commenter noted that it may know the country to which a transfer is being sent, but not the specific payout location. The comment was intended to address the receipt of funds at a foreign location in the general sense; that is, any location that is outside of a State. Thus, the final comment, adopted as renumbered comment 30(c)–2.i., clarifies that a sender need not designate a specific pick-up location.

In addition, commenters requested further clarification for determining whether there is a designated recipient when a transfer is made to an account. For example, in a wire transfer transaction, commenters stated that the consumer requesting the transfer may only identify the recipient of funds by an account number or the location or routing number of the receiving institution. Other commenters argued that transfers to an account associated with an institution in a State should not be viewed as transfers to a designated recipient, even if a person in a foreign country has exclusive access to the account.

New comment 30(c)–2.ii. provides further guidance to address these issues. For transfers to a designated recipient's account, comment 30(c)–2.ii. states that whether funds are to be received at a location physically outside of any State depends on where the account is located. If the account is located in a State, the funds will not be received at a location in a foreign country.

The Bureau concurs with the Board's statement that the statutory reference to a ''person located in a foreign country'' should be read with a view to the location where funds are to be sent, and believes that comment 30(c)–2.ii. is consistent with this approach. Thus, the Bureau agrees that transfers to domestic accounts should not be considered transfers to a location in a foreign country. The Bureau also agrees that providers may not always know where a recipient is physically located at the time a consumer requests a transfer to be sent, and believes that directing providers to look to the location of the account, rather than the location of the individual recipient, creates an appropriate bright line that will facilitate compliance with the final rule, ease compliance burden, and most effectively accomplish the purpose of the statute to apply the provisions to transfers to foreign countries.

One commenter suggested revising the definition of ''designated recipient'' to exclude senders, such that transfers made by a sender to a sender's separate account abroad would be excluded. However, nothing in the statute indicates that the definition of ''designated recipient'' should exclude transfers to a foreign-based account of the sender. The Bureau believes that a sender would also benefit from disclosures indicating the ultimate amount to be received in a transfer, particularly where an exchange rate is applied. The final rule adopts comment 30(c)–3 to clarify that a sender may also be a designated recipient, such as where a sender requests that a provider send an electronic transfer of funds from the sender's checking account in a State to the sender's checking account located in a foreign country.

The Board solicited comment on whether there could be instances where a remittance provider may receive a recipient's email address but no other information to determine the location where funds are to be received. Several commenters affirmed this could happen. For example, one commenter stated that consumers can provide a recipient's email address to use its transfer service; while recipients must register with the provider to access the transferred funds, it is possible that the provider would not know whether the transferred funds will be received at a location in a foreign country until the funds are claimed.

Final comment 30(c)–2.iii. addresses this scenario. Where the sender does not specify information about a recipient's account, but instead just provides information about the recipient, a remittance transfer provider must determine whether the funds will be received at a location in a foreign country based on information that is provided by the sender, and other information the provider may have, at the time the transfer is requested. For example, if a consumer gives a provider

[67] The term ''State'' is defined in 12 CFR 1005.2(l).

the recipient's email address, and the provider has no other information about whether the funds will be received by the recipient at a location in a foreign country, then the provider may determine that funds are not to be received at a location in a foreign country. However, if the provider has additional information at the time the transfer is requested indicating that funds are to be received in a foreign country, such as where the recipient's email address is registered with the provider and associated with a foreign account, then the provider has sufficient information to conclude that the remittance transfer is to be received at a location in a foreign country.

Commenters also noted that, with regard to prepaid cards, the provider may not know at the time the prepaid card is purchased whether the funds will be received at a location physically outside of any State. These commenters stated that where general-purpose reloadable prepaid cards or payroll cards are issued to two persons—one person in a State and another person in a foreign country—and both cards access the same funds, the provider may not be able to ascertain at the time of the request for the cards that funds will be received at a location physically outside of any State. In this case, the issuer does not know at the time of the request the ultimate recipient of the funds.

The Bureau notes that funds that can be accessed by a prepaid card are generally not considered to be an ''account'' as defined in § 1005.2(b) of Regulation E. Thus, where the funds that can be accessed by a prepaid card are held does not determine whether a prepaid card is being issued to a designated recipient. The Bureau believes when a participant in a prepaid card program, such as a prepaid card issuer or a prepaid card program manager, issues prepaid cards, the participant in the prepaid card program must look to where it or another participant in the prepaid card program sends the prepaid cards, to determine whether the prepaid card funds will be received in a foreign country. Likewise, when a participant in a prepaid card program adds additional funds at the sender's direct request to prepaid cards that it or any other participant previously issued, the participant in the prepaid card program must look to where it or another participant in the prepaid card program has sent the cards to determine whether the prepaid card funds will be received in a foreign country. The Bureau does not believe that it is appropriate for a participant in the prepaid card program to determine whether the funds will be received in a foreign country based on where the participants have decided to hold the funds the cards access. The Bureau believes that such a rule would allow participants in the prepaid card program to circumvent the remittance transfer rules by holding the funds in a State. Under such an approach, participants in the prepaid card program would not be required to comply with the remittance transfer rules if the funds are located in a State even where prepaid cards that access the funds are sent only to recipients located in a foreign country.

In the case where two prepaid cards are issued to two persons—one person in a State and another person in a foreign country—and both cards access the same funds, the Bureau believes that the provider has sufficient information to determine that the funds will be received in a foreign country because it has sent one of the prepaid cards to a person in a foreign country. Proposed comment 30(d)–3 suggested that in this situation, the transfer would not be to a designated recipient because the sender retained the ability to draw down the funds on the prepaid card. Proposed comment 30(d)–3 is not adopted. The Bureau is concerned that if it adopted a rule that the transfer is not to a designated recipient in this case, a provider that sends prepaid cards abroad with the intent of providing a service where funds loaded in a State are intended to be accessed in a foreign country could circumvent the remittance transfer rules by always automatically providing a second prepaid card to the sender, even if the sender did not request a second card.

Thus, final comment 30(c)–2.iii. clarifies that if a consumer in a State purchases a prepaid card, the provider has sufficient information to conclude that the funds are to be received in a foreign country if the remittance transfer provider sends a prepaid card to a specified recipient in a foreign country, even if a person located in a State, including the sender, retains the ability to access funds on the prepaid card. In this case, the prepaid issuer knows at the time of the request that a prepaid card has been sent to a recipient located in a foreign country. In contrast, if the provider provides the card directly to the consumer, the provider may conclude that funds are not to be received in a foreign country, because the provider does not know whether the consumer will subsequently send the prepaid card to a recipient in a foreign country.

30(d) Preauthorized Remittance Transfer

In the May 2011 Proposed Rule, the Board requested comment on the treatment of preauthorized bill payments under the definition of ''remittance transfer.'' This issue, and its resolution, are discussed in more detail below in the discussions of § 1005.30(e) and new § 1005.36.

The term ''preauthorized electronic fund transfer'' is currently defined under 12 CFR 1005.2(k) to mean an ''electronic fund transfer authorized in advance to recur at substantially regular intervals.'' Because subpart B applies to more than just EFTs, the final rule includes a new definition of ''preauthorized remittance transfer'' in § 1005.30(d). The definition tracks the definition in § 1005.2(k), but revises its applicability to ''remittance transfers authorized in advance to recur at substantially regular intervals.'' Similarly, the final rule adopts a new comment 30(d)–1 that tracks existing comment 2(k)–1, but with references to remittance transfers replacing references to EFTs.

30(e) Remittance Transfer

30(e)(1) General Definition

EFTA section 919(g)(2)(A) defines a ''remittance transfer'' as an ''electronic (as defined in section 106(2) of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7007 *et seq.* [(''E-Sign Act'')]) transfer of funds requested by a sender located in any State to a designated recipient that is initiated by a remittance transfer provider.'' The statute further specifies that such a transaction is a remittance transfer whether or not the sender holds an account with the remittance transfer provider and whether or not the remittance transfer is also an electronic fund transfer, as defined in EFTA section 903. The statute thus brings within the scope of the EFTA certain transactions that have traditionally been outside the scope of the EFTA, if those transactions meet the elements of the definition of ''remittance transfer.'' Such transactions include cash-based remittance transfers sent through a money transmitter as well as consumer wire transfers and international ACH transactions. Proposed § 205.30(d) incorporated the definition of ''remittance transfer'' in EFTA section 919(g)(2), with revisions for clarity. The Board also proposed commentary to provide further guidance on the definition, as well as examples of transactions that are and are not remittance transfers under the rule.

Proposed § 205.30(d)(1) set forth the general definition in EFTA section 919(g)(2)(A). Proposed § 205.30(d)(1) stated that a remittance transfer means the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider. Proposed § 205.30(d)(1) further stated that the term applies regardless of whether the sender holds an account with the remittance transfer provider and regardless of whether the transfer is also an electronic fund transfer, as defined in Regulation E. Section 1005.30(e)(1) of the final rule incorporates the definition generally as proposed, with additional revisions to the commentary for clarity.

Industry commenters, particularly financial institution commenters, opposed the definition of ''remittance transfer'' as overly broad. These commenters argued that the definition should not apply to open network transactions, such as international wire transfers and ACH transactions, or alternatively, that a separate rule tailored to these transactions should be adopted. Citing to legislative history, these commenters argued that the statute was intended only to address traditional cash-based, low-dollar-value remittances. Industry commenters argued that based on the difficulty with complying with the rule's disclosure requirements, as discussed below in connection with § 1005.31, including open network transactions in the remittance transfer definition could have unintended consequences. These commenters maintained that providers would withdraw from the market or restrict where transfers may be sent if the final rule were applied to international wire transfers and ACH transactions, and that this would either decrease consumer access to remittance transfers or increase costs to consumers. Thus, these commenters argued that the Bureau should exercise its authority under EFTA section 904(c) to exempt these transactions from the definition of ''remittance transfer.'' Industry commenters also urged the Bureau to adopt other exclusions and limitations to the ''remittance transfer'' definition, which are addressed below in the discussion of § 1005.30(e)(2). In contrast, consumer group commenters supported the proposed definition of ''remittance transfer,'' including its inclusion of open network transactions. These commenters argued that the proposed definition is consistent with the language of the statute and the purpose of the statute's provisions.

The Bureau acknowledges the compliance challenges raised by the inclusion of open network transactions. Nevertheless, the Bureau believes the unambiguous language of the statute requires coverage of these transactions, such as wire transfers. The statute is broad in scope, specifically covering transactions that are account-based and that are not electronic fund transfers. The Bureau finds no statutory language to support excluding open network transactions—indeed, quite the contrary: The statute includes a temporary exception for certain insured institutions permitting estimates to be used in providing disclosures under specified circumstances in EFTA section 919(a)(4)(A). There would be no need for such an exception if open network transactions were not covered by the statute. Congress specifically recognized that it would be difficult for financial institutions to meet certain disclosure requirement with regard to open network transactions and tailored a specific accommodation to allow use of reasonably accurate estimates for an interim period until financial institutions can develop methods to determine exact disclosures, such as fees and taxes charged by third parties. Therefore, the Bureau does not believe it should exercise its exception authority under EFTA section 904(c) to exclude open network transactions from the definition of ''remittance transfer.''

Proposed comments 30(d)–1 through 30(d)–4 provided further guidance on each of the elements of the proposed definition of ''remittance transfer.'' Proposed comment 30(d)–1 provided that there must be an electronic transfer of funds. The term ''electronic'' has the meaning given in section 106(2) of the E-Sign Act. There may be an electronic transfer of funds if a provider makes an electronic book entry between different settlement accounts to effectuate the transfer. However, the proposed comment explained that where a sender mails funds directly to a recipient, or provides funds to a courier for delivery to a foreign country, there has not been an electronic transfer of funds, and thus no remittance transfer.

Citing the electronic book entry comment, one commenter suggested that the Bureau should expressly exclude the sale or issuance of checks, money orders, or other paper instruments from the ''remittance transfer'' definition. The Bureau agrees that issuing a paper check, draft, money order, or other paper instrument to be mailed abroad generally does not constitute an electronic transfer of funds. For clarity, the final comment, adopted as comment 30(e)–1, notes that where a provider issues a check, draft, or other paper instrument to be mailed abroad, there is not an electronic transfer of funds, except as described below with respect to online bill payments.

A few commenters suggested that with respect to online bill payments, a consumer does not request an electronic transfer of funds. Instead, commenters stated that the consumer requests only that an amount be paid out of an account, and the payment method is generally left up to the institution. Thus, these commenters argued, there is no specific sender request to send a remittance transfer. The final rule adopts an approach that is consistent with the treatment of online bill payment services as an EFT under Regulation E in § 1005.3(b). Specifically, comment 3(b)(1)–1.vi. makes clear that an EFT includes ''a payment made by a bill payer under a bill-payment service available to a consumer via computer or other electronic means, unless the terms of the bill-payment service explicitly state that all payments, or all payments to a particular payee or payees, will be solely by check, draft, or similar paper instrument drawn on the consumer's account, and the payee or payees that will be paid in this manner are identified to the consumer.''

Accordingly, final comment 30(e)–1 provides that an electronic transfer of funds occurs for a payment made by a provider under a bill-payment service available to a consumer via computer or other electronic means, unless the terms of the bill-payment service explicitly state that all payments, or all payments to a particular payee or payees, will be solely by check, draft, or similar paper instrument drawn on the consumer's account to be mailed abroad, and the payee or payees that will be paid in this manner are identified to the consumer. Thus, with respect to such a bill-payment service, if a provider provides a check, draft or similar paper instrument drawn on a consumer's account to be mailed abroad for a payee that is not identified to the consumer as described above, this payment by check, draft or similar payment instrument will be considered an electronic transfer of funds. In this case, the sender has requested the transfer using a bill-payment service available to a consumer via computer or other electronic means and would expect the transfer to be conducted electronically because the terms of the bill-payment service have not explicitly stated that payments to the particular payee will be solely by a check, draft, or similar paper instrument drawn on the consumer's account to be mailed abroad. In this case, the Bureau believes that it not appropriate to allow a provider to avoid providing the disclosures required by § 1005.31 at the

time of the sender's request, simply because the payee may ultimately be paid by a check, draft or similar paper instrument drawn on the consumer's account mailed abroad.

Proposed comment 30(d)–2 provided that the definition of ''remittance transfer'' requires a specific sender to request a remittance transfer provider send a remittance transfer. The proposed comment explained that a deposit by a consumer into a checking or savings account does not itself constitute such a request, even if a person in a foreign country is an authorized user on that account, where the consumer retains the ability to withdraw funds in the account. This comment is not adopted in the final rule, as inconsistent with guidance adopted in comment 30(c)–2.ii. As discussed above under the section-by-section analysis to § 1005.30(c), when a sender requests that a remittance transfer provider send an electronic transfer of funds to a recipient's account, the location of the account determines whether the transfer is made to a designated recipient and thus is a remittance transfer. If the recipient's account is located in a State, the transfer will not be a remittance transfer because the transfer will not be received at a location in a foreign country, and thus the recipient would not be a ''designated recipient.'' By contrast, if the recipient's account is located in a foreign country, the transfer will be a remittance transfer, even if the sender has the ability to withdraw funds in the account, because the transfer will be received at a location in a foreign country, and the recipient would be a ''designated recipient.'' *See* comment 30(c)–2.ii.

Proposed comment 30(d)–3 provided that the definition of ''remittance transfer'' also requires that the transfer be sent to a designated recipient. As noted above, the definition of ''designated recipient'' requires a person to be identified by the sender as the authorized recipient of a remittance transfer to be sent by a remittance transfer provider. Proposed comment 30(d)–3 explained that there is no designated recipient unless the sender specifically identifies the recipient of a transfer. Proposed comment 30(d)–3 specified that there would be a designated recipient if, for example, the sender instructs a remittance transfer provider to send a prepaid card to a specified recipient in a foreign country, and the sender does not retain the ability to draw down funds on the prepaid card. In contrast, proposed comment 30(d)–3 specified that there would be no designated recipient where the sender retains the ability to withdraw funds, such as when a person in a foreign country is made an authorized user on the sender's checking account, because the remittance transfer provider cannot identify the ultimate recipient of the funds. As discussed in more detail in the section-by-section analysis to § 1005.30(c), both examples are not adopted, as inconsistent with guidance in comment 30(c)–2.ii. and iii.

Proposed comment 30(d)–4 provided that the definition of ''remittance transfer'' requires that the remittance transfer must be sent by a remittance transfer provider. The proposed comment explained that this means that there must be an intermediary actively involved in sending the electronic transfer of funds. Examples in the proposed comment included a person (other than the sender) sending an instruction to an agent in a foreign country to make funds available to a recipient; executing a payment order pursuant to a consumer's instructions; executing a consumer's online bill payment request; or otherwise engaging in the business of accepting or debiting funds for transmission to a recipient and transmitting those funds.

However, the proposed comment explained that a payment card network or other third party payment service that is functionally similar to a payment card network does not send a remittance transfer when a consumer designates a debit or credit card as the payment method to purchase goods or services from a foreign merchant. For example, in such a case, the payment card network or third party payment service is not directly engaged with the sender to send a transfer of funds to a person in a foreign country; rather, the network or third party payment service is only providing contemporaneous third-party payment processing and settlement services on behalf of the merchant or the remittance transfer provider, rather than on behalf of the sender. Similarly, where a consumer provides a checking or other account number directly to a merchant as payment for goods or services, the merchant is not acting as a remittance transfer provider when it submits the payment information for processing.

Commenters generally supported the proposed comment. One commenter suggested that the Bureau should revise the discussion about the use of a payment card network using a debit or credit card as a payment method to include the use of a payment card network using a prepaid card for consistency with other provisions of the rule.

The final comment is adopted as comment 30(e)–2, and is revised. As with the proposed comment, the final comment provides that the definition of ''remittance transfer'' requires that the remittance transfer must be sent by a remittance transfer provider. The final comment explains that this means that there must be an intermediary that is directly engaged with the sender to send an electronic transfer of funds on behalf of the sender to a designated recipient. The final comment clarifies that a payment card network or other third party payment service that is functionally similar to a payment card network does not send a remittance transfer when a consumer provides a debit, credit, or prepaid card directly to a foreign merchant as the payment method to purchase goods or services. In such a case, the payment card network or third party payment service is not directly engaged with the sender to send a transfer of funds to a person in a foreign country; rather, the network or third party payment service is merely providing contemporaneous third-party payment processing and settlement services on behalf of the merchant or the card issuer, rather than on behalf of the sender. The final comment in 30(e)-2 also clarifies that in such a case, the card issuer also is not directly engaged with the sender to send an electronic transfer of funds to the foreign merchant when the card issuer provides payment to the merchant. Similarly, where a consumer provides a checking or other account number, or a debit, credit or prepaid card, directly to a foreign merchant as payment for goods or services, the final comment clarifies that the merchant is not acting as an intermediary that sends a transfer of funds on behalf of the sender when it submits the payment information for processing. The Bureau notes that this comment applies only for purposes of this rule. In other contexts, a person may act as a provider even when it is not directly engaged with the consumer to provide a consumer financial product or service.

Finally, comment 30(e)–2 also discusses the situation where a card issuer or a payment card network is an intermediary that is directly engaged with the sender to obtain funds using the sender's debit, prepaid or credit card and to send those funds to a recipient's checking account located in a foreign country. In this case, the final comment clarifies that the card issuer or payment card network is an intermediary that is directly engaged with the sender to send an electronic transfer of funds on behalf of the sender, and this transfer of funds

is a remittance transfer because it is made to a designated recipient. *See also* comment 30(c)–2.ii.

As noted in the proposal, some transactions that have not traditionally been considered remittance transfers will fall within the scope of the rule. In contrast, other transfer methods specifically marketed for use by a consumer to send money abroad, but that do not meet all elements of the definition of ''remittance transfer,'' may fall outside the scope of the rule (*e.g.,* a prepaid card where the participants in the prepaid card program do not send a card to a designated recipient in a foreign country). While the Board stated that it believed the proposed definition of ''remittance transfer'' in § 205.30(d) implemented the broad statutory definition, the Board solicited comment on whether it should exempt online bill payments made through the sender's institution, including preauthorized bill payments, from the rule, as it could be challenging for institutions to provide timely disclosures.

Most industry commenters urged the Bureau to exempt online bill payments from the rule, including preauthorized bill payments, given the challenges associated with providing disclosures for transfers that occur in the future. Commenters stated that the disclosures for such payments would be burdensome and would provide only marginal benefits to consumers, particularly given that Regulation E already addresses online bill payments. Commenters also noted that different coverage would apply to payments initiated through a financial institution, which would be covered, versus payments initiated directly with a billing party, which would not be covered. With respect to preauthorized bill payments, commenters stated that it would be impracticable to provide pre-payment disclosures when the request is made for transactions that could be scheduled months in advance.

Overall, the Bureau believes the protections afforded by the statute favor the inclusion of online bill payments in the rule, as well as other types of transfers that a sender schedules in advance. subpart A of Regulation E applies to EFTs from an account at a financial institution and provides certain protections to consumers. However, the subpart A provisions do not require disclosures regarding the exchange rate to be applied at transfer or certain other items that must be disclosed under EFTA section 919 and this rule (although related up-front fees would be disclosed in or with the account agreement). In addition, the Bureau also understands that there are non-bank money transmitters not covered by existing provisions in Regulation E that offer international bill payment services.

Moreover, some of the disclosure challenges raised by commenters are similar to those that have been raised in connection with other remittance transfer methods that are included in the rule, for example, where the exchange rate is not necessarily known at the time of transfer. The Bureau recognizes that the rule's coverage differs depending on whether a foreign payee is paid through a remittance transfer provider or paid directly by a consumer. However, this difference arises due to the EFTA's definition of ''remittance transfer.'' As discussed above, for a transfer to be considered a ''remittance transfer,'' the transfer must involve an intermediary that is directly engaged with the sender to send an electronic transfer of funds on behalf of the sender to a designated recipient. A foreign merchant is not acting as an intermediary that sends a transfer of funds on behalf of the sender when it processes a payment paid to it directly by the sender. In addition, in this case, the financial institution is not directly engaged with the sender to send an electronic transfer of funds to the foreign merchant when the institution provides payment to the merchant. The Bureau believes this is different from the situation where an institution offers online international bill payment services to consumers. In this circumstance, the institution is directly engaged with the sender to send an electronic transfer of funds on behalf of the sender to a designated recipient. Thus, the final rule does not exclude online bill payments from the definition. As a result, under the final rule, providers will generally need to provide pre-payment disclosures and receipts for these types of transfers in accordance with § 1005.31.

However, in light of the timing challenges noted above, the final rule sets forth tailored disclosure and cancellation requirements with respect to certain remittance transfers that a sender schedules in advance, including preauthorized remittance transfers (defined and discussed above in § 1005.30(d)), in a new § 1005.36. In addition, the Bureau is issuing the January 2012 Proposed Rule, published elsewhere in today's **Federal Register,** soliciting comment on alternative disclosure and cancellation requirements with respect to these transfers. These are discussed in more detail below in the discussion of § 1005.36.

Proposed comment 30(d)–5 provided a non-exclusive list of examples of transactions that are, and are not, remittance transfers. The list addressed online bill payments in the examples in 30(d)–5.i.E. and 30(d)–5.ii.C. However, electronic transfers of funds to be sent abroad can also be scheduled through other means, such as over the telephone, and such scheduled transfers may not necessarily relate specifically to the payment of bills. Thus, while the final comment, renumbered as comment 30(e)–3, does not contain an exhaustive list of examples, in order to clarify the rule's application, the online bill payment examples in the final comment have been revised to more generally address transfers that senders can schedule in advance, including preauthorized remittance transfers.

30(e)(2) Exceptions

EFTA section 919(g)(2)(B) states that a remittance transfer does not include a transfer described in EFTA section 919(g)(2)(A) ''in an amount that is equal to or lesser than the amount of a small-value transaction determined, by rule, to be excluded from the requirements under section 906(a)'' of the EFTA. EFTA section 906(a) addresses the requirements for electronic terminal receipts. The Board previously determined by rule that financial institutions are not subject to the requirement to provide electronic terminal receipts for small-value transfers of $15 or less. *See* § 1005.9(e). Proposed § 205.30(d)(2) incorporated this exception for small-value transfers by providing that remittance transfers do not include transfer amounts of $15 or less. The final rule adopts the small-value exception in § 1005.30(e)(2)(i). The $15 exception refers to the amount that will be transferred to the designated recipient in the currency in which the transfer will be funded, as described in § 1005.31(b)(1)(i).

Industry commenters urged the Bureau to adopt a variety of additional exceptions to the rule, in addition to exempting wire transfers and other open network transactions. Most industry commenters argued that the Bureau should exclude wire transfers and ACH transactions above a certain dollar amount, generally ranging from $500 to $1,000. These commenters argued that the average value of consumer transfers from the United States is lower than the dollar thresholds that they advocated for, so these thresholds would capture most traditional remittances, while excluding higher-dollar transfers that they argued were not intended to be captured in the statute. Several commenters also presented data that

many wire transfers exceed the suggested dollar amount, and thus, such an exclusion would limit the costs and risks of the proposal, including fraud risks; would mitigate risks associated with the loss of UCC Article 4A coverage for wire transfers (as described in more detail below); and would more properly focus the final rule on traditional remittance transfers.

The final rule does not contain an exclusion for remittance transfers above a specified dollar amount. The Bureau believes that consumers who choose to transfer funds less frequently but in higher dollar amounts or who send relatively large remittance transfers to pay tuition, medical, and other larger bills should receive the same protections as frequent, low-value senders. Indeed, given the amounts involved, such consumers may stand to benefit even more from the disclosures and error resolution rights afforded by the rule to ensure that the proper amount is received by the recipient. Accordingly, the Bureau believes that an exception based solely on a dollar amount would not be consistent with the purposes of the statute. Finally, the dollar amounts suggested by the commenters did not account for variations in average transfer amounts by destination region or type of transfer, some of which exceed the thresholds proposed by commenters.[68]

Similarly, the Bureau does not believe that the rule should exclude remittance transfers requested by high net-worth consumers, as urged by one commenter. Again, there is no indication that Congress intended such an exclusion. Further, a high net-worth consumer has an interest in knowing the amount that will be received by a recipient, and the applicable exchange rate, just as a consumer who does not have a high net worth. A high net-worth consumer also has a similar stake in the resolution of any errors.

The final rule does contain one new exclusion. Several commenters argued that the final rule should exclude from the definition of ''remittance transfer'' any transfers the primary purposes of which is the purchase or sale of securities or commodities as described in § 1005.3(c)(4). Section 1005.3(c)(4) exempts from the definition of ''electronic fund transfer'' any transfer of funds the primary purposes of which is the purchase or sale of a security or commodity where the security or commodity is: (i) Regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission; (ii) purchased or sold through a broker-dealer regulated by the Securities and Exchange Commission or through a futures commission merchant regulated by the Commodity Futures Trading Commission; or (iii) held in book-entry form by a Federal Reserve Bank or Federal agency. To effectuate the purposes of the EFTA and facilitate compliance, the Bureau believes it is necessary and proper to use its authority under EFTA sections 904(a) and (c) to adopt a new § 1005.30(e)(2)(ii) to exclude from the definition of ''remittance transfer'' any transfer that is excluded from the definition of ''electronic fund transfer'' under § 1005.3(c)(4). This exception is narrow in that it only exempts transfers of funds the primary purposes of which is the purchase or sale of certain securities or commodities, as discussed above. The Bureau believes that use of its authority under EFTA sections 904(a) and (c) in this circumstance is appropriate so as not to impact the purchase or sale of securities or commodities.

Application of the EFTA; Relationship to Uniform Commercial Code

As described above, the statute applies to remittance transfers whether or not they are electronic fund transfers. This raises certain issues with respect to traditional cash-based remittance transfers sent through money transmitters, which have not previously been covered by the EFTA or Regulation E, as well as international wire transfers, which are not EFTs.

The statute outlines the application of the EFTA to remittance transfers that are not electronic fund transfers. Specifically, EFTA section 919(e)(1) states that a remittance transfer that is not an electronic fund transfer is not subject to any of the provisions of EFTA sections 905 through 913. For example, a money transmitter sending a remittance transfer (that is not an EFT) is not subject to the requirement in EFTA section 906(b), as implemented in § 1005.9(b), to provide periodic statements to consumers. The transmitter will, however, generally be subject to other provisions of the EFTA, including provisions on liability under EFTA sections 916 through 918. EFTA section 919(e)(2)(A) also clarifies that a transaction that will not otherwise be an electronic fund transfer under the EFTA, such as a wire transfer, does not become an electronic fund transfer because it is a remittance transfer under EFTA section 919.

Until the Dodd-Frank Act provisions become effective, wire transfers are entirely exempt from the EFTA and Regulation E and instead are governed by State law through State enactment of Article 4A of the Uniform Commercial Code. UCC Article 4A primarily governs the rights and responsibilities among the commercial parties for wire transfers, including payment obligations among the parties and allocation of risk of loss for unauthorized or improperly executed payment orders.

UCC Article 4A–108 provides that UCC Article 4A does not apply ''to a funds transfer, *any part of which is governed by the Electronic Fund Transfer Act''* (emphasis added). When EFTA section 919, as implemented by this rule, becomes effective, wire transfers sent on a consumer's behalf that are remittance transfers will be governed in part by the EFTA. As noted in the proposal, EFTA section 919(e)(1) explicitly applies the EFTA to remittance transfers that are not electronic fund transfers, except for certain enumerated provisions. Further, the disclosure and error resolution requirements for remittance transfers are set forth in the EFTA. As a result, by operation of UCC Article 4A–108, the Bureau believes UCC Article 4A will no longer apply to such international consumer wire transfers.[69]

Many commenters, including the Office of the Comptroller of the Currency (OCC), argued that this outcome creates legal uncertainty that will disrupt the long-standing legal framework governing the allocation of risks among financial institutions of wire transfers. Industry commenters urged the Bureau to preempt any provision of State law that prevents a remittance transfer from being treated as a funds transfer under UCC Article 4A based solely upon the inclusion of the remittance transfer provisions in EFTA section 919. Specifically, commenters urged the Bureau to preempt UCC Article 4A–108. Under this suggested approach, the error resolution provisions of EFTA section 919(b)(1) would govern remittance transfers as between a sender and a remittance transfer provider, but the remaining provisions in UCC Article 4A would continue to govern the allocation of risk of loss as between the remittance transfer provider and another financial institution that carries out part of the transfer (to the extent not otherwise inconsistent with the rule).

Under EFTA section 922 and § 1005.12, the Bureau may determine whether a State law relating to, among other things, electronic fund transfers is preempted by the EFTA or Regulation E. However, the statutory preemption provisions states that a State law may be

[68] Chishti, *supra* note 6.

[69] Commercial wire transfers are not affected because a ''sender'' must be a consumer.

preempted only if the State law is inconsistent with the EFTA or Regulation E and then only to the extent of the inconsistency. 15 U.S.C. 1693s. Moreover, the statute and regulation provide that a State law is not inconsistent with any provision if it is more protective of consumers. The Bureau does not believe that UCC Article 4A–108 is inconsistent with the EFTA. No provision of the EFTA conflicts with UCC Article 4A–108, and UCC Article 4A–108 does not require or permit a practice prohibited by the EFTA. *See, e.g.,* § 1005.12(b)(2)(i). Rather, UCC Article 4A–108 provides when State law applies to fund transfers, including consumer wire transfers, and specifically states that UCC Article 4A does not apply if the EFTA ''governs'' the transaction. The amendments to the EFTA under the Dodd-Frank Act address consumer wire transfers, but do not address the application of State law to those transfers. Applying the EFTA preemption provisions to effectively require the application of more State laws than would apply in the absence of such action is simply not what the EFTA preemption standard provides.

In the May 2011 Proposed Rule, the Board noted that Congress amended the EFTA's preemption provision to include a specific reference to State gift card laws when it enacted new EFTA protections for gift cards as part of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act).[70] By contrast, Congress did not amend the EFTA's preemption provision with respect to State laws relating to remittance transfers, including those that are not electronic fund transfers, when it enacted the Dodd-Frank Act.[71] In response, some commenters argued that Sections 1041(a) and (b) of the Dodd-Frank Act, which discusses the relationship between Title X of the Dodd-Frank Act and State law, separately permit the Bureau to preempt UCC Article 4A–108. These provisions may be invoked, however, only if the Bureau finds an inconsistency between Title X and State law. The Bureau does not believe that such an inconsistency exists. Moreover, Section 1041(b) of the Dodd-Frank Act specifically provides, with one exception not relevant here, that no provision of Title X ''shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law.''

Several commenters suggested that the Bureau incorporate UCC Article 4A, or a similar framework in place of UCC Article 4A, into Regulation E. The Bureau does not believe it is appropriate to incorporate UCC Article 4A into Regulation E. The EFTA and the UCC generally focus on different relationships. Under EFTA section 902(b), the primary purpose of the EFTA is the provision of individual consumer rights. In contrast, UCC Article 4A is primarily intended to govern the rights and responsibilities among the commercial parties to a funds transfer, that is, the financial institution that accepts a payment order for a funds transfer and any other financial institutions that may be involved in carrying out the transfer.

Consumers currently receive some protections under UCC Article 4A in the event the wire transfer is not completed, or in the event of errors in execution of the transfer, or in connection with an unauthorized transfer. Nonetheless, although consumers who request wire transfers that are remittance transfers may no longer have the protections set forth in UCC Article 4A, these consumers will receive error resolution, refund and cancellation rights and other protections for these transfers as set forth in §§ 1005.33 and 1005.34.

In addition, the Bureau does not believe it is appropriate to incorporate UCC Article 4A into Regulation E because while UCC Article 4A is a uniform code, it may be adopted differently in the various states. Incorporation of UCC Article 4A (presumably, without a similar provision as UCC Article 4A–108) on its own could have the unintended consequence of the Bureau choosing one State's version of the UCC over another. There could also be a lag between updates and revisions to the UCC among the states and the version incorporated into Regulation E, which could create confusion and potential operational conflicts for those institutions that use the same systems to send commercial and consumer wire transfers.

The Bureau recognizes that one consequence of covering remittance transfers under the EFTA could be legal uncertainty under the UCC for certain remittance transfer providers. Specifically, to the extent that providers of international wire transfers were previously able to rely on UCC Article 4A's rules governing the rights and responsibilities among the parties to a wire transfer, they may no longer be able to do so. However, given the factors discussed above, the Bureau believes that the best mechanisms for resolving this uncertainty rests with the states, which can amend their respective versions of UCC Article 4A, with the purveyors of rules applicable to specific wire transfer systems, which can bind direct participants in the system, and with participants in wire transfers who can incorporate UCC Article 4A into their contracts. In addition, the Bureau recommends that Congress adopt legislation to help resolve the legal uncertainty under the UCC for remittance transfers, so parties engaged in remittance transfers will be able to continue to rely on UCC Article 4A, notwithstanding the implementation of these final rules.

The final rule will be effective one year from the date of publication of the rule in the **Federal Register**. Thus, before the final rule becomes effective, states have the opportunity to amend UCC Article 4A to the extent needed or appropriate to address its application to consumer international wire transfers and wire transfer systems have the opportunity to amend their operating rules to incorporate UCC Article 4A, and participants in wire transfer transactions have the opportunity to enter into contracts incorporating UCC Article 4A. For example, the Board has recently issued a proposal to revise its Regulation J, 12 CFR part 210, to ensure the continued application of UCC Article 4A to remittance transfers carried out through Fedwire.[72] In addition, Congress would have an opportunity to enact legislation to help resolve the legal uncertainty under the UCC for remittance transfers, so parties engaged in remittance transfers will be able to continue to rely on UCC Article 4–A, notwithstanding the implementation of these final rules. The Bureau will continue to monitor developments in this area to evaluate whether these issues are being effectively dealt with by the states, Congress or through private contractual arrangements.

[70] *See* Credit Card Act § 402, Public Law 111–24, 123 Stat. 1734 (2009). The preemption provision was amended to describe how certain State gift card laws may be preempted, to the extent that those laws are inconsistent with the EFTA, in the same manner as State EFT laws.

[71] Several commenters noted that EFTA section 920 is excluded from the list of ''enumerated consumer laws'' under section 1002(12)(c) of the Dodd-Frank Act. Prior to the Dodd-Frank Act, EFTA section 920 addressed the EFTA's relation to State laws. Section 1075 of the Dodd-Frank Act created a new EFTA section 920 relating to debit interchange fees, which is the provision excluded under Dodd-Frank section 1002(12)(c). The relation to State laws provision is now contained in EFTA section 922.

[72] 76 FR 64259 (Oct. 18, 2011).

Application of the EFTA; Relationship to Regulations Implementing the Bank Secrecy Act

The Bureau also recognizes that regulations issued by the Financial Crimes Enforcement Network (FinCEN) to implement the Bank Secrecy Act also contain references to the EFTA. These regulations generally set certain requirements applicable to a ''funds transfer'' and ''transmittal of funds.'' The definitions of ''funds transfer'' and ''transmittal of funds'' in FinCEN's regulations exclude any funds transfers governed by the EFTA. *See* 31 CFR 1010.100(w) and (ddd), respectively. When EFTA section 919, as implemented by this rule, becomes effective, certain transactions that have traditionally been outside the scope of the EFTA will be governed by the EFTA, such as consumer-initiated wire transfers. The Bureau has had discussions with FinCEN about the importance of FinCEN amending its rules so that they continue to apply to remittance transfers after the effective date of this rule. The OCC also stated that it will be imperative that FinCEN act quickly to amend their rules. The Bureau does not believe, however, that it can fill the gap by incorporating FinCEN's regulations into Regulation E. The Bureau believes consolidating the requirements of the Bank Secrecy Act and the EFTA in Regulation E would be impracticable under the respective authorities of two agencies.

30(f) Remittance Transfer Provider

Proposed § 205.30(e) incorporated the definition of ''remittance transfer provider'' from EFTA section 919(g)(3). Proposed § 205.30(e) stated that a remittance transfer provider (or provider) means any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person. To eliminate redundancy, the proposed rule revised statutory references to ''any person or financial institution'' to ''any person,'' because the term ''person'' under Regulation E includes financial institutions. Proposed comment 30(e)–1 clarified that an agent is not deemed to be a remittance transfer provider by merely providing remittance transfer services on behalf of the remittance transfer provider. The proposed regulation is adopted generally as proposed in renumbered § 1005.30(f). Comment 30(f)–1 is revised for clarity to state that a person is not deemed to be acting as a remittance transfer provider when it performs activities as an agent on behalf of a remittance transfer provider. New comments 30(f)–2 and –3 are added as described below. The Bureau notes that this comment 30(f)–1 applies only for purposes of this rule. In other contexts, a person may act as a provider when it performs activities on behalf of a provider.

Normal Course of Business

The Board solicited comment on whether guidance should be adopted interpreting the phrase ''normal course of business'' based on the number of remittance transfers in a given year. Many industry commenters argued that the final rule should provide for a *de minimis* exception based on the number of remittance transfers sent in a given time period, although one credit union commenter stated that it could be difficult to track numbers. Suggestions ranged from 1,200 or fewer transfers annually to 2,400 transfers annually, per method (*i.e.,* 2,400 wire transfers plus 2,400 international ACH transfers).

The commenters did not provide any data on the overall distribution and frequency of remittance transfers across various providers to support treating such high numbers of transactions as being outside the normal course of business. Nor did they suggest other means of determining when remittance transfer providers are engaging in transfers merely as an accommodation to occasional consumer requests rather than part of a business of payment services. Absent significant additional information, the Bureau is skeptical that Congress intended to exclude companies averaging 100 or more remittance transfer providers per month from the statutory scheme. Based on the data presented by commenters, such a range would appear to exclude the majority of providers of open network transfers, such as international wire transfers and ACH transactions, from the rule. For example, one trade association commenter stated that most respondents to an information request said that they make fewer than 2,400 international transactions per year. As discussed above, the Bureau believes that the statute clearly covers open network transfers, such as wire transfers and ACH transactions. Providing an exception based on the ranges suggested by these commenters would allow many financial institutions that arguably regularly and in the normal course of business provide remittance transfers to not be subject to the regulation. The Bureau believes in general that the term ''normal course of business'' covers remittance transfer activities at a level significantly lower than the ranges suggested by these commenters.

In other contexts, regulatory coverage is triggered by a relatively small number of transactions. For example, under Regulation Z, 12 CFR part 1026, a creditor is a person who regularly extends consumer credit under specified circumstances. A person regularly extends consumer credit when it extends consumer credit more than 25 times in the preceding calendar year or in the current year (and five times for transactions secured by a dwelling, or even one time for certain high-cost mortgages).[73] *See* 12 CFR 1026.2(a)(17). Under State law, a single money transmission may trigger a requirement to register as a money transmitter.

The Bureau does not believe it has sufficient information on the frequency with which entities engage in remittance transfers to set a specific numerical threshold based on the current administrative record. Accordingly, the final rule adopts a new comment 30(f)–2 addressing ''normal course of business.'' Comment 30(f)–2 states that whether a person provides remittance transfers in the normal course of business depends on the facts and circumstances, including the total number and frequency of remittance transfers sent by the provider. For example, if a financial institution generally does not make international consumer wire transfers available to customers, but sends a couple of international consumer wire transfers in a given year as an accommodation for a customer, the institution does not provide remittance transfers in the normal course of business. In contrast, if a financial institution makes international consumer wire transfers generally available to customers (whether described in the institution's deposit account agreement, or in practice) and makes transfers multiple times per month, the institution provides remittance transfers in the normal course of business.

While the final comment does not include a numerical threshold for ''normal course of business,'' the Bureau recognizes that a bright-line number may ease compliance. Thus, in the January 2012 Proposed Rule, published elsewhere in the **Federal Register** today, the Bureau is soliciting further comment on a potential safe harbor threshold.

Multiple Remittance Transfer Providers

New comment 30(f)–3 provides guidance where more than one remittance transfer provider is involved

[73] The Bureau notes that it has issued a separate notice of request for information in which the Bureau requests comment on whether it should revise these threshold numbers in Regulation Z. *See* 76 FR 75825 (Dec. 5, 2011).

in providing a remittance transfer. The Bureau recognizes that in some situations more than one remittance transfer provider may be involved in providing a remittance transfer. For example, prepaid card programs may involve, among others: (i) A program sponsor that establishes the program relationships, identifies and procures the necessary parties and sets contractual terms and conditions; (ii) a program manager which functions as a day-to-day operations ''control center'' for the program; and (iii) an issuing bank whose contractual involvement is required to invoke the payment network and which also may serve as the holder of funds that have been prepaid and are awaiting instructions to be disbursed. Any and all of these entities may be a ''remittance transfer provider'' if they meet the definition as set forth in § 1005.30(f).

Comment 30(f)–3 provides that if the remittance transfer involves more than one remittance transfer provider, only one set of disclosures must be given, and the remittance transfer providers must agree among themselves which provider must take the actions necessary to comply with the requirements that subpart B imposes on any or all of them. Even though the providers must designate one provider to take the actions necessary to comply with the requirements that subpart B imposes on any or all of them, all remittance transfer providers involved in the remittance transfer remain responsible for compliance with the applicable provisions of the EFTA and Regulation E.

30(g) Sender

Proposed § 205.30(f) incorporated the definition of ''sender'' from EFTA section 919(g)(4) with minor edits for clarity. Specifically, proposed § 205.30(f) defined ''sender'' to mean ''a consumer in a state who requests a remittance transfer provider to send a remittance transfer to a designated recipient.'' The final rule adopts the definition largely as proposed in renumbered § 1005.30(g), with additional clarifications and a new explanatory comment.

Several commenters suggested that the Bureau limit remittance transfers to those sent for personal, family, or household purposes. Although Regulation E's applicability is generally limited to such consumer-purpose transactions, the limitation is contained in the definition of ''account'' in § 1005.2(b). However, the remittance transfer rule applies to more than just account-based transfers. As a result, these commenters stated that an individual who requests a transfer for business purposes could arguably be a ''sender'' under the rule.

To address these concerns, the Bureau is revising the definition of ''sender'' in § 1005.30(g) to clarify that a sender is a consumer in a State who primarily for personal, family, or household purposes requests a remittance transfer provider to send a remittance transfer to a designated recipient. This revision is consistent with § 1005.2(b) and clarifies that the final rule does not apply to business-to-consumer or business-to-business transactions or to transactions that are not for personal, family or household purposes. For example, a transfer requested by a sole proprietor on behalf of his or her company would not be covered by the rule.

As with the definition of ''designated recipient,'' some commenters requested guidance as to how they should determine whether a consumer is located in a State for account-based transfers. Commenters also requested clarification on how to determine where a consumer is located if the transfer request is made electronically or by telephone, and where the consumer's presence is not readily apparent. To address these questions, new comment 30(g)–1 clarifies that for transfers from an account, whether a consumer is located in a State depends on where the consumer's account is located. If the account is located in a State, the consumer will be located in a State for purposes of the definition of ''sender'' in § 1005.30(g), notwithstanding comment 3(a)–3. Where a transfer is requested electronically or by telephone and the transfer is not from an account, the provider may make the determination of whether a consumer is located in a State on information that is provided by the consumer and on any records associated with the consumer that it might have, such as an address provided by the consumer.

One commenter asked the Bureau to clarify the application of Regulation E's comment 3(a)–3 to subpart B. Comment 3(a)–3 addresses the foreign applicability of Regulation E with respect to EFTs. The proposed definition of ''sender'' and the proposed commentary did not address how comment 3(a)–3 would apply with respect to remittance transfers that are EFTs, such as international ACH transfers from an account. The statutory definition of ''sender,'' and thus the definition in § 1005.30(g), does not turn on a consumer's residency; rather, the definition only requires that there be a consumer in a State requesting a remittance transfer. As with the definition of ''designated recipient,'' the Bureau believes that directing providers to look to the location of the account as a proxy for the location of the sender will create a bright line that will facilitate compliance with the final rule and ease compliance burden. Thus, as discussed above, under the final rule, for remittance transfers from an account, providers must look to the location of the account to determine whether there is a sender, and not the residency of the consumer requesting the transfer. Accordingly, final comment 30(g)–1 clarifies that the provider should make its determination notwithstanding comment 3(a)–3.

Section 1005.31 Disclosures

Section 1073 of the Dodd-Frank Act imposes several disclosure requirements relating to remittance transfers. Among these, EFTA sections 919(a)(2)(A) and (B) require a remittance transfer provider to provide two sets of disclosures to a sender in connection with a remittance transfer. A remittance transfer provider must generally provide a written pre-payment disclosure to a sender when a sender requests a transfer. This disclosure provides information about the sender's remittance transfer, such as the exchange rate, fees, and the amount to be received by the designated recipient. A remittance transfer provider must also provide a written receipt to the sender when payment is made. This disclosure includes the information provided on the pre-payment disclosure, as well as additional information, such as the promised date of delivery, contact information for the designated recipient, and information regarding the sender's error resolution rights.

EFTA section 919(a)(5) provides the Bureau with certain exemption authority, including the authority to permit a remittance transfer provider to provide a single written disclosure to a sender, in lieu of providing both a pre-payment disclosure and receipt. This single disclosure must be provided to the sender prior to payment for the remittance transfer and must accurately disclose all of the information required on both the pre-payment disclosure and the receipt. *See* EFTA section 919(a)(5)(C). EFTA section 919(b) also provides that disclosures under EFTA section 919 must be made in English and in each foreign language principally used by the remittance transfer provider, or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office. The Board proposed § 205.31 to implement the content and formatting requirements for these disclosures, and the Bureau is

finalizing these requirements in § 1005.31, as discussed below.

Section 1005.31(a) sets forth the requirements for the general form of disclosures required under subpart B. Section 1005.31(b)(1) and (2) implement the pre-payment disclosure and receipt requirements of EFTA section 919(a)(2)(A) and (B). Section 1005.31(b)(3) sets forth the requirements for providing a combined disclosure, as permitted by EFTA section 919(a)(5)(C). Section 1005.31(b)(4) contains disclosure requirements relating to a sender's error resolution and cancellation rights. Section 1005.31(c) addresses specific format requirements for subpart B disclosures, including grouping, proximity, prominence and size, and segregation requirements. Section 1005.31(d) sets forth the disclosure requirements for providing estimates, to the extent they are permitted by § 1005.32. Section 1005.31(e) generally implements the timing requirements of EFTA sections 919(a)(2) and 919(a)(5)(C). Section 1005.31(f) clarifies that, except as provided in § 1005.36(b), disclosures required by § 1005.31 must be accurate when a sender makes payment for the remittance transfer, except to the extent permitted by § 1005.32. Finally, § 1005.31(g) contains the requirements for providing foreign language disclosures in certain circumstances.

31(a) General Form of Disclosures

31(a)(1) Clear and Conspicuous

Proposed § 205.31(a) set forth the requirements for the general form of disclosures required under proposed subpart B. Pursuant to EFTA sections 919(a)(3)(A) and (a)(5)(C),[74] proposed § 205.31(a)(1) provided that the disclosures required by subpart B must be clear and conspicuous. Proposed comment 31(a)(1)–1 clarified that disclosures are clear and conspicuous for purposes of subpart B if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to senders. The proposed comment stated that oral disclosures, to the extent permitted, are clear and conspicuous when they are given at a volume and speed sufficient for a sender to hear and comprehend them.

One industry trade association commenter supported the proposal, but suggested that the Bureau should also establish a reasonable person standard in determining whether a disclosure is clear and conspicuous. The Bureau believes the proposed comment, as well as the font and other formatting requirements provided in § 1005.31(c), below, provide remittance transfer providers with the guidance necessary to determine if disclosures are clear and conspicuous. Therefore, the clear and conspicuous standard is adopted as proposed in § 1005.31. Proposed comment 31(a)(1)–1 is also adopted substantially as proposed.

Proposed § 205.31(a)(1) also provided that disclosures required by subpart B may contain commonly accepted or readily understandable abbreviations or symbols. Proposed comment 31(a)(1)–2 clarified that using abbreviations or symbols such as ''USD'' to indicate currency in U.S. dollars or ''MXN'' to indicate currency in Mexican pesos would be permissible. The Bureau did not receive comment regarding the use of commonly accepted or readily understandable abbreviations or symbols. Therefore, this aspect of proposed § 205.31(a)(1) is adopted as proposed in renumbered § 1005.31(a)(1). Comment 31(a)(1)–2 is also adopted as proposed.

31(a)(2) Written and Electronic Disclosures

Proposed § 205.31(a)(2) set forth the requirements for written and electronic disclosures under subpart B. Proposed § 205.31(a)(2) stated that disclosures required by subpart B generally must be provided to the sender in writing. However, the proposal permitted a pre-payment disclosure under proposed § 205.31(b)(1) to be provided to the sender in electronic form, if the sender electronically requests the remittance transfer provider to send a remittance transfer. In such a case, proposed comment 31(a)(2)–1 explained that a pre-payment disclosure could be provided to the sender without complying with the consumer consent and other applicable provisions of the E-Sign Act. The proposed comment also clarified that if a sender electronically requests the remittance transfer provider to send a remittance transfer, the receipt required by proposed § 205.31(b)(2) also could be provided to the sender in electronic form, but only if the provider complies with the consumer consent and other applicable provisions of the E-Sign Act.

Consumer group commenters and one industry commenter supported the requirement that disclosures must be provided in writing and the exception for pre-payment disclosures to be provided electronically if a sender initiates the transaction electronically. Some industry commenters, however, argued that the pre-payment disclosures should be permitted to be provided on a computer screen or orally, if a transaction is conducted in person. One industry commenter suggested that pre-payment disclosures could be provided on a screen similar to those used at a point-of-sale to authorize payment card transactions. Industry commenters asked the Bureau to also permit the combined disclosures to be disclosed electronically without obtaining E-Sign consent.

As discussed in the proposal, the statute generally requires disclosures under subpart B to be in writing, *see* EFTA sections 919(a)(2), (a)(5)(C), and (d)(1)(B)(iv), and generally requires compliance with E-Sign in conjunction with electronic transactions, *see* EFTA section 919(a)(3)(B). Because EFTA section 919(a)(5)(D) specifically allows the Bureau to waive E-Sign requirements only with regard to pre-payment disclosures where the sender initiates the transaction electronically and the provider provides the pre-payment disclosure in an electronic form that the consumer may keep, the Bureau believes that provision of combined disclosures and receipts must be in compliance with E-Sign as specified in 919(a)(3)(B). Similarly, the Bureau believes that pre-payment disclosures provided when a sender conducts a transaction in person must be provided in writing. Thus, the Bureau believes it would not be consistent with the statute to permit the pre-payment disclosure or the combined disclosure to be provided orally or to be shown to a sender on a computer screen at the point-of-sale prior to payment for point-of-sale transactions.

One industry commenter argued that remittance transfer providers that are broker-dealers should be permitted to comply with guidance published by the Securities and Exchange Commission regarding electronic disclosures, rather than being required to obtain E-Sign consent. To the extent that transfers made in connection with securities transactions have been exempted from the rule, as discussed above in § 1005.30(e)(2)(ii), the commenter's concerns should be mitigated.

Therefore, the Bureau is adopting as proposed the provisions regarding written and electronic disclosures in § 1005.31(a)(2) of the final rule. The Bureau is also adopting comment 31(a)(2)–1 in the final rule substantially as proposed.

Proposed comment 31(a)(2)–2 clarified that written disclosures may be provided on any size paper, as long as the disclosures are clear and conspicuous. The proposed comment

[74] EFTA section 919(a)(5)(C) incorporates the requirements of EFTA section 919(a)(3)(A) by reference, including the clear and conspicuous requirement.

stated that disclosures may be provided, for example, on a register receipt or on an 8.5 inch by 11 inch sheet of paper, consistent with current practices in the industry. The Bureau did not receive comment regarding proposed comment 31(a)(2)–2, and it is finalized as proposed.

Proposed § 205.31(a)(2) also provided that the written and electronic disclosures required by subpart B must be made in a retainable form. In the proposal, the Board requested comment on how the requirement to provide electronic disclosures in a retainable form could be applied to transactions conducted via mobile application or text message. Consumer group commenters stated that disclosures sent through text were not likely made in a form the sender can keep because mobile phone carriers regularly delete text message data or limit the size of texts. These commenters argued that the Bureau should not permit disclosures to be provided solely through mobile application or text message until technology allowed them to be retainable. These commenters stated that receipts should not be provided through mobile application or text message because they would not provide a sender with meaningful, consumer-friendly disclosures in a retainable form. Instead, consumer group commenters suggested that the Bureau should permit receipts for mobile telephone transactions to be provided through other electronic forms or written mailed receipts.

Industry commenters, in contrast, argued that the final rule should provide sufficient flexibility to accommodate disclosures relating to remittance transfers sent via mobile application or text message. Some commenters stated that the Bureau should permit remittance transfer providers to provide disclosures through the provider's preferred method, including by mobile application or text message, so long as the sender is capable of receiving disclosures through that method. Another industry commenter argued that the retainability requirement should only apply to the receipt and not to the pre-payment disclosures for transactions conducted via mobile application or text message. One industry commenter stated that for a remittance transfer initiated by mobile telephone, the Bureau should allow disclosures to be provided on the telephone if accompanied by the delivery of a retainable version of the same disclosure through the Internet, since mobile telephones typically do not allow for printing.

As discussed below regarding § 1005.31(a)(5), the Bureau is permitting the pre-payment disclosures required by § 1005.31(b)(1) to be disclosed orally or via mobile application or text message if the transaction is conducted entirely by telephone via mobile application or text message. The Bureau understands that given current technical limitations, in many cases, disclosures provided via mobile application or text message could not be provided in a retainable form or in a manner that satisfies formatting requirements. The Bureau notes, however, that the statute expressly permits the pre-payment disclosures to be provided orally for transfers conducted entirely by telephone. Thus, if a transaction is conducted entirely by telephone via mobile application or text message, a provider may give the pre-payment disclosure orally. Because oral disclosures are not retainable, the Bureau does not believe senders would be less protected by receiving pre-payment disclosures via mobile application or text message that are also not retainable. Moreover, in some cases, disclosures provided via mobile application or text message may be better than oral disclosures. For example, a disclosure provided by text message stored in a mobile telephone could be viewed by the sender for a period of time after the transaction is complete or forwarded to an email or other savable file. Therefore, § 1005.31(a)(2) provides that written and electronic disclosures required by subpart B generally must be made in a retainable form. However, to effectuate the purposes of the EFTA and facilitate compliance, the Bureau believes it is necessary and proper to use its authority under ETFA sections 904(a) and (c) to provide in the final rule that for transfers conducted entirely by telephone via mobile application or text message, the pre-payment disclosures may be provided via mobile application or text message in accordance with § 1005.31(a)(5) and need not be retainable. The Bureau is also adding a new comment 31(a)(2)–4 to clarify that disclosures provided electronically to a mobile telephone that are not provided via mobile application or text message must be retainable. For example, disclosures provided via email must be retainable, even if a sender accesses them by mobile telephone.

Proposed comment 31(a)(2)–3 clarified that a remittance transfer provider may satisfy the requirement to provide electronic disclosures in a retainable form if it provides an online disclosure in a format that is capable of being printed. The proposed comment clarified that electronic disclosures cannot be provided through a hyperlink or in another manner by which the sender can bypass the disclosure. A provider is not required to confirm that the sender has read the electronic disclosures.

Consumer group commenters generally supported these retainability requirements. Industry commenters suggested that the Bureau revise or clarify the rules regarding the provision of electronic disclosures. Industry commenters stated that the Bureau should permit a remittance transfer provider to provide disclosures by sending a hyperlink to the sender or to permit the provider to make a disclosure available on its Web site where disclosures can be viewed. One commenter suggested that the Bureau should clarify that disclosures are retainable as long as they may be saved or stored on a computer. This commenter stated that a disclosure would be retainable if, for example, a sender could save a screen shot or download a file that could be saved.

The Bureau believes proposed comment 31(a)(2)–3 appropriately addressed how disclosures may be provided in a retainable format when disclosed electronically. The proposed comment sets forth general principles for providing electronic disclosures that can be applied to various scenarios in which electronic disclosures are provided. For example, a provider could determine that a screen shot or downloadable file complies with the retainability requirement if those formats are also capable of being printed. The proposed comment is also consistent with other of the Bureau's electronic disclosure provisions that ensure that senders are provided with disclosures, rather than permitting disclosures to simply be made available to them.[75] Therefore, comment 31(a)(2)–3 is adopted as proposed.

31(a)(3) Oral Disclosures for Oral Telephone Transactions

Relying upon authority in EFTA section 919(a)(5)(A), proposed § 205.31(a)(3) permitted the pre-payment disclosures to be provided orally if the transaction was conducted entirely by telephone and if the remittance transfer provider complied with the foreign language disclosure requirements of proposed § 205.31(g)(2), discussed below. One industry commenter opposed the oral disclosure authorization for telephone transactions,

[75] *See* for example, § 1005.20(c)(2) and § 1026.5a(a)(2).

arguing that the length of time to process a transfer made by telephone would increase significantly due to the number of items that must be disclosed orally. Because the Bureau believes the statute intends for senders to receive pre-payment disclosures regardless of the format of the transaction, the Bureau is permitting oral pre-payment disclosures in certain circumstances in § 1005.31(a)(3) of the final rule. Moreover, as discussed below, the Bureau is permitting in § 1005.31(a)(5) the pre-payment disclosures required by § 1005.31(b)(1) to be disclosed orally or via mobile application or text message for transactions conducted entirely by telephone via mobile application or text message. Therefore, the final rule is limiting the application of § 1005.31(a)(3) to transactions conducted through oral conversations. Therefore, § 1005.31(a)(3)(i) is amended to clarify that § 1005.31(a)(3) only applies if the transaction is conducted orally and entirely by telephone. The final rule also adds comment 31(a)(3)–2 to clarify that § 1005.31(a)(3) applies to transactions conducted orally and entirely by telephone, such as transactions conducted orally on a landline or mobile telephone.

The final rule also adds another condition for providers to be permitted to disclose pre-payment disclosures orally, in addition to the requirements that the transaction be conducted entirely by telephone and that the provider comply with the foreign language disclosure requirements of § 1005.31(g)(2). The Bureau believes that for oral telephone transactions, senders should be informed of their cancellation rights before the cancellation period has passed. Because a receipt may be mailed to a sender for telephone transactions, *see* § 1005.31(e)(2), the sender would not receive the abbreviated statement about the sender's cancellation rights required by § 1005.31(b)(2)(iv) until after the cancellation period had passed. Therefore, the Bureau is requiring in § 1005.31(a)(3) that a provider disclose orally a statement about the rights of the sender regarding cancellation required by § 1005.31(b)(2)(iv) pursuant to the timing requirements in § 1005.31(e)(1) in order to disclose the pre-payment disclosures orally for oral telephone transactions.

Proposed comment 31(a)(3)–1 stated that, for transactions conducted partially by telephone, disclosures may not be provided orally. For example, a sender may begin a remittance transfer at a remittance transfer provider's dedicated phone in a retail store, and then provide payment in person to a store clerk to complete the transaction. In such cases, the proposed comment clarified that all disclosures must be provided in writing. Proposed comment 31(a)(3)–1 clarified that for such a transaction, a provider may comply with the disclosure requirements by providing the written pre-payment disclosure in person prior to the sender's payment for the transaction, and the written receipt when payment is made for the remittance transfer.

Industry commenters argued that the Bureau should permit oral pre-payment disclosures for these hybrid transactions. For example, one industry commenter stated that providing the information to senders at the time the sender is speaking with the remittance transfer provider would enable the sender to discuss the disclosed fees or currency delivery options. This commenter stated that it would be difficult to continue providing remittance transfers using a provider's dedicated telephone in a retail store if pre-payment disclosures could not be provided orally.

The Bureau believes that by allowing oral disclosures only for transactions performed entirely by telephone, Congress did not intend to permit providers to satisfy the disclosure requirements orally for transactions conducted partially by telephone. *See* EFTA section 919(a)(5)(A). Therefore, comment 31(a)(3)–1 is adopted substantially as proposed, with a revision to more precisely state that providing the information required by § 1005.31(b)(1) to a sender orally does not fulfill the requirement to provide the disclosures required by § 1005.31(b)(1). The Bureau notes that nothing prohibits a provider from stating orally the information required to be disclosed by § 1005.31(b)(1) to a sender, even though this would not fulfill a provider's pre-payment disclosure requirements.

31(a)(4) Oral Disclosures for Certain Error Resolution Notices

Proposed § 205.31(a)(4) permitted a remittance transfer provider to provide an oral report of the results of an investigation of a notice of error, if the remittance transfer provider determined that an error occurred as described by the sender, and if the remittance transfer provider complied with the foreign language disclosure requirements of proposed § 205.31(g)(2). The Bureau did not receive comment on proposed § 205.31(a)(4), and it is adopted substantially as proposed as § 1005.31(a)(4).

31(a)(5) Disclosures for Mobile Application or Text Message Transactions

In the May 2011 Proposed Rule, the Board noted that retainability and formatting requirements could pose challenges for providing disclosures in transactions conducted via mobile application or text message. As discussed above, many industry commenters argued that the Bureau should change or provide for tailored retainability or formatting requirements for transactions conducted via mobile application or text message to ensure that senders would continue to have access to these services. Several industry commenters noted that they offered or were developing technology to permit senders to send a remittance transfer via a mobile telephone. The commenters believed that such services were evolving rapidly and urged the Bureau to provide flexibility in the final rule.

As discussed above, because remittance transfers sent via mobile application or text message on a telephone are ''conducted entirely by telephone,'' the Bureau believes that EFTA section 919(a)(5)(A) permits the Bureau to allow oral pre-payment disclosures in connection with transfers sent via mobile application or text message if the transfer is conducted entirely by telephone. Because oral disclosures are not retainable, the Bureau does not believe senders would be less protected by receiving pre-payment disclosures via mobile application or text message that is also not retainable. Moreover, in some cases, senders receiving disclosures via mobile application or text message may be informed of the cost of their transaction in a manner that is better than oral disclosures. For example, a disclosure provided by text message stored in a mobile telephone could be viewed by the sender for a period of time after the transaction is complete or forwarded to an email or other savable file.

Therefore, to effectuate the purposes of the EFTA and facilitate compliance, the Bureau believes it is necessary and proper to use its authority under EFTA sections 904(a) and (c) to add in the final rule § 1005.31(a)(5), which states that the pre-payment disclosure may be provided orally or via mobile application or text message if: (i) The transaction is conducted entirely by telephone via mobile application or text message; (ii) the remittance transfer provider complies with the foreign language requirements of § 1005.31(g)(2); and (iii) the provider discloses orally or via mobile

application or text message a statement about the rights of the sender regarding cancellation required by § 1005.31(b)(2)(iv) pursuant to the timing requirements in § 1005.31(e)(1). The final rule also adds comment 31(a)(5)–1 to illustrate how a provider could provide pre-payment disclosures for mobile application and text message transactions. The comment states that, for example, if a sender conducts a transaction via text message on a mobile telephone, the remittance transfer provider may call the sender and orally provide the required pre-payment disclosures. Alternatively, the provider may provide the required pre-payment disclosures via text message. The comment also clarifies that § 1005.31(a)(5) applies only to transactions conducted entirely by mobile telephone via mobile application or text message.

31(b) Disclosures

Proposed section 205.31(b) set forth substantive disclosure requirements for remittance transfers. EFTA sections 919(a)(2)(A) and (B) require a remittance transfer provider to provide to a sender: (i) A written pre-payment disclosure with information applicable to the sender's remittance transfer—specifically, the exchange rate, the amount of transfer and other fees, and the amount that would be received by the designated recipient; and (ii) a written receipt that includes the information provided on the pre-payment disclosure, plus the promised date of delivery, contact information for the designated recipient, information regarding the sender's error resolution rights, and contact information for the remittance transfer provider and applicable regulatory agencies. EFTA section 919(a)(5)(C) also authorizes the Bureau to permit a remittance transfer provider to provide a single written disclosure to a sender, instead of a pre-payment disclosure and receipt, that accurately discloses all of the information required on both the pre-payment disclosure and the receipt. Section 1005.31(b)(1) and (2) finalize these substantive disclosure requirements for pre-payment disclosures and receipts, respectively. The final rule also permits the use of a combined disclosure, in lieu of the pre-payment disclosure and receipt, subject to the requirements in § 1005.31(b)(3).

As discussed below, consumer group commenters opposed the combined disclosures, but otherwise generally supported the disclosures as proposed. These commenters stated that senders currently lack the information about exchange rate, fees, and timing that is required in the disclosures. Many industry commenters generally opposed the proposed disclosures. One industry commenter stated that the Board's consumer testing demonstrated that senders were satisfied with remittance transfer providers' existing disclosures, and that the new requirements would impose significant costs without commensurate benefits to senders.

Many industry commenters further argued that compliance with the disclosure requirements was not possible for wire transfers and international ACH transactions. Specifically, industry commenters opposed the requirements to disclose the exchange rate, fees and taxes imposed by a person other than the provider, and the date of funds availability. One money transmitter commenter stated that these disclosure requirements could also be problematic for some money transmitters, where an international wire transfer is part of the transaction, such as when a sender conducts an account-to-account remittance transfer through a money transmitter.

As discussed below, the Bureau understands the unique compliance challenges for institutions that send remittance transfers via wire transfer or ACH. However, as previously noted, the statute specifically applies the disclosure requirements in EFTA sections 919(a)(2)(A) and (B) to both open network and closed network transactions and provides a specific accommodation to address the compliance challenges faced for open network transactions. As such, the final rule requires all remittance transfer providers to provide either the pre-payment disclosure and a receipt, or a combined disclosure, except to the extent estimates are permitted by § 1005.32.

Pursuant to EFTA section 919(a)(2), information on a pre-payment disclosure and a receipt need only be provided to the extent applicable to the transaction. Similarly, the information required on a combined disclosure need only be provided as applicable because the combined disclosure is simply a consolidation of the pre-payment disclosure and the receipt. *See* EFTA section 919(a)(2)(A) and (B). Proposed comment 31(b)–1 clarified that a remittance transfer provider could choose to omit an inapplicable item provided in proposed § 205.31(b). Alternatively, a remittance transfer provider could disclose a term and state that an amount or item is ''not applicable,'' ''N/A,'' or ''None.'' The proposed comment provided examples of when certain disclosures may not be applicable. For example, if fees or taxes are not imposed in connection with a particular transaction, the provider need not provide the disclosures about fees and taxes generally required by proposed § 205.31(b)(1)(ii) and (vi). Similarly, a Web site need not be disclosed if the provider does not maintain a Web site. The proposed comment also included an example of instances in which exchange rate information was not required on the disclosures for transactions that are both funded and received in U.S. dollars.

One industry trade association commenter argued that dollar-to-dollar transactions should be completely excluded from the disclosure requirements. The Bureau believes, however, that fee and tax information should be disclosed to senders, even if there is no exchange rate applied to the transfer. The final rule does not exclude dollar-to-dollar transactions from the disclosure requirements, but clarifies that the exchange rate disclosure is not required for such transactions.

Comment 31(b)–1 is adopted substantially as proposed, with clarifying revisions providing that an exchange rate is not required to be disclosed if an exchange rate is not applied to the transfer, even if it is not a dollar-to-dollar transaction. As such, the final comment states that a provider need not provide the exchange rate disclosure required by § 1005.31(b)(1)(iv) if a recipient receives funds in the currency in which the remittance transfer is funded, or if funds are delivered into an account denominated in the currency in which the remittance transfer is funded. For example, if a sender in the United States transfers funds from an account denominated in Euros to an account in France denominated in Euros, no exchange rate would need to be provided. Similarly, if a sender funds a remittance transfer in U.S. dollars and requests that a remittance transfer be delivered to the recipient in U.S. dollars, a provider need not disclose an exchange rate.

Proposed comment 31(b)–2 addressed the requirements in proposed § 205.31(b) that certain disclosures be described either using the terms set forth in § 205.31(b) or substantially similar terms. As discussed in the May 2011 Proposed Rule, the Board developed and selected the terms used in proposed § 205.31(b) through consumer testing to ensure that senders could understand the information disclosed to them. However, the May 2011 Proposed Rule provided remittance transfer providers with flexibility in developing their

disclosures, both for disclosures in English and in each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfers, either orally or in writing, at that office. *See* § 1005.31(g) below.

The Bureau did not receive comment regarding proposed comment 31(b)–2, and it is finalized substantially as proposed. In the final rule, comment 31(b)–2 states that terms may be more specific than the terms used in the final rule. For example, a remittance transfer provider sending funds to Colombia may describe a tax disclosed under § 1005.31(b)(1)(vi) as a ''Colombian Tax'' in lieu of describing it as ''Other Taxes.'' Foreign language disclosures required under § 1005.31(g) must contain accurate translations of the terms, language, and notices required by § 1005.31(b).

31(b)(1) Pre-Payment Disclosures

Pursuant to EFTA section 919(a)(2)(A), proposed § 205.31(b)(1) stated that a remittance transfer provider must make specified pre-payment disclosures to a sender, as applicable. The disclosures are discussed below.

31(b)(1)(i) Transfer Amount

Proposed § 205.31(b)(1)(i) provided that the remittance transfer provider must disclose the amount that will be transferred to the designated recipient using the term ''Transfer Amount'' or a substantially similar term. Under the proposal, the transfer amount would have to be disclosed in the currency in which the funds will be transferred because the Board believed the disclosure of the transfer amount would help demonstrate to a sender how a provider calculates the total amount of the transaction, discussed below.

Consumer group commenters agreed that the disclosure of the transfer amount as a separate line item would help senders understand the total amount to be paid in order to send the requested amount of currency to a recipient. Industry commenters asked the Bureau to clarify how to make a disclosure in the currency in which funds will be transferred. These commenters asked if this requirement only applied where a remittance transfer provider performed the conversion. These commenters suggested that the final rule should clarify that the disclosures should be provided in the denomination of the account used to fund the transfer or in the currency submitted by the sender for the transfer.

The Bureau believes that the transfer amount should be disclosed as proposed in order to help demonstrate the cost of the transfer to a sender. Therefore, to effectuate the purposes of the EFTA, the Bureau deems is necessary and proper to use its authority under EFTA sections 904(a) and (c) to finalize this requirement in § 1005.31(b)(1)(i). For clarity, the final rule provides that the transfer amount must be disclosed in the currency in which the remittance transfer is funded, rather than the currency in which funds will be transferred. The Bureau believes that disclosing the transfer amount in the currency in which the remittance transfer is funded—whether the sender pays with cash, with currency in an account, or by other means—will, when combined with the other required disclosures, help senders calculate the effect of the exchange rate on the transaction, if there is a currency exchange. For example, if the funds will be exchanged from U.S. dollars to Mexican pesos, the transfer amount required by § 1005.31(b)(1)(i) must be disclosed in U.S. dollars. Therefore, § 1005.31(b)(1)(i) provides that the remittance transfer provider must disclose the amount that will be transferred to the designated recipient, in the currency in which the remittance transfer is funded, using the term ''Transfer Amount'' or a substantially similar term.

31(b)(1)(ii) Fees and Taxes Imposed by the Provider

Proposed § 205.31(b)(1)(ii) required that a remittance transfer provider disclose any fees and taxes that are imposed on the remittance transfer by the remittance transfer provider, in the currency in which the funds will be transferred. The proposal stated that the disclosure must be described using the term ''Transfer Fees,'' ''Transfer Taxes,'' or ''Transfer Fees and Taxes,'' or a substantially similar term. These disclosures were proposed pursuant to EFTA section 919(a)(2)(A)(ii), which requires a remittance transfer provider to disclose the amount of transfer fees and any other fees charged by the remittance transfer provider for the remittance transfer.

Proposed comment 31(b)(1)–1.i. clarified that taxes imposed by the remittance transfer provider include taxes imposed on the remittance transfer by a State or other governmental body. The proposed comment also provided guidance applicable to the disclosure of both fees and taxes imposed on the remittance transfer by the provider, as well as fees and taxes imposed on the remittance transfer by a person other than the provider, which are discussed in detail below. *See* § 1005.31(b)(1)(vi), below. The proposed comment addressed the requirement that a remittance transfer provider only disclose fees or taxes as applicable. The proposed comment also stated that if both fees and taxes are imposed, the fees and taxes may be disclosed as one disclosure or as separate, itemized disclosures.

Consumer group commenters and an industry commenter argued that the Bureau should require itemized fees and tax disclosures. They believed itemized disclosures would help senders understand what costs are fixed, such as taxes, and what costs may vary depending on the provider, such as fees. However, another industry commenter stated that disclosing fees and taxes together provided senders with adequate information on the total cost of the transaction.

The Bureau agrees that separately listing the fees and taxes on disclosures provides better information to the sender about fixed and variable costs of the transaction, and the final rule provides that fees and taxes must be disclosed separately. Section 1005.31(b)(1)(ii) also clarifies that the fees and taxes must be disclosed in the currency in which the remittance transfer is funded. *See* § 1005.31(b)(1)(i), above. Therefore, § 1005.31(b)(1)(ii) states that a remittance transfer provider must disclose any fees and taxes imposed on the remittance transfer by the provider, in the currency in which the remittance transfer is funded, using the terms ''Transfer Fees'' for fees and ''Transfer Taxes'' for taxes or substantially similar terms. Comment 31(b)(1)–1.i. in the final rule is changed from the proposal to state that if both fees and taxes are imposed, the fees and taxes must be disclosed as separate, itemized disclosures. For example, a provider would disclose all transfer fees using the term ''Transfer Fees'' or a substantially similar term and would separately disclose all transfer taxes as ''Transfer Taxes'' or a substantially similar term.

One industry commenter argued that because a tax is imposed by the government, and not by the remittance transfer provider, EFTA section 919(a)(2)(A)(ii) does not require taxes to be disclosed and, as such, the rule should not require disclosure of taxes. The Bureau believes the statute intended to require the disclosure of all charges imposed on the remittance transfer that would affect the cost of a remittance transfer to the sender. To the extent taxes imposed on the remittance transfer by a State or other governmental body are charged to the sender by the remittance transfer provider, the Bureau

believes they are required to be disclosed under EFTA section 919(a)(2)(A)(ii), which requires a remittance transfer provider to disclose transfer fees and any other fees charged by the remittance transfer provider for the remittance transfer. Even if EFTA section 919(a)(2)(A)(ii) did not require that such taxes be disclosed to senders, the Bureau believes that disclosing the taxes imposed on the remittance transfer will demonstrate to the sender the calculation of the total amount that the sender pays for the transfer and how this amount relates to amount that will be received by the designated recipient and is therefore necessary and proper to effectuate the purposes of the EFTA. As such, to the extent necessary, the Bureau is also requiring these taxes to be disclosed pursuant to its authority under EFTA sections 904(a) and (c). Therefore, as proposed, comment 31(b)(1)–1.i. in the final rule clarifies that taxes imposed on the remittance transfer by the remittance transfer provider include taxes imposed on the remittance transfer by a State or other governmental body.

Finally, as proposed, comment 31(b)(1)–1.i. addresses the disclosure of fees and taxes that are applicable to the transfer. The comment in the final rule states that a provider need only disclose fees or taxes imposed on the remittance transfer by the provider in § 1005.31(b)(1)(ii) and imposed on the remittance transfer by a person other than the provider in § 1005.31(b)(1)(vi), as applicable. For example, if no transfer taxes are imposed on a remittance transfer, a provider would only disclose applicable transfer fees.

Proposed comment 31(b)(1)–1.ii. distinguished between the fees and taxes imposed on the remittance transfer by the provider and the fees and taxes imposed on the remittance transfer by a person other than the provider. This proposed comment is addressed in the discussion regarding fees and taxes imposed on the remittance transfer by a person other than the provider in § 1005.31(b)(1)(vi), below.

31(b)(1)(iii) Total Amount of the Transaction

Proposed § 205.31(b)(1)(iii) required the disclosure of the total amount of the transaction. Although this total is not required by the statute, the Board proposed to require the disclosure of the total amount of the transaction to further the purposes of the EFTA by enabling a sender to understand the total amount to be paid out-of-pocket for the transaction. The Bureau did not receive comment on the proposed provision. Therefore, to effectuate the purposes of the EFTA, the Bureau believes it is necessary and proper to use its authority under EFTA sections 904(a) and (c) to adopt § 205.31(b)(1)(iii) as proposed in § 1005.31(b)(1)(iii).The final rule requires a remittance transfer provider to disclose the total amount of the transaction, which is the sum of § 1005.31(b)(1)(i) and (ii), in the currency in which the remittance transfer is funded, using the term ''Total'' or a substantially similar term.

31(b)(1)(iv) Exchange Rate

Proposed § 205.31(b)(1)(iv) required the disclosure of any exchange rate used by the provider for the remittance transfer, rounded to the nearest 1/100th of a decimal point, consistent with EFTA section 919(a)(2)(A)(iii). The proposed rule stated that the exchange rate must be described using the term ''Exchange Rate'' or a substantially similar term. The proposed rule did not permit floating rates, where the exchange rate is set when the designated recipient claims the funds.

Consumer group commenters strongly supported the prohibition of unknown or floating exchange rates. Many industry commenters, however, urged that the final rule should accommodate floating rates and other circumstances in which an exchange rate may not be known at the time the sender requests the remittance transfer. A few industry commenters argued that the statute does not require the disclosure of an exchange rate set by institutions other than the remittance transfer provider. The commenters stated that by requiring the disclosure of the exchange rate to be used by the remittance transfer provider for the remittance transfer, EFTA section 919(a)(2)(A)(iii) only requires disclosure of an exchange rate that the remittance transfers provider itself set for the remittance transfer.

For example, industry commenters stated that most credit unions offering international transfers do not perform currency conversions themselves, but instead rely on correspondent banks or other business partners to do so. Some industry commenters also stated that most credit unions offering international transfers work with currency providers in real time to contract for exchange rates. The commenters argued that this allows the credit unions to provide their members with the most competitive exchange rates. However, in such an arrangement the exchange rate that will be applied is only known at the time the contract is accepted, and would not be known at the time disclosures are provided to the senders. Similarly, other industry commenters stated that with their current processes and systems, they would know an exchange rate once a remittance transfer is processed, but not when the remittance transfer is requested.

Some industry commenters also stated the exchange rate cannot be determined at the time of the request when a sender designates the receipt of a transaction in one currency, but the receiving account is denominated in another currency. In those cases, the receiving institution must convert the funds into another currency in order to complete the transfer. One industry commenter stated that its customers sometimes request remittance transfers to be sent to their foreign accounts in U.S. dollars. These senders, however, have arrangements with the recipient institutions holding their foreign accounts to convert the funds to the currencies of the accounts either at the spot rates available at the time the accounts are credited or at rates pre-arranged by contracts between the senders and the recipient institutions. One industry commenter stated that, in some countries, a recipient may choose to be paid in one of multiple currencies. The commenter also stated that it permits consumers to change the designated country for pick up. In these cases, the currency in which funds will be received may change at the option of the recipient.

A Federal Reserve Bank commenter, as well as industry commenters, argued that requiring a fixed exchange rate for purposes of providing an exchange rate disclosure would result in less favorable exchange rates for senders. These commenters stated that if providers are required to fix the exchange rate, they will increase the spread they use in order to minimize the risks associated with rate volatility, so the cost of sending remittance transfers would increase for senders. One money transmitter commenter argued that requiring a disclosure of a fixed rate could also lead remittance transfer providers to stop providing services to some locations in which they have historically used floating rates. This commenter noted that such a requirement would require it to renegotiate its contracts with approximately 100 foreign agents representing about 10,000 locations that currently offer only floating rates. This commenter stated that this change would affect about a half million customers annually.

One industry commenter believed that a remittance transfer provider should instead be permitted to disclose that the exchange rate will be changed at the rate set by a daily central bank or other official rate plus or minus a fixed

offset, such as a commission. Other industry commenters suggested permitting disclosure of an estimated exchange rate, as long as the provider also discloses that the rate is subject to change. A Federal Reserve Bank commenter believed that floating exchange rate products should be exempted from the disclosure provisions in the rule.

The Bureau interprets the statute to require a remittance transfer provider to disclose to the sender the exchange rate to be used for the remittance transfer to the sender, both at the time the sender requests the remittance transfer and when the sender pays for the transfer. This interpretation is based on several factors. First, the fact that the exchange rate may be set by another institution involved in the remittance transfer does not change the fact that it will be used by the remittance transfer provider in effectuating the sender's request. Second, the statute specifically requires disclosure of the amount to be received by the designated recipient, using the values of the currency into which the funds will be exchanged. This disclosure requires a provider to determine the exchange rate to be used to effectuate the transfer, whether that rate is set by the remittance transfer provider or a third party.

The purpose of the statute supports the same conclusion. As discussed in the May 2011 Proposed Rule, the disclosure was intended to provide senders with certainty regarding the exchange rate and the amount of currency their designated recipients would receive. Senders would not be able to tell, for example, whether the funds they transmit are sufficient to pay household expenses and other bills where remittance products are based on floating rates.

The Bureau understands, however, that there may be instances in which a sender will request funds to be delivered in a particular currency, but the funds are later converted into another currency due to facts that cannot be known to the provider. In these circumstances, the Bureau believes the remittance transfer provider complies with the requirement to disclose the exchange rate when it discloses information based on the request of the sender, even if the funds are ultimately received in a different currency. If the sender does not know the currency in which the funds will be received or requests funds to be received in the currency in which the remittance transfer is funded, the Bureau believes that the provider may assume that the currency in which funds will be received is the currency in which the remittance transfer is funded. *See also* comment 31(b)(1)(vi)–1, below.

Section 1005.31(b)(iv) of the final rule requires disclosure of the exchange rate used by the provider for the remittance transfer, as proposed. Comment 31(b)(1)(iv)–1 clarifies that if the designated recipient will receive funds in a currency other than the currency in which the remittance transfer is funded, a remittance transfer provider must disclose the exchange rate to be used by the provider for the remittance transfer. An exchange rate that is estimated must be disclosed pursuant to the requirements of § 1005.32, discussed below. A remittance transfer provider may not disclose, for example, that an exchange rate is ''unknown,'' ''floating,'' or ''to be determined.''

Comment 31(b)(1)(iv)–1 further clarifies that if a provider does not have specific knowledge regarding the currency in which the funds will be received, the provider may rely on a sender's representation as to the currency in which funds will be received for purposes of determining whether an exchange rate is applied to the transfer. For example, if a sender requests that a remittance transfer be deposited into an account in U.S. dollars, the provider need not disclose an exchange rate, even if the account is actually denominated in Mexican pesos and the funds are converted prior to deposit into the account. If a sender does not know the currency in which funds will be received, the provider may assume that the currency in which funds will be received is the currency in which the remittance transfer is funded. The Bureau notes that if a provider does not independently have specific knowledge of the currency in which funds will be received, the provider may rely on the sender's representation as to the currency in which funds will be received. For example, the rule does not impose on providers a duty to inquire about this information with a third party.

Some industry commenters also argued that the exchange rate should be permitted to include more than two decimal places, consistent with their current disclosure practices. One industry commenter stated that providing exchange rates that include more than two decimal places provides senders with more accurate and detailed exchange rate information.

The Bureau agrees that it may be appropriate for some providers to disclose an exchange rate that includes more than two decimal places, because a provider may determine that the disclosure would provide a sender with a more accurate representation of the remittance transfer's cost, based on the particular type of transaction or type of currency being used. However, the Bureau also believes that some providers may determine that rounding to fewer digits may sufficiently inform senders of the cost of the exchange. The Bureau is also mindful that a disclosure that includes a long string of numbers could confuse some senders. The Bureau believes it is appropriate to permit a remittance transfer provider to disclose an exchange rate rounded to a number of decimal places that best reflects the cost to the sender, within a range that will not potentially confuse the sender.

Therefore, to effectuate the purposes of the EFTA, the Bureau believes it is necessary and proper to exercise its EFTA sections 904(a) and (c) authority in § 1005.31(b)(1)(iv) to permit the exchange rate to be rounded consistently for each currency to no fewer than two decimal places and no more than four decimal places. The exchange rate must be disclosed using the term ''Exchange Rate'' or a substantially similar term. Comment 31(b)(1)(iv)–2 of the final rule is revised to reflect the more flexible rounding requirements. Comment 31(b)(1)(iv)–2 clarifies that the exchange rate disclosed by the provider for the remittance transfer is required to be rounded. The provider may round to two, three, or four decimal places, at its option. For example, if one U.S. dollar exchanges for 11.9483779 Mexican pesos, a provider may disclose that the U.S. dollar exchanges for 11.9484 Mexican pesos. The provider may alternatively disclose, for example, that the U.S. dollar exchanges for 11.948 pesos or 11.95 pesos. On the other hand, if one U.S. dollar exchanges for exactly 11.9 Mexican pesos, the provider may disclose that ''US$1=11.9 MXN'' in lieu of, for example, ''US$1=11.90 MXN.''

Though the Bureau is permitting flexibility for rounding exchange rate disclosures, the Bureau believes that each provider should disclose its exchange rates in a consistent manner. The Bureau believes that if a provider were permitted to round exchange rates for a particular currency on a transaction-by-transaction basis, a provider could round exchange rates differently in order to make the exchange rate appear to be more favorable. For example, the Bureau does not believe a provider that typically rounds to four decimal places for a specific currency (*e.g.,* the U.S. dollar exchanges for 0.7551 Euros) should be permitted to round to two decimal places for some of those currency transactions (*e.g.,* the U.S. dollar

exchanges for 0.76 Euros). Comment 31(b)(1)(iv)–2 thus clarifies that the exchange rate disclosed for the remittance transfer must be rounded consistently for each currency. For example, a provider may not round to two decimal places for some transactions exchanged into Euros and round to four decimal places for other transactions exchanged into Euros.

As discussed above, a provider may use an exchange rate that is not necessarily set by the provider itself. The final rule adds a new comment 31(b)(1)(iv)–3 to clarify that the exchange rate used by the provider and applied to the remittance transfer need not be set by that provider. For example, an exchange rate set by an intermediary institution and applied to the remittance transfer would be the exchange rate used for the remittance transfer and must be disclosed by the provider.

Consumer group commenters and an industry trade association asked the Bureau to clarify how the exchange rate requirements would apply when a remittance transfer involves a prepaid card. These commenters asked how disclosures, such as the exchange rate, could be provided in accordance with the timing provisions in the May 2011 Proposed Rule when a provider would not know when the recipient would withdraw funds abroad or how much the recipient would withdraw. To the extent a prepaid card is covered by the rule, *see* § 1005.30(e), the funds that will be received by the designated recipient are those that are loaded on to the prepaid card by the sender at the time of the transaction. Often a prepaid card is both funded and loaded in U.S. dollars, and funds remain on the card in U.S. dollars until a cardholder withdraws funds in a foreign country. In these instances, a provider need not provide the exchange rate disclosure required by § 1005.31(b)(1)(iv), because a recipient will receive the currency in the currency in which the remittance transfer is funded. *See* comment 31(b)–1.

Finally, a Federal Reserve Bank commenter noted that the exchange rate cannot be determined when a sender initiates payment on a recurring basis. The Bureau recognizes the unique challenges relating to recurring payments, and the final rule provides alternative provisions for these circumstances in § 1005.36, discussed below.

31(b)(1)(v) Transfer Amount

Proposed § 205.31(b)(1)(v) generally required providers to repeat the disclosure of the transfer amount in proposed § 205.31(b)(1)(i). Proposed § 205.31(b)(1)(v), however, required the transfer amount to be disclosed in the currency in which the funds will be received by the designated recipient to demonstrate to the sender how third party fees or taxes imposed under proposed § 205.31(b)(1)(vi), which are also required to be disclosed in the currency in which the funds will be received, would reduce the amount received by the designated recipient. Proposed § 205.31(b)(1)(v), however, only required this repeat disclosure if third party fees or taxes are imposed under proposed § 205.31(b)(1)(vi), because it would not otherwise be necessary to demonstrate a reduction of the transfer amount by third party fees and taxes. The proposed disclosure was required to be described using the term ''Transfer Amount'' or a substantially similar term. Both the transfer amount required to be disclosed by proposed § 205.31(b)(1)(i) and the transfer amount required to be disclosed by proposed § 205.31(b)(1)(v) were proposed to effectuate the purposes of the EFTA.

The Bureau did not receive comment on the requirement to disclose the transfer amount in proposed § 205.31(b)(1)(v). Therefore, to effectuate the purposes of the EFTA, the Bureau believes it is necessary and proper to use its authority under EFTA sections 904(a) and (c) to finalize this requirement as proposed in § 1005.31(b)(1)(v). The Bureau received comments regarding concerns about making disclosures in the currency in which the funds will be received by the designated recipient. These comments, and a clarification regarding the currency in which the funds will be received by the designated recipient, are discussed below. *See* comment 31(b)(1)(vi)–1.

Proposed comment 31(b)(1)–2 provided more guidance on the requirement to repeat the transfer amount disclosure in some circumstances, and it is adopted substantially as proposed. The comment reflects the clarification in the final rule that disclosure under § 1005.31(b)(1)(i) must be disclosed in the currency in which the remittance transfer is funded. Comment 31(b)(1)–2 clarifies that two transfer amounts are required to be disclosed by § 1005.31(b)(1)(i) and (v). First, a provider must disclose the transfer amount in the currency in which the remittance transfer is funded to show the calculation of the total amount of the transaction. Typically, the remittance transfer is funded in U.S. dollars, so the transfer amount would be expressed in U.S. dollars. However, if remittance transfer is funded, for example, from a Euro-denominated account, the transfer amount would be expressed in Euros.

Second, a provider must disclose the transfer amount in the currency in which the funds will be made available to the designated recipient. For example, if the funds will be picked up by the designated recipient in Japanese yen, the transfer amount would be expressed in Japanese yen. However, the comment also clarifies that this second transfer amount need not be disclosed if fees and taxes are not imposed for the remittance transfer under § 1005.31(b)(1)(vi). As discussed above, in such cases, there is no consumer benefit to the additional information if the transferred amount is not reduced by other fees and taxes.

Section 1005.31(b)(1)(v) also requires a remittance transfer provider to use the term ''Transfer Amount'' or a substantially similar term to describe the disclosure required under this paragraph. Comment 31(b)(1)-2 clarifies, as proposed, that the terms used to describe each transfer amount should be the same.

Finally, the Bureau believes that the rounded exchange rate required to be disclosed under § 1005.31(b)(1)(iv) is intended only to ensure that senders are not overwhelmed by a disclosure of an exchange rate with many numbers following the decimal point. The Bureau does not believe it is intended to constrain the number of decimal places involved in calculating other disclosures. Therefore, § 1005.31(b)(1)(v) adds the clarification that the exchange rate used to calculate the transfer amount in § 1005.31(b)(1)(v) is the exchange rate in § 1005.31(b)(1)(iv), including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate. Comment 31(b)(1)-3 provides examples to demonstrate the exchange rate that must be used to calculate not only the transfer amount in § 1005.31(b)(1)(v), but also the fees and taxes imposed on the remittance transfer by a person other than the provider in § 1005.31(b)(1)(vi) and the amount received in § 1005.31(b)(1)(vii). For example, if one U.S. dollar exchanges for 11.9483779 Mexican pesos, a provider must calculate these disclosures using this rate, even though the provider may disclose pursuant to § 1005.31(b)(1)(iv) that the U.S. dollar exchanges for 11.9484 Mexican pesos. Similarly, if a provider estimates pursuant to § 1005.32 that one U.S. dollar exchanges for 11.9483 Mexican pesos, a provider must calculate these disclosures using this rate, even though the provider may disclose pursuant to § 1005.31(b)(1)(iv)

that the U.S. dollar exchanges for 11.95 Mexican pesos (Estimated). If an exchange rate need not be rounded, a provider must use that exchange rate to calculate these disclosures. For example, if one U.S. dollar exchanges for exactly 11.9 Mexican pesos, a provider must calculate these disclosures using this exchange rate.

31(b)(1)(vi) Fees and Taxes Imposed by a Person Other Than the Provider

Proposed § 205.31(b)(1)(vi) stated that a remittance transfer provider must disclose any fees and taxes imposed on the remittance transfer by a person other than the provider, in the currency in which the funds will be received by the designated recipient. Such fees and taxes could include lifting fees charged in connection with an international wire transfer, a fee charged by a recipient institution or agent, or a tax imposed by a government in the designated recipient's country. Because such fees and taxes affect the amount ultimately received by the designated recipient, the Board proposed the disclosure of other fees and taxes to effectuate the purposes of the EFTA.

Consumer group commenters supported the disclosure of third party fees and taxes to senders of remittance transfers, stating that such a disclosure would be consistent with the language and purpose of the statute, and would best inform the sender of the amount the recipient would ultimately receive. In contrast, industry commenters opposed the disclosure. Most industry commenters argued that compliance with the proposed disclosure requirement would be burdensome, if not impossible. Commenters stated that financial institutions sending wire transfers and international ACH transactions only have control over the delivery to the next institution, and in some cases do not have a relationship with all of the subsequent intermediary institutions involved in a transfer or with the recipient institution. The originating institution may, in some cases, know the routing, but in other cases have no legal or technological means to control routing of a transaction once the transfer has been initiated and, therefore, it cannot know what institutions might be imposing fees or taxes on the remittance transfer. One industry commenter suggested that providing the disclosures may be possible for repeat wire transfers, because fee and tax information is known from the previous transfers, but not for new wire transfers.

Industry commenters and a Federal Reserve Bank commenter argued that third party fees and taxes may not be known at the time of the transaction, which could result in the remittance transfer provider providing misleading information to the sender. Industry commenters also argued that smaller institutions do not have the resources to obtain or monitor information about foreign tax laws or fees charged by unrelated financial institutions that may be involved in the transfer. Some commenters noted that intermediary financial institutions, both inside and outside of the United States, are not required to disclose their fees. Moreover, some industry commenters argued, the sharing of fee information among financial institutions could violate privacy and competition laws. Industry commenters stated that no comprehensive information is available regarding foreign tax laws. Because an institution may not have resources to track tax laws in every foreign country to which it sends a remittance transfer, the commenters argued that some providers would limit the locations to which they send remittance transfers.

Further, some industry commenters noted that a recipient may enter into an agreement with a recipient institution that permits the institution to impose fees for an international payment received by the institution and applied to the recipient's account. The commenters stated that remittance transfer providers would not know whether the recipient has agreed to pay such fees or how much the recipient may have agreed to pay. The commenters argued that such fees charged to a recipient by a third party pursuant to an agreement between the recipient and a third party should not be required to be disclosed.

Some industry commenters argued that the statute did not intend for third party fees and taxes to be included in the disclosure of the total amount that will be received by the designated recipient. For example, one industry commenter argued that the statute only intended to include in the calculation of the amount of currency to be received the elements specifically required to be disclosed under EFTA section 919(a)(2)(A)(ii) and (iii) (*i.e.,* the amount of transfer fees and any other fees charged by the remittance transfer provider, and any exchange rate to be used by the remittance transfer provider for the remittance transfer). Another industry commenter argued that State laws that require a remittance transfer provider to disclose to a sender the total amount to be received by the designated recipient do not require disclosure of third party fees and taxes that may be imposed on the remittance transfer. Instead, the commenters argued, State laws only require the remittance transfer provider to disclose the amount of currency to be received after application of the exchange rate. Therefore, the commenters stated that fees or taxes set by a party other than the remittance transfer provider are not required to be included in the disclosure of the total amount received and, therefore, should not be required to be disclosed separately.

Overall, many industry commenters stated that the proposed disclosure requirements would cause financial institutions to withdraw from the market or restrict the locations to which wire transfers will be sent. The commenters also stated that the proposed requirements would increase costs to senders, and some argued that the proposed requirements would delay transactions while financial institutions determined the required information in order to make disclosures. Some industry commenters argued that the requirements put financial institutions at a competitive disadvantage compared to money transmitters, which, they argued, are typically able to know the required disclosures due to their closed network structure. Further, they argued that the proposed requirements could deter foreign financial institutions from agreeing to process U.S.-originated remittance transfers.

Generally, industry commenters urged the Bureau to exempt financial institutions that provide remittance transfers through correspondent relationships from the requirement to disclose third party fees or require different disclosures for these types of transactions. Industry commenters and a Federal Reserve Bank commenter also suggested that the final rule should incorporate a good faith standard with respect to these fee and tax disclosures. Some industry commenters further argued that the Bureau should not require foreign taxes to be provided, regardless of whether a remittance transfer was sent through a correspondent relationship. Industry commenters alternatively suggested that the Bureau only require a disclosure that the amount received may be subject to foreign taxes. A Federal Reserve Bank commenter suggested that the Bureau should provide a safe harbor for the foreign tax disclosure for providers that disclosed current or historical information available to the provider through reasonable efforts.

Commenters also suggested that the Bureau assist industry with determining unknown fees and taxes, particularly to help ease the disclosure burden on small providers. One industry commenter believed the Bureau should

require correspondent institutions to publish the fees and taxes that are charged. Industry and consumer group commenters suggested that the Bureau should maintain a resource that provides relevant foreign taxes.

As discussed in the introduction above, the Bureau recognizes the challenges for remittance transfer providers to determining fees and taxes imposed by third parties. However, the plain language of the statute requires disclosure of the amount of currency that will be received by the designated recipient. The Bureau believes this requires remittance transfer providers to determine the costs specifically related to the remittance transfer that may reduce the amount received by the designated recipient. Congress specifically recognized that these determinations would be difficult with regard to open network transactions by financial institutions and tailored a specific accommodation to allow use of reasonably accurate estimates for an interim period until financial institutions can develop methods to determine exact disclosures, such as fees and taxes charged by third parties.

This disclosure provides consumer benefits by making senders aware of the impact of these fees and taxes, which is essential to fulfill the purpose of the statute. Providing a total to recipient that reflects the impact of third party fees and taxes, and separately disclosing those fees and taxes, will provide senders with a greater transparency regarding the cost of a remittance transfer. For many senders and recipients, disclosure of the amount of third party fees and taxes that may be deducted could be crucial to knowing whether the amount transferred will be sufficient to pay important household expenses and other bills. Senders also need to know the amount of such fees and taxes to determine whether to use the same provider for any future transfers. Without such information, it would be difficult for a sender to determine the costs of the transfer that would enable the sender to choose the most cost-effective method of sending remittance transfers. Moreover, as discussed below, the cost of third party taxes may vary depending on the types of institutions involved in the transmittal route, and disclosure of these taxes will assist senders comparing costs between providers. While the Bureau understands that tax information may not be readily available to a provider, the provider is in the best position to obtain the information to comply with the disclosure requirements. Because a provider will be engaged in sending remittance transfers to certain countries and, in some cases, will have relationships with entities in those countries, the Bureau believes the provider itself is in the best position to determine foreign tax information.

Therefore, to effectuate the purposes of the EFTA, the Bureau believes it is necessary and proper to use its authority under EFTA sections 904(a) and (c) to require in § 1005.31(b)(vi) of the final rule the disclosure of any fees and taxes imposed on the remittance transfer by a person other than the provider, using the terms ''Other Fees'' for fees and ''Other Taxes'' for taxes, or substantially similar terms.[76] As discussed above, fees and taxes must be disclosed separately from one another in order to show which costs are fixed and which costs are variable. *See* comment 31(b)(1)–1.i. As discussed above, the Bureau believes that the rounded exchange rate required to be disclosed under § 1005.31(b)(1)(iv) is not intended to constrain the number of decimal places involved in calculating other disclosures. Therefore, § 1005.31(b)(1)(vi) adds the clarification that the exchange rate used to calculate the fees and taxes in § 1005.31(b)(1)(vi) is the exchange rate in § 1005.31(b)(1)(iv), including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate. As discussed above, comment 31(b)(1)–3 provides examples to demonstrate the exchange rate that must be used to calculate the fees and taxes imposed on the remittance transfer by a person other than the provider.

As noted above, proposed comment 31(b)(1)–1.ii. distinguished between the fees and taxes imposed by the provider, discussed above in § 1005.31(b)(1)(ii), and the fees and taxes imposed by a person other than the provider. The proposed comment provided examples of each of these types of fees and taxes. Proposed comment 31(b)(1)–1.ii. also clarified that the terms used to describe each of these types of fees and taxes must differentiate between such fees and taxes and provided an example to illustrate this differentiation.

Industry commenters requested clarification regarding the types of fees imposed on the remittance transfer by a person other than the provider. For example, an industry commenter and a Federal Reserve Bank commenter asked the Bureau to clarify that these fees and taxes do not include fees and taxes that banks and other parties charge one another for handling a remittance transfer, so long as the fees do not affect the amount of the transfer. Another industry commenter asked whether funds deducted from the amount received in a remittance transfer by a recipient institution exercising its rights of set-off would be required to be disclosed as a fee to a sender.

Comment 31(b)(1)–1.ii. of the final rule clarifies that the fees and taxes required to be disclosed include only those that are charged to the sender or designated recipient and are specifically related to the remittance transfer. The Bureau does not believe that any fee or tax is required to be disclosed solely because it is charged at the same time that a remittance transfer is sent, because such fees and taxes are not necessarily ''imposed on the remittance transfer.'' For example, an overdraft fee charged by a bank at the same time that a remittance transfer is sent or received in an account is not imposed on the remittance transfer. In order to further clarify what charges should be disclosed to senders, the comment in the final rule provides examples of the types of fees that are not required to be disclosed under this provision, in addition to the examples of the types of fees that should be included that were included in the May 2011 Proposed Rule.

Specifically, comment 31(b)(1)–1.ii. states that the fees and taxes required to be disclosed by § 1005.31(b)(1)(ii) include all fees and taxes imposed on the remittance transfer by the provider. For example, a provider must disclose a service fee and any State taxes imposed on the remittance transfer. In contrast, the fees and taxes required to be disclosed by § 1005.31(b)(1)(vi) include fees and taxes imposed on the remittance transfer by a person other than the provider. Fees and taxes imposed on the remittance transfer by a person other than the provider include only those fees and taxes that are charged to the sender or designated recipient and are specifically related to the remittance transfer. For example, a provider must disclose fees imposed on a remittance transfer by the receiving institution or agent at pick-up for receiving the transfer, fees imposed on a remittance transfer by intermediary institutions in connection with an international wire transfer, and taxes

[76] Due to a scrivener's error, § 205.31(b)(vi) in the proposed rule had stated that these fees and taxes must be disclosed using the term ''Other *Transfer* Fees,'' ''Other *Transfer* Taxes,'' or ''Other *Transfer* Fees and Taxes,'' or a substantially similar term (emphasis added). The model forms as proposed, however, used the term ''Other Fees and Taxes.'' The terms set forth in § 1005.31(b)(vi) are adopted without the word ''transfer'' in order to more concisely describe the fees and taxes required to be disclosed in § 1005.31(b)(vi). The terms used in the final rule conform to the language used in the model forms, which participants in consumer testing generally understood to mean fees and taxes charged by a person other than the provider.

imposed on a remittance transfer by a foreign government.

However, the comment states that a provider need not disclose, for example, overdraft fees that are imposed by a recipient's bank or funds that are garnished from the proceeds of a remittance transfer to satisfy an unrelated debt, because these charges are not specifically related to the remittance transfer. Similarly, fees that banks charge one another for handling a remittance transfer or other fees that do not affect the total amount of the transaction or the amount that will be received by the designated recipient are not charged to the sender or designated recipient. For example, an interchange fee that is charged to a provider when a sender uses a credit or debit card to pay for a remittance transfer need not be disclosed. The comment also clarifies that the terms used to describe the fees or taxes imposed on the remittance transfer by the provider in § 1005.31(b)(1)(ii) and imposed on the remittance transfer by a person other than the provider in § 1005.31(b)(1)(vi) must differentiate between such fees and taxes. For example, the terms used to describe fees disclosed under § 1005.31(b)(1)(ii) and (vi) may not both be described solely as ''Fees.''

Proposed comment 31(b)(1)(vi)–1 clarified how a provider must disclose fees and taxes in the currency in which funds will be received. Industry commenters expressed concern that a remittance transfer provider may not know the currency in which the funds will be received. As discussed above in comment 31(b)(1)(iv)–1, if a provider does not have specific knowledge regarding the currency in which the funds will be received, the provider may rely on a sender's representations as to the currency in which funds will be received.

Comment 31(b)(1)(vi)–1 is adopted substantially as proposed, with an added clarification regarding reliance on a sender's representation regarding the currency in which the funds will be received. The Bureau is also revising the comment to reflect the clarification that disclosures that require an exchange rate to be applied should use the exchange rate in § 1005.31(b)(1)(iv), including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate.

Comment 31(b)(1)(vi)–1 states that § 1005.31(b)(1)(vi) requires the disclosure of fees and taxes in the currency in which the funds will be received by the designated recipient. A fee or tax described in § 1005.31(b)(1)(vi) may be imposed in one currency, but the funds may be received by the designated recipient in another currency. In such cases, the remittance transfer provider must calculate the fee or tax to be disclosed using the exchange rate in § 1005.31(b)(1)(iv), including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate. For example, an intermediary institution in an international wire transfer may impose a fee in U.S. dollars, but funds are ultimately deposited in the recipient's account in Euros. In this case, the provider would disclose the fee to the sender expressed in Euros, calculated using the exchange rate used by the provider for the remittance transfer.

The comment further states that for purposes of § 1005.31(b)(1)(v), (vi), and (vii), if a provider does not have specific knowledge regarding the currency in which the funds will be received, the provider may rely on a sender's representation as to the currency in which funds will be received. For example, if a sender requests that a remittance transfer be deposited into an account in U.S. dollars, the provider may provide the disclosures required in § 1005.31(b)(1)(v), (vi), and (vii) in U.S. dollars, even if the account is denominated in Mexican pesos and the funds are subsequently converted prior to deposit into the account. If a sender does not know the currency in which funds will be received, the provider may assume that the currency in which funds will be received is the currency in which the remittance transfer is funded.

The final rule also adds a new comment 31(b)(1)(vi)–2 to address situations where the information needed to determine the foreign taxes that apply to a transaction is not known to the provider and not publically available. Some industry commenters stated that foreign taxes may depend on variables other than the country to which the remittance transfer is sent, such as by the specific tax status of the sender and receiver, account type, or type of financial institution. The commenters stated that a sender may not be aware of the information needed to determine the tax obligation that applies to the transaction.

The Bureau believes that when these types of variables affect the foreign taxes that apply to the transaction, providers may have to rely on representations made by the sender. If the sender does not know the information, and the provider does not otherwise have specific knowledge of the information, the Bureau believes it is necessary to provide a reasonable mechanism by which the provider may disclose the foreign tax. The Bureau believes it is appropriate in these instances to disclose the highest tax that could be imposed with respect to a particular variable, so the sender is not surprised that the amount received is reduced by more taxes than what is disclosed.

Comment 31(b)(1)(vi)–2 states that the amount of taxes imposed by a person other than the provider may depend on the tax status of the sender or recipient, the type of accounts or financial institutions involved in the transfer, or other variables. For example, the amount of tax may depend on whether the receiver is a resident of the country in which the funds are received or the type of account to which the funds are delivered. If a provider does not have specific knowledge regarding variables that affect the amount of taxes imposed by a person other than the provider for purposes of determining these taxes, the provider may rely on a sender's representations regarding these variables, pursuant to § 1005.31(b)(1)(vi). If a sender does not know the information relating to the variables that affect the amount of taxes imposed by a person other than the provider, the provider may disclose the highest possible tax that could be imposed for the remittance transfer with respect to any unknown variable.

The Bureau notes that if a provider does not independently have specific knowledge regarding variables that affect the amount of taxes imposed by a person other than the provider, the provider may rely on the sender's representations regarding these variables. For example, the rule does not impose on providers a duty to inquire about this information with a third party. The Bureau also notes that a provider may continue to rely on the sender's representations in any subsequent remittance transfers, unless the provider has specific knowledge that information relating to such variables has changed.

31(b)(1)(vii) Amount Received

Proposed § 205.31(b)(1)(vii) stated that a remittance transfer provider must disclose to the sender the amount that will be received by the designated recipient, in the currency in which the funds will be received. *See* EFTA section 919(a)(2)(A)(i). The proposed rule stated that the disclosures should be described using the term ''Total to Recipient'' or a substantially similar term. The proposed rule provided that the disclosure must reflect all charges that would affect the amount to be received.

For the reasons discussed above, industry commenters objected to the

proposal because, they argued, costs that are required to be known to disclose the amount received, such as the exchange rate and third party fees and taxes, cannot be known at the time the pre-payment disclosure and receipt are required to be disclosed. As discussed above, an industry commenter argued that the statute only intended the amount of currency that will be received by the designated recipient to reflect the other elements that are required to be disclosed separately under EFTA section 919(a)(2)(A)(ii) and (iii). Other industry commenters argued that the disclosure should only reflect the exchange rate, fees, and taxes set by the remittance transfer provider itself, and not those set or charged by persons other than the provider. Some industry commenters believed the amount that will be received by the designated recipient should be subject to a good faith standard, should be permitted to be estimated, or should include a statement that the total amount is subject to change.

EFTA section 919(a)(2)(A)(i) requires a remittance transfer provider to disclose the amount received by the designated recipient using the values of the currency into which the funds will be exchanged. The Bureau interprets the amount to be received by the designated recipient as the amount net of all fees and taxes that will be paid for the transfer. An exchange rate, if one is applied, is just one of the factors that could affect the actual amount received by the designated recipient. Providing a total amount to be received that does not take into account all cost elements would not be consistent with the statute's goal of providing disclosures of the total costs of a remittance transfer.

The Bureau is not persuaded that the amount to be received by the designated recipient should only reflect those elements that are separately required to be disclosed under the statute. Under the plain language of EFTA section 919(a)(2)(A)(i), the amount of funds that will be received by the designated recipient must be disclosed to the sender. The Bureau believes this amount must reflect all fees and taxes specifically related to the remittance transfer, regardless of the entity that charges them. Moreover, the Bureau believes that the exchange rate to be used to calculate the total to recipient is the exchange rate that is used for the remittance transfer, whether or not the remittance transfer provider itself sets the exchange rate or merely applies an exchange rate set by another entity to the transaction. Absent this approach, providers could disclose different amounts received depending only on whether the provider itself or a different institution applies the exchange rate. The Bureau believes such a result would be inconsistent with the statutory goal of providing the sender with the actual amount that will be received by the designated recipient.

Therefore, proposed § 205.31(b)(1)(vii) is adopted substantially as proposed in renumbered § 1005.31(b)(1)(vii), with an addition to clarify the appropriate exchange rate that must be used to calculate the amount received, discussed below. Comment 31(b)(1)(vii)–1 is also adopted substantially as proposed to clarify the charges that must be reflected in the amount received. The comment is amended to clarify that the disclosed amount received must be reduced by the amount of any fee or tax, whether the fee or tax is imposed on the remittance transfer by the remittance transfer provider or by a person other than the remittance transfer provider. The comment clarifies that the fees and taxes that must be disclosed are those fees and taxes that are imposed on the remittance transfer. *See* comment 31(b)(1)–1–ii. Specifically, comment 31(b)(1)(vii)–1 states that the disclosed amount to be received by the designated recipient must reflect all charges imposed on the remittance transfer that affect the amount received, including the exchange rate and all fees and taxes imposed on the remittance transfer by the remittance transfer provider, the receiving institution, or any other party in the transmittal route of a remittance transfer. The disclosed amount received must be reduced by the amount of any fee or tax that is imposed on the remittance transfer by any person, even if that amount is imposed or itemized separately from the transaction amount.

Finally, § 1005.31(b)(1)(vii) revises proposed § 205.31(b)(1)(vii) to clarify the exchange rate that should be used in calculating the amount received. One industry commenter stated that using a rounded exchange rate may add some *de minimis* value to the amount received. For some currencies, this may result in a transaction amount being disclosed in a foreign currency for which no coins are available to complete the transaction. The commenter recommended a *de minimis* exemption for error resolution triggered based on rounding. As discussed above, the Bureau believes that the rounded exchange rate required to be disclosed under § 1005.31(b)(1)(iv) is not intended to constrain the number of decimal places involved in calculating other disclosures. Therefore, § 1005.31(b)(1)(vii) adds the clarification that the exchange rate used to calculate the amount received in § 1005.31(b)(1)(vii) is the exchange rate in § 1005.31(b)(1)(iv), including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate. As discussed above, comment 31(b)(1)–3 provides examples to demonstrate the exchange rate that must be used to calculate the amount received.

31(b)(2) Receipt

Proposed § 205.31(b)(2) provided that a remittance transfer provider must disclose a written receipt to a sender when payment is made for the remittance transfer. As with the proposed pre-payment disclosure, the disclosures required on the receipt could be omitted if not applicable. The required disclosures are discussed below.

31(b)(2)(i) Pre-Payment Disclosures on Receipt

Proposed § 205.31(b)(2)(i) provided that the same disclosures included in the pre-payment disclosure must be disclosed on the receipt, pursuant to EFTA section 919(a)(2)(B)(i)(I). As discussed above, the Bureau is requiring providers to disclose some information in the pre-payment disclosure, such as the transfer amount, that is not specifically required by EFTA section 919(a)(2)(A). The Bureau did not receive comment regarding the requirement to provide the same pre-payment disclosures on the receipt. Therefore, to effectuate the purposes of the EFTA, the Bureau believes it is necessary and proper to use its authority under EFTA sections 904(a) and (c) to finalize that requirement in renumbered § 1005.31(b)(2)(i), as proposed.

31(b)(2)(ii) Date Available

Proposed § 205.31(b)(2) also provided for the disclosure of additional elements on the receipt. EFTA section 919(a)(2)(B)(i)(II) requires the disclosure of the promised date of delivery to the designated recipient on a receipt. The Board stated its belief that the statute requires disclosure of the date the currency will be available to the designated recipient, not the date the funds are physically picked up by the designated recipient, because the recipient may not pick up the funds for some period of time after the funds are available. Thus, proposed § 205.31(b)(2)(ii) stated that a remittance transfer provider must disclose the date of availability of funds to the designated recipient, using the term ''Date Available'' or a substantially similar term. Proposed comment 31(b)(2)–1

provided further guidance on this disclosure.

In the proposal, the Board recognized that in some instances, it may be difficult to determine the exact date on which a remittance transfer will be available to a designated recipient. For example, an international wire transfer may pass through several intermediary institutions prior to becoming available at the institution of a designated recipient, and the time it takes to pass through these intermediaries may be difficult to determine. As a result, the Board recognized that remittance transfer providers would likely disclose the latest date on which the funds would be available, even if funds are often available sooner. Thus, proposed § 205.31(b)(2)(ii) permitted a provider to include a statement that funds may be available to the designated recipient earlier than the date disclosed, using the term ''may be available sooner'' or a substantially similar term. The Board had tested various terms in consumer testing for communicating the fact that funds may be available earlier than the date disclosed. Participants generally understood the meaning of the statement that funds ''may be available sooner'' better than other terms.

Consumer group commenters supported the disclosure of the date funds will be available. Many industry commenters argued, however, that it would be difficult or impossible to determine when funds would be made available to a recipient in an open network system, such as where transfers are made to an account at a financial institution with which the provider does not have a correspondent relationship. Industry commenters argued that even if the date of receipt by a recipient financial institution is known, there could be a delay in depositing the funds into a recipient account due to delays at intermediary financial institutions or at the recipient institution. One industry trade association stated that infrastructure deficiencies in some countries may make it impossible to determine the actual date on which funds will be available.

An industry commenter supported the flexibility provided by the term ''may be available sooner,'' but stated that dates still may be unpredictable for reasons beyond a provider's control. One industry trade association argued that in order to mitigate compliance risks, some remittance transfer providers will disclose a date well past a reasonable estimate of the date funds will be made available, which would render the disclosure meaningless.

Due to these factors, some industry commenters urged the Bureau to permit an estimated date of availability, including an estimate of the date that funds may be available to a recipient institution, and not the recipient. One commenter suggested that the disclosure could state that a transfer may be delayed by intermediaries or other factors beyond the provider's control.

As stated in the proposal, EFTA section 919(a)(2)(B)(i)(II) requires disclosure of a single, promised date of delivery of the funds. Neither EFTA section 919(a)(4) nor EFTA section 919(c) permit a remittance transfer provider to provide an estimate of this promised date, despite the fact that the statute permits estimates in other circumstances. Moreover, because the statute requires a remittance transfer provider to provide a disclosure of the promised date of delivery to the designated recipient, the Bureau believes that permitting a provider to disclose the date that funds will be made available to the recipient institution would not comply with the statute.

The Bureau believes that by permitting the provider to disclose a date by which funds will certainly be delivered, but also stating that funds ''may be available sooner,'' a provider can comply with the disclosure requirement. The Bureau recognizes that providers may overestimate the disclosed date on which funds will be available to mitigate compliance risks. However, the Bureau believes that competitive pressures will give providers an incentive to provide as accurate a date as possible.

Therefore, § 1005.31(b)(2)(ii) is finalized substantially as proposed. Section 1005.31(b)(2)(ii), however, clarifies in the rule, rather than the commentary, as proposed, that a provider must disclose the date in the foreign country on which funds will be available to the designated recipient. This clarification is included to account for instances where time zone differences result in a date in the United States being different from the date in the country of the designated recipient.

The final rule also adopts comment 31(b)(2)–1 substantially as proposed. The comment clarifies that a remittance transfer provider may not provide a range of dates that the remittance transfer may be available, nor an estimate of the date on which funds will be available. If a provider does not know the exact date on which funds will be available, the provider may disclose the latest date on which the funds will be available. For example, if funds may be available on January 3, but are not certain to be available until January 10, then a provider complies with § 1005.31(b)(2)(ii) if it discloses January 10 as the date funds will be available. However, a remittance transfer provider may also disclose that funds ''may be available sooner'' or use a substantially similar term to inform senders that funds may be available to the designated recipient on a date earlier that the date disclosed. For example, the provider may disclose ''January 10 (may be available sooner).''

31(b)(2)(iii) Recipient

Proposed § 205.31(b)(2)(iii) provided that a remittance transfer provider must disclose the name and, if provided by the sender, the telephone number and/or address of the designated recipient. The proposed rule stated that the remittance transfer provider must describe the disclosure using the term ''Recipient'' or a substantially similar term. The Bureau did not receive comment on proposed § 205.31(b)(2)(iii), which is adopted as proposed in renumbered § 1005.31(b)(2)(iii).

31(b)(2)(iv) Rights of Sender

As discussed in more detail below regarding §§ 1005.33 and 1005.34, EFTA section 919(d) provides the sender with substantive error resolution and cancellation rights. EFTA section 919(a)(2)(B)(ii)(I) requires a remittance transfer provider to provide a statement containing information about the rights of the sender regarding the resolution of errors on the receipt or combined disclosure. EFTA section 919(d)(3) requires the Bureau to issue final rules regarding appropriate cancellation and refund policies for senders. The Board stated its belief that providing a lengthy disclosure to the sender each time the sender makes a remittance transfer could be ineffective at conveying the most important information that a sender would need to resolve an error or cancel a transaction. However, the Board also stated that a sender should have access to a complete description of the sender's error resolution and cancellation rights in order to effectively exercise those rights. As a result, the Board proposed § 205.31(b)(2)(iv) in conjunction with a long form error resolution notice in proposed § 205.31(b)(4). The two disclosures were intended to balance the interest in providing a sender a concise disclosure with the sender's ability to obtain a full explanation of those rights.

Proposed § 205.31(b)(2)(iv) stated that a remittance transfer provider must disclose to a sender an abbreviated statement about the sender's error

resolution and cancellation rights using language set forth in Model Form A–37 of Appendix A or substantially similar language. The proposed statement included a brief disclosure of the sender's error resolution and cancellation rights, as well as a notification that a sender may contact the remittance transfer provider for a written explanation of these rights.

Consumer group commenters argued that the abbreviated disclosure in proposed § 205.31(b)(2)(iv) should provide more comprehensive information to a sender. These commenters also suggested that the abbreviated disclosure would not comply with the statute. One of the consumer group commenters stated that all of the senders' rights should be disclosed on the receipt, instead of a shorter disclosure, because senders of remittance transfers may be less educated or less likely to have access to phone and internet compared to other consumers.

The Bureau agrees that education of senders about the consumer protections created by EFTA section 919 is an important statutory and policy goal. However, the Bureau believes EFTA section 919(a)(2)(B)(ii)(I) does not require a remittance transfer provider to enumerate a sender's error resolution rights. Rather, the statute requires the provider to disclose information about the rights of the sender under EFTA section 919 regarding the resolution of errors, and the Bureau believes the proposed language satisfies this requirement. Moreover, consumer testing participants understood and responded positively to the concise, abbreviated disclosure and favorably compared the statement against current error resolution disclosures with which they had experience and which they noted could be long and in ''fine print.'' Thus, the Bureau is finalizing the abbreviated disclosure requirement in renumbered § 1005.31(b)(2)(iv). *See also* § 1005.31(b)(4), below. The Bureau, however, is amending the language in the abbreviated statement about senders' error resolution rights on Model Form A–37 to include a more explicit statement informing senders that they have such rights. The Bureau is also adding a requirement in § 1005.31(b)(2)(iv) to account for the alternative cancellation requirements in § 1005.36(c) for remittance transfers scheduled by the sender at least three business days before the date of the transfer, as discussed below. Section 1005.31(b)(2)(iv), therefore, also provides that for any remittance transfer scheduled by the sender at least three business days before the date of the transfer, the statement about the rights of the sender regarding cancellation must instead reflect the requirements of § 1005.36(c).

31(b)(2)(v) Contact Information of the Provider

EFTA section 919(a)(2)(B)(ii)(II) generally requires that the remittance transfer provider disclose appropriate contact information for the remittance transfer provider, its State regulator, and the Bureau. The Board stated that appropriate contact information includes the name, telephone number, and Web site of these entities, so that senders would have multiple options for addressing any issues that may arise with respect to a remittance transfer provider. Proposed § 205.31(b)(2)(v) provided for the disclosure of the name, telephone number, and Web site of the remittance transfer provider. The Bureau did not receive comment on proposed § 205.31(b)(2)(v), and the Bureau is finalizing it substantially as proposed in renumbered § 1005.31(b)(2)(v). The final rule adds language to allow providers to disclose more than one telephone number to account for circumstances, for example, where a provider maintains a separate TTY/TDD telephone number.

31(b)(2)(vi) Agency Contact Information

Proposed § 205.31(b)(2)(vi) provided for disclosure of a statement that the sender can contact the State agency that regulates the remittance transfer provider and the Bureau for questions or complaints about the remittance transfer provider, using language set forth in Model Form A–37 of Appendix A or substantially similar language. The proposed statement included contact information for these agencies, including the toll-free telephone number of the Bureau established under section 1013 of the Dodd-Frank Act.

The Board requested comment on several aspects of proposed § 205.31(b)(2)(vi). First, the Board solicited comment on whether and how a remittance transfer provider should be required to disclose information regarding a State agency that regulates the provider for remittance transfers conducted through a toll-free telephone number or online and, if so, what would be the appropriate State agency to disclose to a sender. Some commenters believed the disclosure of Bureau contact information would be sufficient. Several industry commenters argued that the Bureau should not require a remittance transfer provider to disclose the State agency that regulates the remittance transfer. These commenters believed the requirement would create operational hurdles for providers that operate in multiple states and would provide negligible consumer protection benefit.

One money transmitter commenter stated that it would be difficult to tailor State regulator disclosures to each individual agent, and that managing State-specific receipts and forms would be costly. This commenter stated that agents that provide services in multiple states often distribute forms to their locations as part of their chain of distribution. Requiring these agents to manage State-specific forms, the commenter argued, would be a significant change in distribution processes and could create liability risk for the remittance transfer provider. This commenter believed remittance transfer providers would thus create a multi-State disclosure form, which would provide senders with superfluous information.

Another money transmitter commenter noted that many states already have guidance regarding the prominence and placement of contact information on a remittance transfer provider's Web site and in storefront locations. The commenter stated that many states prefer senders to contact the remittance transfer provider before contacting a State agency for questions and complaints. The commenter believed that the Bureau should instead require a statement that would refer to other sources, such as a Web site or toll-free number, to obtain contact information for the appropriate State agency, and that the Bureau should maintain contact information for State agencies, so that senders could contact the Bureau for appropriate State agency information.

EFTA section 919(a)(2)(B)(ii)(II) requires a remittance transfer provider to provide appropriate contact information for the State agency that regulates the remittance transfer provider. The Bureau does not believe that providing contact information for an alternative source that maintains a list of State agencies would satisfy the statutory requirement. The Bureau recognizes that remittance transfer providers that have locations in multiple states, or that provide remittance transfers online or by telephone, will have to determine the appropriate State agency to disclose on a receipt. The Bureau believes that due to segregation and other formatting requirements, discussed below, a remittance transfer provider may not disclose contact information for agencies in other states. Therefore, the final rule maintains the requirement to disclose information regarding a State

agency that regulates the remittance transfer provider.

However, several changes are made in the final rule to clarify which State agency should be disclosed, because a remittance transfer provider may be regulated by more than one agency in a particular State. The Bureau believes that the statute is meant to provide senders a resource for addressing problems regarding a particular remittance transfer and that the State agency that licenses or charters the remittance transfer provider is the appropriate State agency to provide such assistance to senders. Thus, in § 1005.31(b)(2)(vi), the final rule adds the clarification that the disclosure must disclose the State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer.

Second, the Board requested comment on whether a remittance transfer provider should be required to disclose the contact information for the Bureau, including the toll-free telephone number, in cases where the Bureau is not the primary Federal regulator for consumer complaints against the remittance transfer provider. The Board also requested comment on whether it would be appropriate to instead require the contact information of the primary Federal regulator of the remittance transfer provider for consumer complaints.

Consumer group commenters and an industry commenter stated that the Bureau's contact information should be included on the receipt. These commenters stated that listing the Bureau's contact information, rather than the primary Federal regulator, would ensure that consumer complaints about remittance transfer provider were centralized in one Federal agency. The commenter suggested that even if the Bureau does not directly regulate a remittance transfer provider, the Bureau could track complaints and launch an investigation if a pattern and practice of non-compliance emerges.

The Bureau agrees that it is appropriate to provide the Bureau's contact information, even in instances where the Bureau is not the provider's primary Federal regulator, as required by EFTA section 919(a)(2)(B)(ii)(II)(bb). The Bureau believes that providing a single Federal agency as the appropriate contact for senders will assist in tracking complaints. The Bureau is not requiring a separate disclosure of a primary Federal regulator in the final rule, because the disclosure of multiple Federal agencies could confuse senders. Instead, the Bureau believes consumers are better served by contacting the Bureau, which can direct senders to the appropriate Federal agency as necessary. Therefore, § 1005.31(b)(2)(vi) in the final rule requires a remittance transfer provider to disclose the contact information for the Bureau, including the toll-free telephone number.

Finally, the Board requested comment on whether financial institutions that are primarily regulated by Federal banking agencies, such as national banks, should be required to disclose State regulatory agency information. The Board requested comment regarding the circumstances in which it might be appropriate to disclose such a State regulatory agency.

Some industry commenters stated that the rule should only require Federally-chartered depository institutions to provide contact information for their primary Federal regulator. One industry commenter argued that providing information regarding State regulators would be confusing and ineffective, since its primary Federal regulator already has an established procedure for addressing errors.

The Bureau believes the final rule sufficiently accounts for circumstances in which an institution may not be licensed or chartered by a State agency. Under the final rule, the provider must disclose the State agency that licenses or charters the remittance transfer provider. However, disclosures must only be disclosed as applicable. Consequently, if no State agency licenses or charters a particular provider, then no State agency is required to be disclosed.

The Bureau is also adding several other changes to § 1005.31(b)(2)(vi) in the final rule for clarity. The final rule adds language to allow providers to disclose more than one telephone number for the State agency that licenses or charters the provider and the Bureau to account for circumstances, for example, where these agencies maintain separate TTY/TDD telephone numbers. The provision also adds the requirement that a remittance transfer provider must disclose the name of both the State agency that licenses or charters the remittance transfer provider and the Bureau, in addition to the telephone number(s) and Web site of each agency.

Section 1005.31(b)(2)(vi) of the final rule states that a remittance transfer must provide a statement that the sender can contact the State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer and the Consumer Financial Protection Bureau for questions or complaints about the remittance transfer provider. The statement must use the language set forth in Model Form A–37 of Appendix A to this part or substantially similar language. The disclosure also must provide the name, telephone number(s), and Web site of the State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer and the name, toll-free telephone number(s), and Web site of the Consumer Financial Protection Bureau.

Comment 31(b)(2)–2 has been added to the final rule to clarify that a remittance transfer provider must only disclose information about a State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer, as applicable. For example, if a financial institution is solely regulated by a Federal agency, and not licensed or chartered by a State agency, then the institution need not disclose information about a State agency and would solely disclose information about the Bureau, whether or not the Bureau is the provider's primary Federal regulator.

The final rule also adds comment 31(b)(2)–3 to clarify that a remittance transfer provider must only disclose information about one State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer, even if other State agencies also regulate the remittance transfer provider. For example, a provider may disclose information about the State agency which granted its license. If a provider is licensed in multiple states, and the State agency that licenses the provider with respect to the remittance transfer is determined by a sender's location, a provider may make the determination as to the State in which the sender is located based on information that is provided by the sender and on any records associated with the sender. For example, if the State agency that licenses the provider with respect to an online remittance transfer is determined by a sender's location, a provider could rely on the sender's statement regarding the State in which the sender is located and disclose the State agency that licenses the provider in that State. A State-chartered bank must disclose information about the State agency that granted its charter, regardless of the location of the sender.

31(b)(3) Combined Disclosure

EFTA section 919(a)(5)(C) grants the Bureau authority to permit a remittance transfer provider to provide to a sender a single written disclosure instead of the pre-payment disclosure and receipt, if the information disclosed is accurate at the time at which payment is made. The combined disclosure must include the

content provided in the pre-payment disclosure and the receipt under EFTA sections 919(a)(2)(A) and (B). As discussed above, the Bureau is also requiring providers to disclose some information in the pre-payment disclosure and receipt, such as the transfer amount, that is not specifically required by EFTA section 919(a)(2)(A) or (B). The Board determined through consumer testing that participants understood the information provided on the combined disclosure, and about half of the participants stated that they would prefer to receive the single, combined disclosure rather than a pre-payment disclosure and a separate receipt. Therefore, proposed § 205.31(b)(3) generally permitted a remittance transfer provider to provide the disclosures described in proposed § 205.31(b)(1) and (2) in a single disclosure prior to payment, as applicable, as an alternative to providing the two disclosures described in proposed § 205.31(b)(1) and (2).

Consumer group commenters urged the Bureau not to permit combined disclosures. One consumer group commenter stated that requiring both a pre-payment disclosure and a receipt would permit consumers to audit the transaction and ensure that providers do not impose hidden fees. This commenter noted that the combined disclosure would not likely reduce compliance burdens for providers because State laws may already mandate a post-transaction receipt. Another consumer group commenter argued that two disclosures were necessary to perform two different legal functions. This commenter stated that a pre-transaction disclosure serves as an offer that provides terms of written contract, and a receipt indicates that the contract has been agreed upon. This commenter believed a combined disclosure would be too confusing to senders and that the proposed rule did not address how the combined disclosure will ensure information is accurate. Some industry commenters argued that the Bureau should permit the combined disclosure, but maintained that it should be permitted to be provided after payment is made. *See also* § 1005.31(e), discussed below.

Some consumer testing participants stated that they would prefer to receive a pre-payment disclosure and a receipt because they were concerned that the combined disclosure would not provide proof of payment for the remittance transfer. Therefore, in the proposal, the Board solicited comment on whether proof of payment should also be required for remittance transfer providers using the combined disclosure and, if so, solicited comment on appropriate methods of demonstrating proof of payment for the combined disclosure. Consumer group commenters contended that methods for providing proof of payment could not be adequately set forth in the final rule. An industry commenter argued against requiring proof of payment for the combined disclosure, based on the challenges posed by the required timing of combined disclosures. Another industry commenter maintained that senders were satisfied with the existing proof of payment provided to them.

The Bureau believes a combined disclosure has benefits. Based on the Board's consumer testing, the Bureau believes that senders will understand the combined disclosures provided to them and that some senders will prefer to receive disclosures in a combined format. As discussed with respect to § 1005.31(f), below, the provider must ensure that the combined disclosure is accurate when payment is made. Moreover, the Bureau believes that the combined disclosure could reduce the compliance burden for some providers because the provider would only be required to provide one disclosure, rather than two, with mandated content in a specified format. Therefore, the Bureau believes it is appropriate to permit this alternative disclosure.

However, the Bureau also believes that senders need to be able to confirm that they have completed the transaction. A proof of payment enables senders to demonstrate that the combined disclosure they received was part of a completed transaction. A proof of payment would also help remittance transfer providers determine which transfers have actually been completed, so that a sender cannot assert error resolution rights based on a combined disclosure, where a sender has not made payment for the transfer. Thus, the Bureau is adding a proof of payment requirement to the final rule.

Accordingly, to effectuate the purposes of the EFTA, the Bureau believes it is necessary and proper to use its authority under EFTA sections 904(a) and (c) to finalize the combined disclosure requirement. Section 1005.31(b)(3) states that as an alternative to providing the disclosures described in § 1005.31(b)(1) and (2), a remittance transfer provider may provide the disclosures described in § 1005.31(b)(2), as applicable, in a single disclosure pursuant to the timing requirements of § 1005.31(e)(1). If the remittance transfer provider provides the combined disclosure and the sender completes the transfer, the remittance transfer provider must provide the sender with proof of payment when payment is made for the remittance transfer. The proof of payment must be clear and conspicuous, provided in writing or electronically, and provided in a retainable form. The final rule also adds new comment 31(b)(3)–1, which clarifies that the combined disclosure must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the transfer, pursuant to § 1005.31(e)(1), and the proof of payment must be provided when payment is made for the remittance transfer. The comment also clarifies that the proof of payment for the transaction may be provided on the same piece of paper as the combined disclosure or on a separate piece of paper. For example, a provider may feed a combined disclosure through a computer printer when payment is made to add the date and time of the transaction, a confirmation code, and an indication that the transfer was paid in full. A provider may also provide this additional information to a sender on a separate piece of paper when payment is made.

The Bureau notes that the use of the term ''proof of payment'' does not suggest or establish an evidentiary standard. The requirement to provide a sender with proof of payment is only intended to convey to a sender that payment has been received. To this end, new comment 31(b)(3)–1 also clarifies that a remittance transfer provider does not comply with the requirements of § 1005.31(b)(3) by providing a combined disclosure with no further indication that payment has been received.

31(b)(4) Long Form Error Resolution and Cancellation Notice

Proposed § 205.31(b)(4) stated that a remittance transfer provider must provide a notice to the sender describing the sender's error resolution and cancellation rights under proposed §§ 205.33 and 205.34 upon the sender's request. As discussed above, consumer group commenters argued that comprehensive error resolution and cancellation rights should be stated on the receipt or combined disclosure in lieu of an abbreviated disclosure, and not only upon request by a sender. The Bureau is retaining the abbreviated disclosure in the final rule. However, the Bureau also believes that a sender must have access to a complete description of the sender's error resolution and cancellation rights.

The requirement to provide a long form error resolution and cancellation notice is adopted substantially as proposed in renumbered § 1005.31(b)(4). The final rule adds the requirement that

the notice must be provided promptly to the sender. The Bureau believes that adding a timing requirement to the provision will ensure that providers do not delay in providing the notice to a sender, and the requirement to provide notices promptly is consistent with other provisions in Regulation E. *See, e.g.,* § 1005.11(d)(1). Therefore, § 1005.31(b)(4) states that, upon the sender's request, a remittance transfer provider must promptly provide to the sender a notice describing the sender's error resolution and cancellation rights, using language set forth in Model Form A–36 of Appendix A to this part or substantially similar language. As discussed above with respect to § 1005.31(b)(2)(iv), the Bureau is adding a requirement in § 1005.31(b)(4) to account for the alternative cancellation requirements in § 1005.36(c) for remittance transfers scheduled by the sender at least three business days before the date of the transfer, as discussed below. Therefore, § 1005.31(b)(4) also provides that for any remittance transfer scheduled by the sender at least three business days before the date of the transfer, a description of the rights of the sender regarding cancellation must instead reflect the requirements of § 1005.36(c).

31(c) Specific Format Requirements

Proposed § 205.31(c) set forth specific format requirements for the written and electronic disclosures required by this section. Proposed § 205.31(c)(1) and (2) contained grouping and proximity requirements for certain disclosures required under proposed § 205.31. Proposed § 205.31(c)(3) set forth prominence and size requirements for disclosures required by subpart B. Proposed § 205.31(c)(4) contained segregation requirements for disclosures provided under subpart B, with certain specified exceptions.

In the proposal, the Board recognized that the specific formatting requirements set forth in proposed § 205.31(c) were more prescriptive than other disclosures required under Regulation E. The Board requested comment on whether certain requirements in proposed § 205.31(c) could be less prescriptive, while still ensuring that senders are provided with clear and conspicuous disclosures. The Board also solicited comment on how the formatting requirements in proposed § 205.31 could be applied to transactions conducted via mobile application or text message.

The Bureau received comments regarding each of the proposed format requirements, which are discussed in turn below. Additionally, one industry commenter suggested that the formatting requirements in the final rule should accommodate State law disclosures. The Bureau believes it is appropriate to establish formatting requirements tailored to the elements required to be disclosed under the statute. Providers can separately comply with each State's formatting requirements, to the extent that they meet or exceed the requirements set forth in the final rule. The Bureau believes that the proposed formatting requirements will ensure that disclosures are clear and conspicuous as required under EFTA section 919(a)(3)(A) and will thereby help senders understand the costs of remittance transactions. As discussed in the proposal, the formatting requirements demonstrate to senders the mathematical relationship between one line item and another, in part by presenting the required information in a logical sequence. Therefore, the Bureau is generally adopting the formatting requirements as proposed.

Commenters also raised concerns regarding the proposed formatting requirements as applied to disclosures provided via mobile application or text message. Industry commenters argued that prescriptive formatting requirements conducive to paper disclosures may not easily apply to new methods of conducting remittance transfers, and that the proposed rule could make compliance difficult as new technologies arise. These commenters urged the Bureau to provide flexibility for formatting requirements for disclosures provided via mobile application or text message. These commenters noted that formatting may be constrained by data and character limits, and that a remittance transfer provider does not necessarily control formatting when disclosures are sent through these methods.

Industry commenters also noted that senders using mobile applications or text messages could incur additional costs due to the formatting requirements. For example, additional data charges may apply for disclosures provided via mobile application or text message to accommodate formatting requirements. These charges could make senders reluctant to make transfers via mobile application or text message and, therefore, create a disincentive for providers to make remittance transfers available through these alternative methods. They argued that the provider should have the flexibility to provide disclosures using various methods—such as text message, mobile application, email, internet, or mail—as long as the sender is capable of receiving the disclosures.

As discussed above in the supplementary information to § 1005.31(a)(5), remittance transfer providers can provide oral pre-payment disclosures for transactions conducted by mobile application or text message. The Bureau does not believe senders would be less protected by receiving disclosures via mobile application or text message than if they received oral disclosures, even if the mobile applications and text messages are not subject to standard formatting requirements.

Therefore, the Bureau is generally not requiring in the final rule that pre-payment disclosures provided via mobile application or text message comply with the grouping, proximity, font size, and segregation requirements of the final rule. Though these disclosures are not subject to these formatting requirements in the final rule, the Bureau expects that providers will provide mobile application or text message disclosures in a logical sequence to demonstrate to senders the mathematical relationship between one line item and another in order to disclose the information clearly and conspicuously. Moreover, pre-payment disclosures provided via mobile application or text message must be provided in equal prominence to each other, as required in § 1005.31(c)(3), discussed below.

31(c)(1) Grouping

Proposed § 205.31(c)(1) provided that the information about the transfer amount, fees and taxes imposed by the provider, and total amount of transaction must be grouped together. The purpose of this grouping requirement was to make clear to the sender that the total amount charged is comprised of the transfer amount plus any transfer fees and taxes. Proposed § 205.31(c)(1) also provided that the information about the transfer amount in the currency to be made available to the designated recipient, fees and taxes imposed by a person other than the provider, and amount received by the designated recipient must be grouped together. The purpose of this grouping requirement was to make clear to the sender how the total amount to be transferred to the designated recipient, in the currency to be made available to the designated recipient, would be reduced by fees or taxes charged by a person other than the remittance transfer provider.

The Bureau did not receive comments on the proposed grouping requirements beyond the general comments about the

proposed formatting requirements, discussed above. Thus, the Bureau is adopting the proposed requirement substantially as proposed in renumbered § 1005.31(c)(1), with revisions to address the applicability of the grouping requirements to mobile applications and text messages. Section 1005.31(c)(1) states that the information required by § 1005.31(b)(1)(i), (ii), and (iii) generally must be grouped together. The information required by § 1005.31(b)(1)(v), (vi), and (vii) generally must be grouped together. Disclosures provided via mobile application or text message, to the extent permitted by § 1005.31(a)(5), need not be grouped together.

Comment 31(c)(1)–1 is also adopted substantially as proposed. The comment clarifies that information is grouped together for purposes of subpart B if multiple disclosures are in close proximity to one another and a sender can reasonably calculate the total amount of the transaction, and the amount that will be received by the designated recipient. Proposed Model Forms A–30 through A–35 in Appendix A, discussed in more detail below, illustrate how information may be grouped to comply with the rule. The proposed comment also clarifies that a remittance transfer provider may group the information in another manner. For example, a provider could provide the grouped information as a horizontal, rather than a vertical, calculation.

31(c)(2) Proximity

Proposed § 205.31(c)(2) provided that the exchange rate must be disclosed in close proximity to the other disclosures on the pre-payment disclosure. The Board stated in the May 2011 Proposed Rule that disclosing the exchange rate in close proximity to both the calculations that demonstrate the total transaction amount, as well as the total amount the recipient would receive, would help a sender understand the effect of the exchange rate on the transaction. Proposed § 205.31(c)(2) also provided that error resolution and cancellation disclosures must be disclosed in close proximity to the other disclosures on the receipt. The Board determined in consumer testing that providing a brief statement regarding error resolution and cancellation rights located near the other disclosures effectively communicated these rights to a sender. Therefore, the Board provided that the error resolution and cancellation disclosures should be closely proximate to the other disclosures on the receipt to prevent such disclosures from being overlooked by a sender.

The Bureau did not receive comment on the proposed proximity requirements beyond the general comments addressing the proposed formatting requirements discussed above. Thus, the Bureau is adopting the proposed requirement substantially as proposed in renumbered § 1005.31(c)(2), with revisions to address the applicability of the proximity requirements to mobile applications and text messages. Section 1005.31(c)(2) states that the exchange rate disclosure required by § 1005.31(b)(1)(iv) generally must be disclosed in close proximity to the other information required by § 1005.31(b)(1). The abbreviated statement about the sender's error resolution and cancellation rights required by § 1005.31(b)(2)(iv) generally must be disclosed in close proximity to the other information required by § 1005.31(b)(2). Disclosures provided orally or via mobile application or text message, to the extent permitted by § 1005.31(a)(5), need not comply with the proximity requirements of § 1005.31(c)(2).

31(c)(3) Prominence and Size

Proposed § 205.31(c)(3) set forth the requirements regarding the prominence and size of the disclosures required under subpart B. The proposed rule provided that written and electronic disclosures required by subpart B must be made in a minimum eight-point font. The Board solicited comment on whether a minimum font size should be required and, if so, whether an eight-point font size is appropriate.

One industry commenter supported the eight-point font requirement. However, other industry commenters urged the Bureau to eliminate the eight-point font requirement. These commenters argued that the font requirement would add unnecessary compliance costs that did not have a corresponding consumer benefit. Industry commenters argued that the font requirement may not create the desired consistency in disclosures, because, for example, fonts may display differently on different screens and printers. Rather, these commenters believed the Bureau should only require that the disclosures be subject to either a clear and conspicuous or clear and readily understandable standard.

The Bureau believes that disclosures should be disclosed in at least an eight-point font, as proposed. As discussed in the proposal, the disclosures that the Board developed for consumer testing used eight-point font, consistent with the font size typically used in register receipts. Participants in the Board's consumer testing generally found that the disclosures were readable, and they were able to locate the different disclosure elements during testing. The Bureau agrees with the Board that disclosures provided in a smaller font could diminish the readability and noticeability of the disclosures. Therefore, the eight-point font requirement is generally retained in the final rule. However, given the particular concerns raised above with respect to mobile disclosures, the final rule does not apply the font requirement to disclosures made by mobile application or text message, to the extent permitted by § 1005.31(a)(5).

Proposed § 205.31(c)(3) further provided that written disclosures required by subpart B must be on the front of the page on which the disclosure is printed. The proposed paragraph also provided that each of the written and electronic disclosures required under proposed § 205.31(b) must be in equal prominence to each other. One industry commenter asked the Bureau to clarify how written and electronic disclosures should be disclosed in equal prominence to each other. As discussed in the proposal, disclosures that must be equally prominent to each other should be displayed in the same font and type size.

The Bureau is adopting the prominence and size requirement substantially as proposed in renumbered § 1005.31(c)(3), with revisions to address the applicability of the font size requirement to mobile applications and text messages and revisions to better clarify that only disclosures provided in writing or electronically must be provided in equal prominence to each other and in eight-point font. Section 1005.31(c)(3) states that written disclosures required by subpart B must be provided on the front of the page on which the disclosure is printed. Disclosures required by subpart B that are provided in writing or electronically must be in a minimum eight-point font, except for disclosures provided via mobile application or text message to the extent permitted by § 1005.31(a)(5). Disclosures required by § 1005.31(b) that are provided in writing or electronically must be in equal prominence to each other.

31(c)(4) Segregation

Proposed § 205.31(c)(4) provided that written and electronic disclosures required by subpart B must be segregated from everything else and contain only information that is directly related to the disclosures required under subpart B. Proposed comment 31(c)(4)–1 clarified how a remittance transfer provider could segregate disclosures.

Proposed comment 31(c)(4)–2 identified information that would be considered directly related to the required disclosures, for purposes of determining what information must be segregated from the required disclosures.

The Board proposed the segregation of required disclosures from other information to avoid overloading the sender with information that could distract from the required disclosures. In permitting directly related information to be included with the required disclosures, the Board recognized that certain information not required by the statute or regulation could be integral to the transaction. The Board stated that remittance transfer providers should be able to communicate this information, such as the confirmation code that a designated recipient must provide in order to receive the funds, to a sender. The Board requested comment on the proposed segregation requirement and whether additional information should be permitted to be included with the required segregated disclosures.

Industry commenters requested further guidance on the segregation requirement, including clarification regarding how disclosures presented on a computer screen could be segregated, and whether disclosures would be considered segregated in a variety of mailing scenarios, including when disclosures are mailed on or with a periodic statement. The Bureau believes proposed comment 31(c)(4)–1 provides sufficient guidance to enable providers to determine whether the disclosures are segregated in a variety of scenarios. For example, the comment requires segregated disclosures to be set off from other information, such as disclosures required by states, but does not require the information to be displayed on a separate sheet of paper. The comment also explains that disclosures may be set off from other information on a notice by outlining them in a box or series of boxes, with bold print dividing lines or a different color background, or by using other means. A provider could apply this guidance to develop, for example, segregated disclosures set off in a box on a periodic statement or set off with a different color background on a computer screen. Therefore, the Bureau is finalizing comment 31(c)(4)–1 substantially as proposed, but adds another example for clarity.

Industry commenters also suggested that certain additional information should be deemed ''directly related'' to the required disclosures, such that it would not have to be segregated from the required disclosures. Suggested additions included information regarding the retrieval of funds, such as the number of days the funds will be available to the recipient before the funds are returned to the sender, and a statement that a provider makes money from foreign currency exchange. The Bureau agrees that this information is directly related to the required disclosures and need not be segregated from them. Therefore, the Bureau is adding these to the list of ''directly related'' items in comment 31(c)(4)–2.

The Bureau is adopting the segregation requirement substantially as proposed in renumbered § 1005.31(c)(4), with revisions to address the applicability of the requirement to mobile applications and text messages and revisions to better clarify that only disclosures provided in writing or electronically must be segregated. Section 1005.31(c)(4) states that except for disclosures provided via mobile application or text message, to the extent permitted by § 1005.31(a)(5), disclosures required by subpart B that are provided in writing or electronically must be segregated from everything else and must contain only information that is directly related to the disclosures required under subpart B. Comment 31(c)(4)–1 of the final rule clarifies that disclosures may be segregated from other information in a variety of ways. For example, the disclosures may appear on a separate sheet of paper or may be set off from other information on a notice by outlining them in a box or series of boxes, with bold print dividing lines or a different color background, or by using other means.

Comment 31(c)(4)–2 in the final rule clarifies that, for purposes of § 1005.31(c)(4), the following is directly related information: (i) The date and time of the transaction; (ii) the sender's name and contact information; (iii) the location at which the designated recipient may pick up the funds; (iv) the confirmation or other identification code; (v) a company name and logo; (vi) an indication that a disclosure is or is not a receipt or other indicia of proof of payment; (vii) a designated area for signatures or initials; (viii) a statement that funds may be available sooner, as permitted by § 1005.31(b)(2)(ii); (ix) instructions regarding the retrieval of funds, such as the number of days the funds will be available to the recipient before they are returned to the sender; and (x) a statement that the provider makes money from foreign currency exchange.

31(d) Estimates

Proposed § 205.31(d) provided that estimated disclosures may be provided to the extent permitted by proposed § 205.32. *See* proposed § 205.32, adopted as § 1005.32, below. The proposed rule provided that such disclosures must be described as estimates, using the term ''Estimated,'' or a substantially similar term, in close proximity to the estimated term or terms described. As discussed in the proposal, consumer testing participants generally understood that where the term ''estimated'' was used in close proximity to the estimated term or terms, the actual amount could vary (for example, the amount of currency to be received could be higher or lower than the amount disclosed). Proposed comment 31(d)–1 provided examples of terms that may be used to indicate that a disclosed amount is estimated. For instance, a remittance transfer provider could describe an estimated disclosure as ''Estimated Transfer Amount,'' ''Other Estimated Fees and Taxes,'' or ''Total to Recipient (Est.).'' A Member of Congress and consumer group commenters agreed that the Bureau should require disclosures to be labeled as estimates when estimates are used. Therefore, proposed § 205.31(d) and proposed comment 31(d)–1 are adopted substantially as proposed in renumbered § 1005.31(d) and comment 31(d)–1.

31(e) Timing

Proposed § 205.31(e) set forth the timing requirements for the disclosures required by proposed § 205.31.

31(e)(1) Timing of Pre-Payment and Combined Disclosures

Proposed § 205.31(e)(1) provided that a pre-payment disclosure required by § 205.31(b)(1) or a combined disclosure provided under § 205.31(b)(3) must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the remittance transfer.

Consumer group commenters strongly supported requiring these disclosures to be provided before payment, stating that providing pre-payment disclosures was a centerpiece of the statute. One consumer group commenter stated that pre-payment disclosures were necessary to facilitate shopping.

Several industry commenters, however, opposed the requirement to provide disclosures before payment. One industry trade association commenter argued that the disclosure would provide negligible benefits, citing the fact that some participants in the Board's consumer testing stated that they did not want a disclosure prior to payment. One industry commenter suggested that the pre-payment disclosures would confuse or irritate

customers who would not understand why disclosure was being provided at that time. Another industry commenter stated that the pre-payment disclosures created needless compliance costs, which would be passed on to senders. As discussed above, some industry commenters urged that if pre-payment disclosures were required, that they be permitted to be disclosed orally or on a screen, even when the transaction is conducted in person, to reduce compliance costs and delays for the sender.

A few industry commenters argued that the combined disclosure should be permitted to be provided after payment is made. One industry commenter noted that EFTA section 919(a)(5)(C) only requires combined disclosure to be accurate at the time payment is made. This commenter stated that providing a document similar to a receipt prior to payment is not possible because such a disclosure could not provide accurate information regarding the date and time of the transaction, the amount paid, and the transaction number, which are elements that help establish proof of payment. Therefore, this commenter argued that the rule should permit the combined disclosure to be provided after payment, if a pre-payment disclosure is provided orally or on a screen at the point-of-sale. This commenter maintained that allowing oral or electronic disclosures would be appropriate in the context of EFTA section 919(a)(5) authority to permit combined disclosures and in light of the Bureau's duty to consider the final rule's costs and benefits. At minimum, this commenter believed the Bureau should permit this method of disclosure for senders who have used the provider's service in the past.

Another industry commenter stated that it currently only had the capability of providing information to senders on a register receipt after payment. This commenter believed that requiring a combined disclosure to be provided prior to payment would require printing a pre-payment disclosure in the middle of a sales transaction.

The Bureau recognizes the operational challenges associated with providing pre-payment and particularly combined disclosures to senders prior to payment. However, although current practice generally is to provide written disclosures after payment is made, the statute clearly requires certain disclosures to be provided prior to payment and other disclosures to be provided when payment is made for the remittance transfer. The Bureau also believes that the statute precludes combined disclosures from being provided to senders after payment or in a non-written format. EFTA section 919(a)(5)(C) affirmatively requires that the combined disclosure be *accurate at the time at which payment is made* (emphasis added). Such a requirement would be superfluous if the combined disclosure could be provided after payment because a disclosure provided after payment must accurately reflect the terms of the completed transaction pursuant to EFTA section 919(a)(2)(B). Accordingly, the Bureau believes the statute requires both the pre-payment disclosure and the combined disclosure be given prior to payment.

As discussed below in § 1005.36, special timing rules have been adopted for preauthorized remittance transfers to account for the particular challenges associated with providing disclosures for transfers that may occur far in the future. Therefore, proposed § 205.31(e)(1) is adopted substantially as proposed in renumbered § 1005.31(e)(1), with modifications to reference new § 1005.36. Section 1005.31(e)(1) states that except as provided in § 1005.36(a), a pre-payment disclosure required by § 1005.31(b)(1) or a combined disclosure required by § 1005.31(b)(3) must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the transfer.

Proposed comment 31(e)–1 clarified when a sender has requested a remittance transfer, for purposes of determining when a pre-payment or combined disclosure must be provided. The proposed comment is adopted substantially as proposed, with a reference to the provisions for preauthorized remittance transfers in new § 1005.36. Comment 31(e)–1 states that, except as provided in § 1005.36(a), pre-payment and combined disclosures are required to be provided to the sender when the sender requests the remittance transfer, but prior to payment for the transfer. The comment clarifies that whether a consumer has requested a remittance transfer depends on the facts and circumstances. A sender that asks a provider to send a remittance transfer, and that provides transaction-specific information to the provider in order to send funds to a designated recipient, has requested a remittance transfer. For example, a sender who asks the provider to send money to a recipient in Mexico and provides the sender and recipient information to the provider has requested the remittance transfer provider to send a remittance transfer. In contrast, a consumer who solely inquires about that day's rates and fees to send to Mexico has not requested the remittance transfer provider to send a remittance transfer.

31(e)(2) Timing of Receipts

EFTA section 919(a)(2)(B) requires that a receipt be provided to a sender at the time the sender makes payment in connection with the remittance transfer. Proposed § 205.31(e)(2) provided that a receipt must be provided to the sender when payment is made for the transaction. The Bureau did not receive comment on this proposed provision. Under the final rule, a receipt required to be provided by § 1005.31(b)(2) generally must be provided to the sender when payment is made for the remittance transfer, except for preauthorized remittance transfers as provided in § 1005.36(a). The Bureau notes that the final rule does not require the receipt to be provided at an exact moment when the sender, for example, hands cash or a credit card to an agent to pay for the transfer. Rather, the Bureau believes that payment for a remittance transfer is a process that may involve several steps. For example, payment for a transfer by credit card could involve a sender handing a credit card to an agent, the agent asking the sender for identification, the agent sending the credit card authorization request, the card authorization being approved, the agent requesting signature on a credit card receipt, and the sender signing the credit card receipt.

Proposed comment 31(e)–2 provided examples of when a remittance transfer provider may provide the sender a receipt. The Bureau did not receive comment on the proposed comment, which is adopted substantially as proposed. Comment 31(e)–2 in the final rule, however, adds a reference to the special timing rules for preauthorized remittance transfers in § 1005.36. The comment also adds a clarification regarding when a payment is made for purposes of the final rule, including an example stating that, for purposes of subpart B, payment is made when a sender authorizes a payment. The Bureau believes that, for purposes of subpart B, payment is made when a sender authorizes payment because a receipt will be most useful to a sender at that time. Otherwise, if payment is considered to be made when the funds actually leave the sender's account due to delays in processing a payment, a receipt may not be provided to a sender for a day or more. Furthermore, it is not clear how a sender's cancellation right would operate in this scenario. For example, because a sender does not know when funds leave an account, a sender would be unable to know when

the cancellation right would be triggered.

Comment 31(e)–2 in the final rule states that except as provided in § 1005.36(a), a receipt required by § 1005.31(b)(2) must be provided to the sender when payment is made for the remittance transfer. For example, a remittance transfer provider could give the sender the disclosures after the sender pays for the remittance transfer in person, but before the sender leaves the counter. A provider could also give the sender the disclosures immediately before the sender pays for the transaction. For purposes of subpart B, payment is made, for example, when a sender provides cash to the remittance transfer provider or when payment is authorized.

Proposed § 205.31(e)(2) further stated that if a transaction is conducted entirely by telephone, a written receipt may be mailed or delivered to the sender no later than one business day after the date on which payment is made for the remittance transfer. If a transaction is conducted entirely by telephone and involves the transfer of funds from the sender's account held by the provider, the written receipt may be provided on or with the next regularly scheduled periodic statement. *See* EFTA section 919(a)(5)(B). In some circumstances, a provider conducting such a transfer from the sender's account held by the provider is not required to provide a periodic statement under other laws. The Board believed that in such circumstances, it would be appropriate to permit the provider to provide a written receipt within a similar period of time as a periodic statement. Therefore, pursuant to EFTA section 904(c), the Board also proposed in § 205.31(e)(2) that the written receipt may be provided within 30 days after payment is made for the remittance transfer if a periodic statement is not required. Under the proposal, in order for the written receipt to be mailed or delivered to a sender conducting a transaction entirely by telephone at these later times, the remittance transfer provider was required to comply with the foreign language requirements of proposed § 205.31(g)(3).

One industry commenter argued that the Bureau should include a timing exception in circumstances where a receipt is required to be provided to a sender shortly before a periodic statement is produced. This commenter stated that a remittance transfer provider may not be able to provide the required disclosures to a sender for a remittance transfer that occurs at the end of a billing cycle in time to include in the statement. The commenter suggested that in such circumstances, the Bureau should permit the receipt to be provided by the later of the next periodic statement date or 30 days after payment. The Bureau believes the final rule gives providers sufficient time to provide a receipt to a sender after a remittance transfer is sent; thus, no accommodation for transfers made at the end of a billing cycle is included in § 1005.31(e)(2). Because periodic statements must include certain information that occurs during a cycle, *see* § 1005.9(b), the Bureau expects that, for purposes unrelated to this rule, providers already delay sending a periodic statement for a short time after a cycle ends to ensure that all activity occurring within a cycle is included in the appropriate statement.

Accordingly, to effectuate the purposes of the EFTA and to facilitate compliance, the Bureau believes it is necessary and proper to use its authority under EFTA section 904(a) and (c) to adopt the provisions regarding mailing a receipt in proposed § 205.31(e)(2) as § 1005.31(e)(2) with revisions. Section 1005.31(e)(2) in the final rule eliminates the requirement to comply with proposed § 205.31(g)(3), because the provision has been eliminated in the final rule, as discussed in further detail below. Section 1005.31(e)(2) is also revised to state that if a transaction is conducted entirely by telephone and involves the transfer of funds from the sender's account held by the provider, the receipt may be provided within 30 days after payment is made for the remittance transfer if a periodic statement is not *provided,* rather than if a periodic statement is not required. In some circumstances, a provider may provide a sender with a periodic statement even if one is not required to be provided. In these circumstances, the Bureau believes a provider should instead disclose the receipt on or with the periodic statement and that the provision allowing a provider to give a receipt 30 days after payment is made should not apply.

Section 1005.31(e)(2) is further revised to account for circumstances in which a provider discloses the statement about the rights of the sender regarding cancellation required by § 1005.31(b)(2)(iv), in order to use the telephone exceptions pursuant to § 1005.31(a)(3)(iii) or (a)(5)(iii). In those circumstances, the Bureau does not believe a provider should be required to repeat the statement about the rights of the sender regarding cancellation on a receipt when it has already been disclosed to the sender. Thus, pursuant to the Bureau's authority under EFTA section 919(d)(3), § 1005.31(e)(2) states that the statement about the rights of the sender regarding cancellation required by § 1005.31(b)(2)(iv) may, but need not, be disclosed pursuant to the timing requirements of § 1005.31(e)(2) if a provider discloses this information pursuant to § 1005.31(a)(3)(iii) or (a)(5)(iii). The Bureau also adds comment 31(e)(2)–5 to clarify that even though the statement about the rights of the sender regarding cancellation need not be disclosed pursuant to the timing requirements of § 1005.31(e)(2), the statement about the rights of the sender regarding error resolution required by § 1005.31(b)(2)(iv) must be disclosed pursuant to the timing requirements of § 1005.31(e)(2).

Proposed comment 31(e)–3 provided further clarification regarding circumstances where a sender transfers funds from his or her account, as defined by § 205.2(b) (currently § 1005.2(b)), that is held by the remittance transfer provider. The Bureau did not receive comment on proposed comment 31(e)–3, which is adopted substantially as proposed.

The Bureau is providing further guidance in the final rule regarding the timing of receipts for remittance transfers made via mobile application or text message. As discussed above, because remittance transfers sent via mobile application or text message are conducted entirely by mobile telephone, the Bureau believes that EFTA section 919(a)(5)(A) permits pre-payment disclosures to be provided orally for such transfers. Similarly, the Bureau believes that that EFTA section 919(a)(5)(B) permits receipts for transfers sent entirely by telephone via mobile application or text message to be provided in accordance with the mailing rules provided for transactions conducted entirely by telephone in § 1005.31(e)(2) or § 1005.36(a). Therefore, the final rule adds a new comment 31(e)–4 to clarify that if a transaction is conducted entirely by telephone via mobile application or text message, a receipt required by § 1005.31(b)(2) may be mailed or delivered to the sender pursuant to the timing requirements in § 1005.31(e)(2) or § 1005.36(a). For example, if a sender conducts a transfer entirely by telephone via mobile application, a remittance transfer provider may mail or deliver the disclosures to a sender pursuant to the timing requirements in § 1005.31(e)(2) or § 1005.36(a).

Finally, several industry commenters requested that the Bureau specifically permit remittance transfer providers to provide receipts for transactions conducted via mobile application or text message by email or through a

provider's Web site. The Bureau notes that written receipts provided in accordance with § 1005.31(e)(2) or § 1005.36(a) may be provided electronically, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act. *See* comment 31(a)(2)–1.

31(f) Accurate When Payment Is Made

Proposed § 205.31(f) provided that the disclosures required by proposed § 205.31(b) must be accurate when a sender pays for the remittance transfer, except when estimates are permitted by proposed § 205.32. Proposed comment 31(f)–1 clarified that a remittance transfer provider did not have to guarantee the terms of the remittance transfer in the disclosures required by § 205.31(b) for any specific period of time. However, if any of the disclosures required by proposed § 205.31(b) are not accurate when a sender pays for the remittance transfer, a provider would be required to give new disclosures before receiving payment for the remittance transfer. For example, a sender at a retail store may be provided a pre-payment disclosure under proposed § 205.31(b)(1) at a customer service desk, but the sender may decide to leave the desk to go shopping. Upon the sender's return to the customer service desk an hour later, the sender would have to be provided a new pre-payment disclosure if any of the information had changed. However, the sender would not need to be provided a new disclosure if the information had not changed.

Consumer group commenters supported the requirement that disclosures must be accurate when payment is made. An industry trade association commenter asked the Bureau to permit remittance transfer providers to include a statement in the disclosures clarifying that changes to the disclosures may occur between the time of payment and the time a transaction clears. However, the Bureau notes that under the proposed rule, only disclosures provided before payment is made would not be guaranteed and thus subject to change. Disclosures provided on receipts generally would be guaranteed, and thus not subject to change, except where estimates are permitted.

Proposed § 205.31(f) is adopted substantially as proposed in renumbered § 1005.31(f). The final rule, however, provides that the requirements of § 1005.31(f) and comment 31(f)–1 do not apply to preauthorized remittance transfers, which are subject to separate accuracy requirements in § 1005.36(a).

31(g) Foreign Language Disclosures

EFTA section 919(b) provides that disclosures required under EFTA section 919 must be made in English and in each of the foreign languages principally used by the remittance transfer provider, or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office. The Board proposed § 205.31(g)(1) to implement EFTA section 919(b) for written or electronic disclosures generally, with some modifications as discussed in the May 2011 Proposed Rule. In addition, the Board proposed § 205.31(g)(2) and (3) to exempt from the general foreign language disclosure requirements oral disclosures and written receipts for telephone transactions. The Bureau is adopting § 205.31(g) in renumbered § 1005.31(g) generally as proposed with some changes in response to suggestions from commenters, as discussed in detail below.

31(g)(1) General

Proposed § 205.31(g)(1) provided that disclosures required under subpart B, other than oral disclosures and written receipts for telephone transactions, must be made in English and in each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at that office. Alternatively, proposed § 205.31(g)(1) provided that these disclosures may be made in English, and, if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction (or for written or electronic disclosures made pursuant to proposed § 205.33, in the foreign language primarily used by the sender with the remittance transfer provider to assert the error), provided that such foreign language is principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at that office.

As discussed in the May 2011 Proposed Rule, proposed § 205.31(g)(1) contained certain exceptions and clarifications to the requirements of EFTA section 919(b). Specifically, the Board proposed: (i) To apply the provisions only to written or electronic disclosures and address oral disclosures separately in proposed § 205.31(g)(2); (ii) to simplify the statutory language in EFTA section 919(b) by removing the term ''or its agents;'' (iii) to include electronic advertising, soliciting or marketing as a trigger to the foreign language disclosure requirements, in addition to oral and written advertisements, solicitations, or marketing; (iv) to limit the trigger to foreign language advertisements, solicitations, or marketing of remittance transfer services, and to exclude from the trigger foreign language advertisements, solicitations, or marketing of other products or services; and (v) to permit, under its EFTA section 904(c) authority, a remittance transfer provider to fulfill its obligations by providing the sender with disclosures in English and, if applicable, the one triggered foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction or assert an error in lieu of providing disclosures in each of the triggered foreign languages.

Commenters did not object to these specific proposed modifications. However, several industry commenters stated that the foreign language disclosure requirements generally would provide a disincentive for remittance transfer providers to provide a wide range of foreign language services to customers. Some of these commenters suggested that if remittance transfer providers were to offer fewer foreign language services, this would drive some customers to use illicit operators who provide the foreign-language services discontinued by legitimate remittance transfer providers. Another commenter suggested that the disclosures should only be provided in English because the foreign language requirement would impose costs that would be passed on to consumers who might not derive any benefit from such services.

Consumer group commenters and a member of Congress, however, thought the rule should ensure that non- and limited-English speaking consumers have access to meaningful remittance transfer disclosures. The Congressional commenter also agreed with the Board's proposal to extend the advertising, soliciting, or marketing trigger to electronic advertisements, solicitations, and marketing.

EFTA section 919(b) requires disclosures to be provided in certain foreign languages, and the Bureau believes the Board's proposed modifications to the statutory requirements alleviates burden on remittance transfer providers. The Bureau believes that proposed § 205.31(g)(1) reflects a proper balancing of interests in providing non- and limited-English speaking consumers with disclosures in a language with which they are familiar with the burden on remittance transfer providers of providing multilingual disclosures in

implementing EFTA section 919(b). The statute and the implementing regulation seek to ensure that if remittance transfer providers make a concerted effort to reach out to potential remittance transfer customers through advertisements, solicitations, and marketing in a foreign language in a particular office, then such providers should also be required to provide important disclosures in that language when such customers come to that office to purchase remittance transfer services from that provider or assert an error.

Furthermore, the Bureau agrees with the Board's proposed modifications and clarifications to the statutory language for the reasons discussed in the May 2011 Proposed Rule, and commenters did not object to such modifications and clarifications. Therefore, to effectuate the purposes of the EFTA and facilitate compliance, the Bureau believes it is necessary and proper to use its authority under EFTA section 904(a) and (c) to adopt proposed § 205.31(g)(1) in renumbered § 1005.31(g)(1), with the removal of a reference to proposed § 205.31(g)(3) regarding written receipts for telephone transactions, which is further discussed below, and other minor technical and clarifying amendments. Most notably, the Bureau is changing the references to ''that office'' in the proposed rule to ''the office in which a sender conducts a transaction or asserts an error'' for clarity.

Principally Used

Proposed comment 31(g)(1)–1 clarified when a foreign language is principally used. As the Board stated in the May 2011 Proposed Rule, the statute indicates that more than one foreign language may be principally used. Consequently, the Board's interpretation of the term ''principally used'' was not limited to the one foreign language used most frequently by the remittance transfer provider. Instead, proposed comment 31(g)(1)–1 adopted a facts-and-circumstances approach to determining when a foreign language is principally used. Under proposed comment 31(g)(1)–1, factors contributing to whether a foreign language is principally used would include: (i) The frequency with which the remittance transfer provider advertises, solicits, or markets remittance transfers in a foreign language at a particular office; (ii) the prominence of such advertising, soliciting, or marketing in that language at that office; and (iii) the specific foreign language terms used to advertise, solicit, or market remittance transfer services at that office. Proposed comment 31(g)(1)–1 also included examples to illustrate when a foreign language is principally used and when there is incidental use of the language. As discussed in the May 2011 Proposed Rule, the Board also considered an objective standard based on whether a foreign language meets a certain percentage threshold of a remittance transfer provider's advertisements at a particular office. However, the Board rejected such a standard based on the fact that the standard may be arbitrary, may be difficult to administer, and may inappropriately exclude instances where a foreign language is principally used to advertise, solicit or market remittance transfers, even if the number of advertisements in the foreign language is nominally low.

Some industry commenters suggested that there be further clarification on the term ''principally used,'' but did not specifically state what kind of guidance would be helpful. A consumer group commenter agreed with the proposed facts-and-circumstances approach for determining foreign languages principally used in advertising, soliciting, or marketing remittance transfer services. A member of Congress agreed with the Board's interpretation that the statutory provision contemplated that more than one foreign language could be principally used.

The Bureau agrees with the Board's reasoning in proposing comment 31(g)(1)–1. Because the Bureau believes the particular facts and circumstances surrounding the use of a foreign language to advertise, solicit, or market remittance transfers will determine whether a foreign language is ''principally used'' to advertise, solicit, or market at a particular office, the Bureau does not believe further general statements would be helpful. However, the Bureau is amending one of the illustrative examples in comment 31(g)(1)–1 to provide a more clear example of when a remittance transfer provider would be considered to be principally using a foreign language to advertise, solicit, or market remittance transfers at an office.

Advertise, Solicit, or Market

Neither the EFTA nor Regulation E defines ''advertising,'' ''soliciting,'' or ''marketing.'' [77] However, the general concept of advertising, soliciting, or marketing is explained in other regulations administered by the Bureau. *See, e.g.,* Regulation Z, 12 CFR 1026.2(a)(2) and associated commentary; Regulation DD, 12 CFR 1030.2(b) and 1030.11(b) and associated commentary.

The Board proposed comment 31(g)(1)–2 to provide positive and negative examples of advertising, soliciting, or marketing in a foreign language. These examples were based on examples from the commentary to other regulations (specifically, renumbered §§ 1026.2(a)(2) and 1030.2(b)) regarding the definition of ''advertisement,'' as well as examples related to the promotion of overdrafts under § 1030.11(b). Some industry commenters asked whether the terms ''market'' and ''solicit'' mean something different than ''advertise'' and requested definitions for ''market'' or ''solicit'' if they are meant to have different meanings. The Bureau believes, that for purposes of subpart B of Regulation E, the terms ''advertise,'' ''solicit'' and ''market'' have the same general meaning, and comment 31(g)(1)–2 is adopted substantially as proposed.

At the Office

Under EFTA section 919(b) and proposed § 205.31(g)(1), foreign language disclosures would be required when the foreign language is principally used to advertise, solicit, or market ''at that office.'' As discussed above, the Bureau is changing the reference in § 1005.31(g)(1) from ''that office'' to ''the office in which a sender conducts a transaction or asserts an error'' for clarity in the final rule. The Board proposed comment 31(g)(1)–3 to clarify the meaning of ''office.'' As discussed in the May 2011 Proposed Rule, proposed 31(g)(1)–3 reflected the Board's belief that an office includes both physical and non-physical locations where remittance transfer services are offered to consumers, including any telephone number or Web site through which a consumer can complete a transaction or assert an error. The Board further noted that a telephone number or Web site that provides general information about the remittance transfer provider, but through which a consumer does not have the ability to complete a transaction or assert an error, is not an office. Proposed comment 31(g)(1)–3 also clarified that a location need not exclusively offer remittance transfer services in order to be considered an

[77] Regulation E contains some guidance on whether a card, code, or other device is ''marketed or labeled as a gift card or gift certificate'' or ''marketed to the general public'' for purposes of the requirements pertaining to gift cards. *See* comments 20(b)(2)–2, 20(b)(2)–3, and 20(b)(4)–1. However, that guidance focuses on a narrow set of circumstances and does not address more broadly what actions generally constitute advertising, soliciting, or marketing.

office for purposes of § 1005.31(g)(1) (proposed as § 205.31(g)(1)), and included an example to illustrate this point.

Some industry commenters requested clarification on whether a Web site targeted to consumers outside of the United States could be an ''office'' for purposes of the foreign language disclosure requirements. In response, the Bureau is revising comment 31(g)(1)–3 to clarify that because a consumer must be located in a State to be considered a ''sender'' under § 1005.30(g), a Web site is not an ''office,'' even if the Web site can be accessed by consumers that are located in the United States, unless a sender may conduct a remittance transfer on the Web site or may assert an error for a remittance transfer on the Web site. Therefore, a Web site that is targeted to people outside of the United States will not be deemed to be an ''office'' for purposes of § 1005.31(g) so long as senders cannot conduct a remittance transfer on the Web site or assert an error for a remittance transfer on the Web site.

The Board also proposed comment 31(g)(1)–4 to provide guidance on the phrase ''at that office.'' Proposed comment 31(g)(1)–4 stated that advertisements, solicitations, or marketing posted, provided, or made at a physical office, on a Web site of a remittance transfer provider, or during a telephone call with the remittance transfer provider would constitute advertising, soliciting, or marketing at an office of a remittance transfer provider. The proposed comment also clarified that for error resolution disclosures, the relevant office would be the office in which the sender first asserts the error and not the office where the remittance transfer was conducted.

One industry commenter requested clarification on a number of situations where the remittance transfer provider may be engaging in general advertising, marketing, or soliciting that is not intended to be made at a particular office, but due to the nature of such advertising, marketing, or soliciting, it happens to occur at a particular office. The Bureau agrees that such a clarification is appropriate and has revised comment 31(g)(1)–4 to state that an advertisement, solicitation, or marketing that is considered to be made at an office does not include general advertisements, solicitations, or marketing that are not intended to be made at a particular office. The proposed comment includes an example to illustrate this concept. Specifically, if an advertisement for remittance transfers in Chinese appears in a Chinese newspaper that is being distributed at a grocery store in which the agent of a remittance transfer provider is located, such advertisement would not be considered to be made at that office.

The Bureau is also amending comment 31(g)(1)–4 to provide that advertisements, soliciting, or marketing posted, provided, or made via mobile application or text message would also be considered advertising, soliciting, or marketing at an office of a remittance transfer provider. The amendment is consistent with the Bureau's other revisions in the final rule clarifying that transfers through mobile application or text message are considered to be transfers conducted by telephone. *See* § 1005.31(a)(5). The Bureau is also making other minor amendments to comment 31(g)(1)–4 for additional clarity, including changing ''that office'' to ''the office in which a sender conducts a transaction or asserts an error'' to be consistent with the change the Bureau is adopting in § 1005.31(g)(1). Based on this change, comment 31(g)(1)–4 also contains a clarification that for disclosures required under § 1005.31, the relevant office would be the office in which the sender conducts the transaction.

31(g)(2) Oral, Mobile Application or Text Message Disclosures

In the May 2011 Proposed Rule, the Board proposed to use its authority under EFTA section 904(c) to exempt oral disclosures from the foreign language requirement under EFTA section 919(b). In proposed § 205.31(g)(2), the Board proposed to use its authority under EFTA section 919(a)(5)(A) to permit oral disclosures for transactions conducted entirety by telephone, subject to the requirement that they be made in the language primarily used by the sender with the remittance transfer provider to conduct the transaction. Proposed § 205.31(g)(2) also provided that disclosures permitted to be provided orally under proposed § 205.31(a)(4) for error resolution purposes must be made in the language primarily used by the sender with the remittance transfer provider to assert the error.

Some industry commenters thought that the rule should not require disclosures in any foreign language that is not principally used to advertise, solicit, or market remittance transfers. These commenters suggested that such a requirement could hurt consumers by reducing the number of languages that a remittance transfer provider would be willing to use to conduct a transaction.

However, as the Board explained in the May 2011 Proposed Rule, if a foreign language must be principally used by the remittance transfer provider to advertise, solicit, or market remittance transfers in order to trigger the foreign language requirement for oral disclosures, a sender conducting a transaction or asserting an error in a foreign language on the telephone that did not meet the foreign language advertising trigger may only receive required oral disclosures in English. Consequently, if the remittance transfer provider conducted the actual transaction or communicated with the sender regarding the alleged error in a foreign language, a remittance transfer provider could then switch to English to orally disclose the required information under such a rule. The Bureau believes that senders would benefit from having the required oral disclosures provided in the same language primarily used by the sender with the remittance transfer provider to conduct the transaction or assert the error, regardless of whether the language meets the foreign language advertising trigger. Failure to include this modification from the general foreign language requirement for oral disclosures could lead to consumers not understanding the required disclosures, which would be contrary to the goals and purposes of the statute.

Furthermore, the Bureau agrees with the Board's reasoning in the May 2011 Proposed Rule that disclosures provided orally under § 1005.31(a)(3) and (4) should be provided only in the language primarily used to conduct the transaction or assert the error. Otherwise, under EFTA section 919(b), a sender conducting a telephone transaction orally or receiving the results of an error investigation orally could be given disclosures in English and in every foreign language triggered by the regulation, which would likely lead to consumer confusion. While the Bureau recognizes that this rule might reduce the languages in which a remittance transfer provider would be willing to conduct a transaction, the Bureau believes that applying the general foreign language disclosure rule to oral disclosures would be harmful to consumers for the reasons set forth above.

Moreover, as discussed above, the Bureau is adopting § 1005.31(a)(5) to permit disclosures to be provided orally or via mobile application or text message for transactions conducted entirely by telephone via mobile application or text message. Therefore, to effectuate the purposes of the EFTA and facilitate compliance, the Bureau believes it is necessary and proper to

use its authority under EFTA sections 904(a) and (c) to adopt proposed § 205.31(g)(2) in renumbered § 1005.31(g)(2) with amendments to include a reference to transactions conducted entirely by telephone via mobile application or text message and other minor, non-substantive amendments.

Written Receipt for Telephone Transactions

The Board also proposed § 205.31(g)(3), which provided that written receipts for transactions conducted entirely by telephone must be made in English and, if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction, regardless of whether such foreign language is primarily used by the remittance transfer provider to advertise, solicit, or market remittance transfers. The Board, however, requested comment on whether the general rule proposed in § 205.31(g)(1) (adopted as § 1005.31(g)(1) above) should apply to the written receipt provided for transactions conducted entirely by telephone. Adopting the general rule proposed in § 205.31(g)(1) for written receipts provided for transactions conducted entirely by telephone would mean that a remittance transfer provider would not be obligated to provide the written receipt in a foreign language, even if such foreign language was used to conduct the telephone transaction, unless the foreign language was principally used to advertise, solicit, or market remittance transfers during the telephone call.

As noted above, some industry commenters thought that the rule should not require disclosures in any foreign language that is not principally used to advertise, solicit, or market remittance transfers because this might cause remittance transfer providers to reduce the number of languages they would be willing to use to conduct a remittance transfer. Another industry commenter stated that in its experience, consumers can understand written English even though they may prefer to conduct a transaction orally in their native language for the fluency, ease, and speed at which the transaction may be conducted when speaking in one's native language.

The Bureau believes that applying the general rule under § 1005.31(g)(1) to written receipts provided to senders after payment would not cause the same type of consumer confusion as it would for pre-payment disclosures provided orally in transactions conducted entirely by telephone. Although some senders may not have enough familiarity with English to feel comfortable speaking with the remittance transfer provider in English, the same pressure to comprehend and respond quickly does not exist with written disclosures. Unlike with oral disclosures, senders have sufficient time to review written disclosures and, if necessary, find resources to help understand the disclosure.

Furthermore, the Bureau notes that in the Board's outreach with industry, remittance transfer providers generally stated that providing written disclosures in a foreign language can be more costly and burdensome than providing oral disclosures in a foreign language. The Bureau also notes that a remittance transfer provider may have employees or agents that happen to speak a certain foreign language for which the provider does not have written disclosures. The Bureau would not want providers to discourage such employees or agents from using their foreign language skills to help senders with their remittance transfer transactions in order to avoid having to provide written disclosures in the language spoken by the employee or agent. In order to minimize the potential unintended consequence of having remittance transfer providers reduce the number of foreign languages they may offer for telephone transactions, the Bureau is not adopting proposed § 205.31(g)(3). Therefore, written receipts required to be provided to the sender after payment for transactions conducted entirely by telephone are subject to the general rule under § 1005.31(g)(1).

General Clarifications

The Board also proposed additional commentary in the May 2011 Proposed Rule to provide general guidance on issues that affect each of the subsections of proposed § 205.31(g) (adopted as § 1005.31(g)) discussed above. EFTA section 919(b) does not limit the number of languages that may be used on a single disclosure. However, proposed comment 31(g)–1 suggested that a single written or electronic document containing more than three languages is not likely to be helpful to a consumer. Since the proposed commentary was not a strict limit, the Board solicited comment on whether the regulation should strictly limit the number of languages that may be contained in a single written or electronic disclosure. The Board also sought comment on whether three languages is an appropriate suggested limit to the number of languages in a single written or electronic document.

One industry commenter suggested that the rule cap the number of languages a remittance transfer provider would be required to disclose to three languages. The commenter also stated that requiring English, Spanish, and French would cover the vast majority of the languages used in transfers they send from the United States. This commenter also noted that other regulators that have required foreign language disclosures have typically limited the languages that must be disclosed to either English and Spanish, or a small subset of languages such as Spanish, Chinese, Tagalog, Vietnamese, and Korean. A consumer group commenter recommended that rather than adopting a ceiling on the number of languages that may appear on a disclosure, the Bureau should create guidelines that ensure disclosures with multiple foreign languages are easy to understand.

The Bureau does not believe that limiting the foreign languages that may be used by a remittance transfer provider best effectuates the goals of the statute. In the Bureau's view, if a remittance transfer provider principally uses a foreign language to advertise, solicit, or market remittance transfers at an office, the remittance transfer provider is deliberately reaching out to consumers speaking that foreign language, and the required disclosures should be provided in that foreign language, regardless of whether it is a language that is commonly used for remittance transfers originating in the United States. Furthermore, while too many languages on a single written document may diminish a consumer's ability to read and understand the disclosures, the Bureau believes that remittance transfer providers may find ways to present the information in a number of foreign languages that are clear and conspicuous to senders, and that imposing a definitive limit on the number of languages that may appear on a single disclosure may be too inflexible. Moreover, the Bureau believes that the formatting requirements in § 1005.31(c), as discussed above, may help to ensure that senders can find and understand the information that is most important to them with respect to the remittance transfer. The Bureau is amending comment 31(g)–1 to note that disclosures must be clear and conspicuous pursuant to § 1005.31(a)(1) without suggesting a specific limit on the number of languages in a single disclosure.

Proposed comment 31(g)–1 also clarified that the remittance transfer provider may provide disclosures in a

single document with both languages or in two separate documents with one document in English and the other document in the applicable foreign language. The Board also proposed several examples in comment 31(g)–1 to illustrate the application of this concept.

Some industry commenters thought that senders should be able to designate the language in which they prefer to receive disclosures, provided it is a language that is principally used by the remittance transfer provider to advertise, solicit, or market remittance transfers, instead of providing disclosures in both English and the applicable foreign language. The Bureau notes that EFTA section 919(b) requires disclosures to be provided in English and in each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market at that office. This means that regardless of which office a sender chooses to conduct a remittance transfer, he or she will always obtain written or electronic disclosures in English, even if the disclosure in a foreign language is not consistent among different offices because such disclosure will depend on whether the foreign language meets the foreign language disclosure trigger at that office. The Bureau believes that always disclosing in English is important to allow senders to compare disclosures received at different provider locations and for different providers. Therefore, the final rule requires remittance transfer providers to provide disclosures in English in all cases. This is fully consistent with EFTA section 919(b). Comment 31(g)–1 is adopted as proposed with some technical and clarifying amendments, including to remove references to § 205.31(g)(3), consistent with the Bureau's decision regarding written receipts for telephone transactions, as discussed above.

The Board also proposed comment 31(g)–2 to clarify when a language is primarily used by the sender with the remittance transfer provider to conduct a transaction and assert an error. A remittance transfer provider must determine the language that is primarily used by the sender with the remittance transfer provider to conduct a transaction or assert an error if the provider chooses to provide written or electronic disclosures in English and the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction or to assert an error. Furthermore, under § 1005.31(g)(2), a remittance transfer provider is required to provide oral disclosures in the language that is primarily used by the sender with the remittance transfer provider to conduct the transaction or assert an error.

Specifically, proposed comment 31(g)–2 clarified that the language primarily used by the sender with the remittance transfer provider to conduct the transaction is the primary language used to convey the information necessary to complete the transaction. Proposed comment 31(g)–2 also stated that the language primarily used by the sender with the remittance transfer provider to assert an error is the primary language used by the sender with the remittance transfer provider to provide the information required by § 1005.33(b) to assert an error. The proposed comment also provided examples to clarify this concept.

One industry commenter suggested that the foreign language disclosure requirement should relate to the language used by the remittance transfer provider, rather than the language used by the sender. Some industry commenters recommended that the Bureau provide further clarification of the term ''primarily used'' without specifying what type of guidance would be helpful. The Bureau notes that proposed comment 31(g)–2 specifies that the relevant foreign language is the foreign language primarily used by the sender with the remittance transfer provider to conduct a transaction or assert an error, and the examples show that a foreign language must be used by both the sender and the remittance transfer provider to be primarily used by the sender with the remittance transfer provider to conduct a transaction or assert an error. The Bureau believes the proposed commentary is clear on this point. However, as additional clarification, the Bureau is including a new example in comment 31(g)–2 to illustrate when a sender primarily uses a foreign language with a remittance transfer provider in the internet context.

Storefront and Internet Disclosures

EFTA section 919(a)(6)(A) states that the Bureau may prescribe rules to require a remittance transfer provider to prominently post, and timely update, a notice describing a model remittance transfer for one or more amounts. The provision states that such a notice shall show the amount of currency that will be received by the designated recipient, using the values of the currency into which the funds will be exchanged. EFTA section 919(a)(6)(A) also states that the Bureau may require the notice prescribed to be displayed in every physical storefront location owned or controlled by the remittance transfer provider. Further, EFTA section 919(a)(6)(A) states that the Bureau shall prescribe rules to require a remittance transfer provider that provides remittance transfers via the internet to provide a notice, comparable to the storefront notice described in the statute, located on the home page or landing page (with respect to such remittance transfer services) owned or controlled by the remittance transfer provider.

EFTA section 919(a)(6)(B) states that, prior to proposing rules under EFTA section 919(a)(6)(A), appropriate studies and analyses must be performed to determine whether a storefront notice or internet notice facilitates the ability of a consumer to: (i) Compare prices for remittance transfers, and (ii) understand the types and amounts of any fees or costs imposed on remittance transfers. The studies and analyses must be consistent with EFTA section 904(a)(2), which requires an economic impact analysis that considers the costs and benefits of a regulation to financial institutions, consumers, and other users. These costs and benefits include the extent to which additional paperwork would be required, the effects upon competition in the provision of services among large and small financial institutions, and the availability of services to different classes of consumers, particularly low income consumers.[78]

Consistent with EFTA section 919(a)(6)(B), the Board reviewed and analyzed the statute and a variety of independent articles, studies, and Congressional testimony; conducted outreach with industry and consumer advocates; and held focus groups with consumers who send remittance transfers. Based on its findings, summarized below, the Board concluded in the May 2011 Proposed Rule that the statutory notice would not facilitate a consumer's ability to compare prices or to understand the fees and costs imposed on remittance transfers.[79]

The notice described by the statute illustrates only the exchange rate offered by that remittance transfer provider for the particular model transfer amount. In addition to the exchange rate, however, the total cost of a remittance transfer includes fees charged by the remittance transfer provider, any intermediary in

[78] As discussed below, the Board performed an analysis in the proposed rule consistent with EFTA section 904(a)(2), as it existed prior to any amendments in the Dodd-Frank Act. Section 904(a)(2), however, did not apply and was not amended by the Dodd-Frank Act to apply to the Bureau. Regardless, the Board's analysis from the proposal is unchanged, and the Bureau concurs with the Board's analysis.

[79] A complete discussion of the Board's findings is available at 76 FR at 29924–29927.

the transfer, and the receiving entity. The total cost also includes any taxes that may be charged in the sending and receiving jurisdictions. Thus, the Board determined the statutory storefront notice would not present a complete picture to the consumer of all potential fees and costs for a remittance transfer.

In the proposal, the Board considered two alternatives to the type of notice described in the statute that could more effectively communicate costs to a sender. The Board considered requiring the posting of transfer fee information for model send amounts, but believed that this alternative notice would have many of the same limitations as the statutory notice. The Board also considered requiring a notice that would reflect all the costs of a transfer. A notice with this alternative content could help consumers to obtain a better understanding of the total cost of a remittance transfer, but the length and complexity of such notices could limit their utility.

The analysis conducted by the Board identified other limitations with both the statutory and alternative storefront disclosures. First, most consumers would be unable to apply the information provided by the statutory notice to their own transfers. The fees, exchange rate, and taxes for a remittance transfer can vary based upon the amount sent, transfer corridor (*i.e.,* the sending location to the receiving location), speed of transfer (*e.g.,* the next day, the same day, or in one hour), method of delivery (*e.g.,* an electronic deposit into a bank account or a cash disbursement), and type of receiving entity (*e.g.,* a bank or a money transmitter's payout partner). For example, some remittance transfer providers offer a discount on their exchange rate spread for large send amounts. Therefore, even if the consumer's transfer were identical to the model transfer posted in the storefront notice except for the send amount, the consumer still may be unable to determine the exchange rate that would apply to the consumer's transfer based on the storefront notice.

Moreover, a consumer could be overwhelmed by the amount of data appearing in a long, complex storefront notice posted by these providers and, therefore, might not use it. A storefront notice for sending a specified amount to a single country could contain multiple rows of information to account for differences in pricing based on the transfer method, timing option, receipt location, and cost permutations described above. Many providers offer remittance transfers to multiple countries, and several locations within each country, which would multiply the number of data points on the notice.

Finally, frequent fluctuations in exchange rates could result in disclosures being inaccurate for a period of time. Remittance transfer providers would have to update the storefront notice for each send location several times a week, or as frequently as several times a day, to account for the fluctuations in exchange rates. These rates could also be different at a single provider's different send locations. Remittance transfer providers would need to distribute the updated notices to each send location, and each send location would need to replace the outdated notice just as frequently. Non-exclusive send locations that offer the services of two or more money transmitters would have to post and update the storefront notices for each remittance transfer provider. As a result, a storefront notice could be unhelpful and even misleading to consumers, while creating unnecessary legal risks for remittance transfer providers.

The analysis also identified potential effects that the storefront notice requirement would have on competition and costs to the consumer. The work involved in posting and updating storefront notices could cause some agents to stop offering remittance transfers. Further, credit unions and small banks that infrequently conduct transfers could find the burden and cost of producing storefront notices prohibitive and discontinue the service. Given the costs and risks associated with posting and updating the storefront notices contemplated by the statute, some providers could decide to exit the market, which could reduce competition among providers and increase costs for consumers.

Because the Board did not propose a rule mandating the posting of storefront notices, it did not propose a rule mandating the posting of internet notices. Since the proposal did not require a storefront notice, there could be no ''comparable'' internet notice. Moreover, the Board's study of model internet notices indicated that consumers using internet remittance transfer providers to request remittance transfers would be less likely to use a model transfer notice than those using providers at a physical location. Many internet providers currently disclose transaction-specific information prior to the consumer's payment for a transfer, and § 1005.31(b)(1), discussed above, makes this practice a regulatory requirement.

Industry commenters supported the findings that the storefront notice and internet notice would not be useful to consumers. One consumer group commenter believed that the Bureau should require any storefront advertising to be in a storefront disclosure format prescribed by the Bureau. The commenter argued that the storefront disclosure should include the amount a sender pays to a remittance transfer provider and the amount to be received by a recipient for at least two sample amounts. The commenter suggested that disclosures could be based on the cost at a certain time, such as the previous business day, to alleviate the concerns about disclosures needing to be updated more frequently.

The Bureau agrees with the Board's analysis, and believes that the storefront and internet disclosures described in EFTA section 919(a)(6)(A) would not accomplish the statutory goals of facilitating the ability of consumers to compare prices for remittance transfers and to understand the types and amounts of any fees or costs imposed on remittance transfers. The disclosures would not provide a complete disclosure of all of the costs of a remittance transfer. Even if all costs were provided in the disclosures, consumers would be unable to extrapolate from a storefront disclosure the cost of their particular transaction, because the cost could depend on other variables. The Bureau also recognizes the burden on remittance transfer providers could be significant and could lead some providers to no longer provide remittance services. The burden on providers would be substantial even if the disclosures were only required to be updated daily. Moreover, requiring less frequent updating would result in the disclosures being inaccurate for a period of time.

Because the cost to providers could be substantial, and the benefit of the storefront and internet disclosures would be minimal, the final rule does not require the posting of model remittance transfer notices at a storefront or on the internet.

Section 1005.32 Estimates

The statute provides two exceptions to the requirement to disclose the amount of currency that will be received by the designated recipient. The first exception is in EFTA section 919(a)(4). It provides that, subject to rules prescribed by the Bureau, disclosures by insured depository institutions or credit unions regarding the amount of currency that will be received by the designated recipient will be deemed to be accurate in certain circumstances so long as the disclosure provides a reasonably accurate estimate of the amount of currency to be received.

Under the statute, a remittance transfer provider may use this exception only if: (i) It is an insured depository institution or insured credit union (collectively, an ''insured institution'' as described in more detail below) conducting a transfer from an account that the sender holds with it; and (ii) the insured institution is unable to know, for reasons beyond its control, the amount of currency that will be made available to the designated recipient. *See* EFTA section 919(a)(4). This exception (the ''temporary exception'') expires five years after the enactment of the Dodd-Frank Act, on July 21, 2015. If the Bureau determines that expiration of the exception would negatively affect the ability of insured institutions to send remittances to foreign countries, the Bureau may extend the exception to not longer than ten years after enactment (*i.e.,* to July 21, 2020). *See* EFTA section 919(a)(4)(B).

The second exception is in EFTA section 919(c). It provides that if the Bureau determines that a recipient country does not legally allow, or the method by which transactions are made in the recipient country do not allow, a remittance transfer provider to know the amount of currency that will be received by the designated recipient, the Bureau may prescribe rules addressing the issue. EFTA section 919(c) further states that if rules are prescribed, they must include standards for the remittance transfer provider to provide: (i) A receipt that is consistent with EFTA sections 919(a) and (b); and (ii) a reasonably accurate estimate of the currency to be received. The second exception (the ''permanent exception'') does not have a sunset date.

The Board proposed § 205.32 to implement the two exceptions in EFTA sections 919(a)(4) and (c). Proposed § 205.32 generally permitted a remittance transfer provider to disclose estimates if it cannot determine exact amounts for the reasons specified in the statute. The Bureau is adopting § 205.32 generally as proposed in renumbered § 1005.32, with clarifications and revisions in response to comments received, as discussed in detail below. In addition, the Bureau is adopting new comment 32–1 to provide additional guidance on the circumstances when estimates may be provided. Specifically, new comment 32–1 states that estimates as permitted in § 1005.32(a) and (b) may be used in the pre-payment disclosure described in § 1005.31(b)(1), the receipt disclosure described in § 1005.31(b)(2), the combined disclosure described in § 1005.31(b)(3), and the pre-payment disclosures and receipt disclosures for both first and subsequent preauthorized remittance transfers described in § 1005.36(a)(1) and (2).

32(a) Temporary Exception for Insured Institutions

Proposed § 205.32(a)(1) provided a temporary exception for remittance transfer providers, which permits them to disclose estimates of the exchange rate, the transfer amount, other fees and taxes, and total to recipient if: (i) A remittance transfer provider cannot determine exact amounts for reasons beyond its control; (ii) a remittance transfer provider is an insured institution; and (iii) the remittance transfer is sent from the sender's account with the insured institution.

Most industry commenters generally supported permitting insured institutions to disclose estimates. For example, one commenter stated that restricting the use of estimates could discourage innovation and increase costs to offset risk. Consumer group commenters generally supported the proposed use of estimates but requested that the temporary exception not be extended. Some industry commenters, however, objected to permitting estimates to be disclosed because estimates could lead to inaccurate or misleading disclosures which would disservice consumers.

The Bureau believes permitting estimates, as provided by the temporary exception, is consistent with the statutory language and purpose of EFTA section 919(a)(4). The statute specifically provides that, subject to the Bureau's rules, an insured institution may use a reasonably accurate estimate of the amount of currency received under certain circumstances. Section 1005.32(a)(1) implements the temporary exception generally as proposed, as discussed below.

EFTA section 919(a)(4) only addresses estimates for the amount of currency that will be received by a designated recipient. Nonetheless, proposed § 205.32(a)(1) also permitted disclosure of an estimate for the exchange rate, the transfer amount in the currency made available to the designated recipient, the fees imposed by intermediaries in the transmittal route, and taxes imposed in the recipient country that are a percentage of the amount transferred to the designated recipient to the extent those amounts are not known for reasons beyond the insured institution's control. In the May 2011 Proposed Rule, the Board stated its belief that, by permitting an estimate of the amount that will be received, Congress must have intended to permit estimates of the components that determine that amount. The inability to determine the exact amount of one or more of these additional items is the reason why the amount of currency that will be received by the designated recipient must be estimated. Furthermore, the Board stated that permitting estimates of these additional items would help consumers to understand why the amount of currency to be received is displayed as an estimate. The Bureau did not receive any comments on this aspect of the proposal. The Bureau concurs with the Board's reasoning, and believes that to effectuate the purposes of the EFTA and facilitate compliance, it is necessary and proper to exercise its authority under EFTA sections 904(a) and (c) to allow an estimate of the exchange rate, transfer amount, and other fees and taxes disclosures in § 1005.32(a)(1). To not exercise the Bureau's authority in this way would render the statutory exemption essentially meaningless, and the Bureau believes that result could not be intended by the statutory exemption for estimating the amount of currency received.

In the proposed rule, the Board also stated that EFTA section 919(a)(4) only addresses the use of an estimate of the amount of foreign currency that will be received by a designated recipient. However, the proposed rule permitted an estimate of the currency that will be received, whether it is in U.S. dollars or foreign currency. The Bureau understands that senders may send remittance transfers to be paid to the designated recipient in U.S. dollars. When an insured institution sends a remittance transfer via international wire transfer, fees are sometimes deducted by intermediary institutions in the transmittal route with which the sending institution has no correspondent relationship. Although the insured institution may not know the total amount of these fees in advance, it must disclose them to the sender under § 1005.31(b)(1)(vi). The amount that will be received by the designated recipient, whether that currency is U.S. dollars or foreign currency, will be an estimate if fees imposed by intermediaries are disclosed as estimates. Therefore, to effectuate the purposes of EFTA and to facilitate compliance, the Bureau believes it is necessary and proper to exercise its authority under EFTA sections 904(a) and (c) to allow an estimate of the amount of currency that will be received, even if that currency is in U.S. dollars.

The proposed commentary to § 205.32(a)(1) provided further guidance on the temporary exception. Specifically, proposed comment 32(a)(1)–1 clarified that an insured

institution cannot determine exact amounts ''for reasons beyond its control'' when: (i) The exchange rate required to be disclosed under proposed § 205.31(b)(1)(iv) is set by a person with which the insured institution has no correspondent relationship after the insured institution sends the remittance transfer; or (ii) fees required to be disclosed under proposed § 205.31(b)(1)(vi) are imposed by intermediary institutions along the transmittal route and the insured institution has no correspondent relationship with those institutions.

One industry commenter requested clarification regarding instances when an insured institution has a correspondent relationship but may not control or know what exchange rate the correspondent will use. For example, a remittance transfer provider may send a remittance transfer in U.S. dollars and a correspondent institution may be responsible for exchanging to the currency in which funds will be received. Similarly, other industry commenters noted that an insured institution may not know the taxes or fees imposed by a correspondent institution. Although the Bureau acknowledges that some insured institutions currently may not receive certain exchange rate, tax, or fee information from a correspondent institution, the Bureau believes that such information can be obtained through contractual arrangements in a correspondent relationship. The Bureau notes that the statutory exception is only available for circumstances beyond remittance transfer providers' control, and the Bureau believes that adjusting contractual arrangements with correspondent banks to provide for better information relay is within the control of remittance transfer providers. Accordingly, comment 32(a)(1)–1 is adopted substantially as proposed with clarifying revisions and an example.

Proposed comment 32(a)(1)–2 provided examples of scenarios that qualify for the temporary exception. The Bureau did not receive significant comment on the examples provided in the proposed comment. Comment 32(a)(1)–2 is adopted substantially as proposed with clarifying revisions. Comment 32(a)(1)–2.i. clarifies that an insured institution cannot determine the exact exchange rate to disclose for an international wire transfer if the insured institution does not set the exchange rate, and the rate is set when the funds are deposited into the recipient's account by the designated recipient's institution with which the insured institution does not have a correspondent relationship. The insured institution will not know the exchange rate that the recipient institution will apply when the funds are deposited into the recipient's account. Comment 32(a)(1)–2.ii. provides that an insured institution cannot determine the exact fees to disclose under § 1005.31(b)(1)(vi) if an intermediary institution or the designated recipient's institution, with which the insured institution does not have a correspondent relationship, imposes a transfer or conversion fee. Finally, comment 32(a)(1)–2.iii. states that an insured institution cannot determine the exact taxes to disclose under § 1005.31(b)(1)(vi) if the insured institution cannot determine the applicable exchange rate or other fees, as described in proposed comments 32(a)(1)–2.i. and 32(a)(1)–2.ii., and the recipient country imposes a tax that is a percentage of the amount transferred to the designated recipient, less any other fees.

Proposed comment 32(a)(1)–3 provided several examples of when an insured institution would not qualify for the exception in proposed § 205.32(a). In each case, the insured institution could determine the exact amount for the relevant disclosure. The proposed examples illustrated that if an insured institution can determine the exact exchange rate, fees, and taxes required to be disclosed under § 1005.31(b)(1)(iv) and (vi), it can determine the exact amounts to be derived from calculations involving them.

The Bureau did not receive significant comment on the proposed provision, which is adopted substantially as proposed. Comment 32(a)(1)–3.i. explains that an insured institution can determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) if it converts the funds into the local currency to be received by the designated recipient using an exchange rate that it sets. Comment 32(a)(1)–3.ii. states that an insured institution can determine the exact fees required to be disclosed under § 1005.31(b)(1)(vi) if it has negotiated specific fees with a correspondent institution, and the correspondent institution is the only institution in the transmittal route to the designated recipient's institution, which itself does not impose fees. Finally, comment 32(a)(1)–3.iii. clarifies that an insured institution can determine the exact taxes required to be disclosed under § 1005.31(b)(1)(vi) if the recipient country imposes a tax that is a percentage of the amount transferred to the designated recipient, less any other fees, and the insured institution can determine the exact amount of the applicable exchange rate and other fees. Similarly, the insured institution can determine these taxes if the recipient country imposes a specific sum tax that is not tied to the amount transferred.

Proposed § 205.32(a)(2) provided that the temporary exception expires on July 20, 2015, consistent with the five-year term set forth in EFTA section 919(a)(4)(B). EFTA section 919(a)(4)(B) gives the Bureau authority to extend the application of the temporary exception to July 21, 2020, if it determines that termination of the exception would negatively affect the ability of insured institutions to send remittances to foreign countries. The Bureau understands that this exception was intended to avoid an immediate disruption of remittance transfer services by insured institutions using international wire transfers. The exception gives these institutions time to reach agreements and modify systems to provide accurate disclosures.

Industry commenters argued that the temporary exception for insured institutions should be made permanent, or in the alternative, be extended to ten years after the date of enactment of the Dodd-Frank Act, which is July 21, 2020. The OCC also noted the ability of the Bureau to extend the temporary exception for insured institutions to ten years after the date of enactment of the Dodd-Frank Act and urged the Bureau to consider the impact of these standards on community banks. In contrast, consumer groups supported the five-year sunset of the temporary exception and requested that the Bureau indicate that the temporary exception will not be extended.

The Bureau notes that the sunset of the temporary exception is statutory. In addition, the Bureau believes that there is no basis at this time to assess whether allowing the exception to expire in accordance with the statute would have negative effects where the final rule is just now being issued, initial implementation is expected to take a year, and the market has not yet had a chance to respond to the regulatory requirements. Therefore, the Bureau declines to extend the temporary exception at this time. Finally, the Bureau notes that in the May 2011 Proposed Rule, proposed § 205.32(a)(2) stated July 20, 2015 as the sunset date for the temporary exception provided in § 205.32(a)(1). The final rule includes a technical edit to clarify that the sunset date for the temporary exception is July 21, 2015 in order to avoid potential confusion and promote consistency among references to the date of enactment of the Dodd-Frank Act. Accordingly, proposed § 205.32(a)(2) is adopted as proposed in renumbered

§ 1005.32(a)(2), with a technical edit to reflect the change in date to July 21, 2015.

For purposes of the temporary exception, proposed § 205.32(a)(3) provided that the term ''insured institution'' included insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) and insured credit unions as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752). Industry commenters generally requested clarification on the application of the temporary exception to uninsured institutions. In particular, these commenters requested that the temporary exception should also include uninsured depository institutions, such as certain U.S. branches and agencies of foreign banks. They also argued that uninsured U.S. branches of foreign banks also process retail international wire transfers in the same manner as insured institutions, and would face similar compliance challenges as other insured institutions.

The Bureau believes that including uninsured U.S. branches of foreign banks in the term ''insured institution'' is consistent with the purposes of the statutory exception and will prevent disruption in remittance transfer services. The Bureau notes that section 3(c)(3) of the Federal Deposit Insurance Act provides that for certain purposes, the term ''insured depository institution'' includes any uninsured U.S. branch or agency of a foreign bank or a commercial lending company owned or controlled by a foreign bank. Therefore, the Bureau believes including uninsured U.S. branches and agencies of foreign banks in the term ''insured institution'' is consistent with the statutory exception and section 3 of the Federal Deposit Insurance Act. Accordingly, proposed § 205.32(a)(3) is adopted with clarification in renumbered § 1005.32(a)(3).

Similarly, one commenter argued that registered broker-dealers should be covered by the temporary exception because they may process international wire transfers. However, as discussed above, the Bureau is clarifying that, for the purposes of this rule, fund transfers in connection with securities transactions are not remittance transfers. Therefore, the Bureau believes further clarification in the rule with respect to this comment is not necessary.

32(b) Permanent Exception for Transfers to Certain Countries

Proposed § 205.32(b) contained the permanent exception set forth in EFTA section 919(c). Under EFTA section 919(c), if the Bureau determines that a recipient nation does not legally allow, or the method by which transactions are made to the recipient country do not allow, a remittance transfer provider to know the amount of currency that will be received, the Bureau may issue rules to permit the remittance transfer provider to provide a reasonably accurate estimate. The Board's proposal specifically noted that there is at least one recipient country where a particular method of remittances do not allow remittance transfer providers to know the amount of currency that will be received.[80]

In light of that determination, the proposed rule allowed estimates to be provided for amounts required to be disclosed under proposed § 205.31(b)(1)(iv) through (vii) for transfers to certain countries. Like the temporary exception in EFTA section 919(a)(4), the permanent exception in EFTA section 919(c) only addresses estimates for the amount of currency that will be received by a designated recipient. For the reasons described above with respect to the temporary exception, proposed § 205.32(b) also permitted disclosure of estimates for the exchange rate, the transfer amount in the currency made available to the designated recipient, and taxes imposed in the recipient country that are a percentage of the amount transferred to the designated recipient. The Bureau did not receive any comments on this aspect of the proposal. For the reasons set forth above with regard to the temporary exception and to effectuate the purposes of EFTA and facilitate compliance, the Bureau believes it is necessary and proper to exercise its authority under EFTA sections 904(a) and (c) to adopt this proposed permanent exception in § 1005.32(b).

32(b)(1)(i) Laws of Recipient Country

Proposed § 205.32(b)(1) allowed estimates to be provided for the exchange rate, transfer amount, other fees and taxes, and total to recipient disclosures (adopted as § 1005.31(b)(1)(iv) through (vii) above), if a remittance transfer provider cannot determine exact amounts because the laws of the recipient country do not permit such a determination.

Industry commenters raised concerns about whether remittance transfer providers have the resources to determine whether this exception applies. Consumer group commenters argued that the statute requires the Bureau to determine which recipient countries qualify for the permanent exception, rather than leaving the determination to individual market participants. Both industry and consumer group commenters recommended that the Bureau maintain a list of countries or a database, updated annually, to which the permanent exception based on the laws of a recipient country would apply.

The Bureau believes that it is appropriate for remittance transfer providers to identify and comply with a recipient country's currency laws. The Bureau also believes that remittance transfer providers and their correspondents generally are able to obtain this information because they are engaged in the business of remittance transfers to recipient countries and must comply with any applicable law that prevents the remittance transfer provider from determining exchange rates or exact amounts. Nonetheless, in response to comments received and upon further consideration, the Bureau is revising proposed § 205.32(b) to facilitate compliance by providing a safe harbor list of countries which qualify for the permanent exception.

Accordingly, the Bureau is renumbering proposed § 205.32(b) as § 1005.32(b)(1) and adopting new § 1005.32(b)(2) to provide a safe harbor. New § 1005.32(b)(2) states that a remittance transfer provider may rely on the list of countries published by the Bureau to determine whether estimates may be provided under the permanent exception, unless the provider has information that a country's laws or the method by which transactions are conducted in that country permits a determination of the exact disclosure amount.

In addition, the Bureau is adopting commentary on new § 1005.32(b)(2). New comment 32(b)–5 provides guidance on the safe harbor list published by the Bureau. New comment 32(b)–6 provides further guidance on reliance on the Bureau-provided list of countries that qualify for the permanent exception. New comment 32(b)–7 addresses circumstance where there is a change in laws of the recipient country.

Proposed comment 32(b)(1)–1 clarified that the ''laws of the recipient country'' do not permit a remittance transfer provider to determine exact amounts when a law or regulation of the recipient country requires the person making funds directly available to the designated recipient to apply an exchange rate that is: (i) Set by the government of the recipient country after the remittance transfer provider sends the remittance transfer; or (ii) set when the designated recipient chooses to claim the funds. Comment 32(b)(1)–

[80] *See* 76 FR 29923.

1 is adopted substantially as proposed, but renumbered as comment 32(b)–1 for organizational purposes.

One commenter requested clarification about whether proposed comment 32(b)(1)–1 covered instances where the local currency is thinly traded and the laws of a recipient country require an authorized dealer to set the exchange rate when the remittance transfer is received. The Bureau believes that the proposed comment already covers such circumstances because the government of the recipient country, acting through an authorized dealer, sets the exchange rate after the remittance transfer has been sent. In addition, the transfer may also qualify for the permanent exception if the exchange rate is required by law to be set by the authorized dealer when the recipient claims the funds.

Proposed comments 32(b)(1)–2.i. and 32(b)(1)–2.ii. provided examples illustrating the application of the exception. Proposed comment 32(b)(1)–2.i. explained that the laws of the recipient country do not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under proposed § 205.31(b)(1)(iv) (adopted as § 1005.31(b)(1)(iv) above) when, for example, the government of the recipient country sets the exchange rate daily and the funds are made available to the designated recipient in the local currency the day after the remittance transfer provider sends the remittance transfer. Under such circumstances, an estimate for the exchange rate would be permitted because the remittance transfer provider cannot determine a rate that a foreign government has yet to set.

In contrast, proposed comment 32(b)(1)–2.ii. explained that the laws of the recipient country permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under proposed § 205.31(b)(1)(iv) (adopted as § 1005.31(b)(1)(iv) above) if, for example, the government of the recipient country ties the value of its currency to the U.S. dollar. The Bureau did not receive significant comment on comment 32(b)(1)–2. This comment is adopted substantially as proposed, but renumbered as comment 32(b)–2 for organizational purposes.

32(b)(1)(ii) Method by Which Transactions are Made in the Recipient Country

Proposed § 205.32(b)(2) allowed estimates to be provided for the exchange rate, transfer amount, other fees and taxes, and total to recipient disclosures (adopted as § 1005.31(b)(1)(iv) through (vii) above), if a remittance transfer provider cannot determine exact amounts because the method by which transactions are made in the recipient country does not permit such a determination.

Based on the Board's outreach and interpretation of the statute, the Board stated its belief that the exception for methods by which transactions are made in the recipient country under proposed § 205.32(b)(2) was intended to permit estimates for certain international ACH transactions. Specifically, the Board interpreted the exception under § 205.32(b)(2) to apply to remittances sent via international ACH on terms negotiated by the government of the United States and the government of a recipient country where the exchange rate is set after the transfer is sent. Accordingly, proposed comment 32(b)(2)–1 stated that the ''method by which transactions are made in the recipient country'' does not permit a remittance transfer provider to determine exact amounts when transactions are sent via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank after the provider sends the remittance transfer.

Industry commenters argued that the Bureau should adopt a broader reading of the statute, and that international wire transfers should be covered by the permanent exception. These commenters argued that international wire transfers are a method by which transactions are made in a recipient country that does not allow the remittance transfer provider to know the amount of currency that will be received by a designated recipient and should thus qualify for the permanent exception. One industry commenter stated that the permanent exception is helpful for certain international ACH transactions; however, the benefit is limited by the number of recipient countries that participate in the Federal Reserve System's FedGlobal ACH program. Other industry commenters requested that all international ACH transfers be covered by the permanent exception and that the exception should not be limited to those that are sent on terms negotiated between the United States government and the recipient country's government. These commenters noted that all cross-border ACH transfers, regardless of how the exchange rate is set, are subject to similar difficulties as certain international ACH transfers that qualify for the permanent exception. Consumer group commenters supported the proposal's application of the permanent exception based on the method to certain international ACH transfers.

In each case, the Bureau agrees with the Board's interpretation. The Bureau believes that extending the permanent exception to international wire transfers and all international ACH transactions would be inconsistent with the statutory language and purpose of the provision, which specifically refers to methods of transfer *in a recipient country* (emphasis added). The Bureau must give meaning to this phrase, and does not believe that the interpretation urged by commenters is dependent on a method of transfer in a particular country.

The Bureau does not believe that the permanent exception in EFTA section 919(c) applies to international wire transfers because wire transfers are not a method that is particular to a specific country or group of countries. Rather, compliance challenges may arise due to the international wire transfer business model, which is based on a chain of correspondents and two-party contractual relationships.

In addition, the application of the permanent exception to international wire transfers and ACH transactions generally would make the temporary exception superfluous. As discussed above, the statute is broad in scope, specifically covering transactions that are account-based and that are not electronic fund transfers, and therefore, covers open network transactions. Further, as described above with regard to the temporary exception, the statute specifically permits the use of estimates by depository institutions and credit unions for certain account-based transactions. If all open network transactions were included in the permanent exception, there would be no need for the temporary exception because nearly all, if not all, the types of transfers that qualify for the temporary exception would be covered by the permanent exception. The Bureau does not believe the temporary exception is superfluous. Therefore, it would not be appropriate to extend the permanent exception to these transactions.

One commenter argued that the permanent exception for method of transfer should also include instances when the remittance transfer provider and the sender agree to have the exchange rate set at some point in the future (*i.e.,* floating rate products). As with wire transfers, such an agreement is not a method by which a transaction is made that is particular to a specific country or group of countries. Therefore, the Bureau also believes that

this circumstance would not be eligible for the permanent exception. The Bureau notes, however, that the remittance transfer provider that is party to such an agreement may provide estimates of the exchange rate if the remittance transfer provider qualifies for the temporary exception in § 1005.32(a). For the reasons discussed above, proposed § 205.32(b)(2) is adopted as proposed in renumbered § 1005.32(b)(1)(ii). Proposed comment 32(b)(2)–1 is adopted substantially as proposed with clarifying revision, but renumbered as comment 32(b)–3 for organizational purposes.

Proposed comment 32(b)(2)–2 provided examples illustrating the application of the permanent exception. The comment is adopted substantially as proposed, but renumbered as comment 32(b)–4 for organizational purposes. Comment 32(b)–4.i. provides an example of when a remittance transfer would qualify for the exception. The Bureau notes that some comments received indicate that there may be confusion as to the application of the permanent exception provided in § 1005.32(b)(1)(ii) to any transfer sent via international ACH. However, comment 32(b)–4.i. explains that a transfer would only qualify for the exception when sent via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is a rate set by the recipient country's central bank or other governmental authority on the business day after the provider has sent the remittance transfer. Under such circumstances, the provider cannot determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv). Thus, remittance transfers sent via Directo a México currently would qualify for the permanent exception in § 1005.32(b)(1)(ii). Accordingly, proposed comment 32(b)–4.i. is adopted substantially as proposed.

Proposed comments 32(b)(2)–2.ii. and –2.iii. provided examples of when a remittance transfer would not qualify for the permanent exception in § 1005.32(b)(1)(ii). The Bureau did not receive significant comment on the proposed comments, which are adopted substantially as proposed, with technical and clarifying edits, in renumbered comments 32(b)–4.ii. and 32(b)–4.iii. Comment 32(b)–4.ii. explains that a remittance transfer provider is not permitted to provide estimates under the permanent exception if it sends a remittance transfer via international ACH on terms negotiated between the United States government and a private-sector entity in the recipient country, under which the exchange rate is set by the institution acting as the entry point to the recipient country's payments system on the next business day. In this case, transactions are made using a method negotiated between the United States and a private entity. Nonetheless, remittance transfers sent using such a method may qualify for the temporary exception in § 1005.32(a). Comment 32(b)–4.iii. explains that a remittance transfer provider does not qualify for the permanent exception if, for example, it sends transfers via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank or other governmental authority before the sender requests a transfer. In such a case, the remittance transfer provider can determine the exchange rate required to be disclosed.

32(c) Bases for Estimates

If a remittance transfer qualifies for either the temporary exception in EFTA section 919(a)(4) or the permanent exception in EFTA section 919(c), the statute permits the provider to disclose a reasonably accurate estimate to the sender. Proposed § 205.32(c) stated that estimates provided pursuant to the exceptions in proposed § 205.32(a) and (b) (adopted as § 1005.32(a) and (b) above) must be based on an approach listed in the regulation for the required disclosure.

Proposed § 205.32(c) further stated that if a remittance transfer provider bases an estimate on an approach that is not listed, the provider complies with proposed § 205.32(c) so long as the designated recipient receives the same, or greater, amount of currency that it would have received had the estimate been based on a listed approach. Thus, use of an approach other than one listed in the proposed rule is compliant with the regulation if the sender is not harmed by such use.

Industry commenters generally requested greater flexibility in estimating exchange rates and fees. For example, commenters recommended less prescriptive approaches, such as permitting remittance transfer providers to base estimates on reasonably available information, adopting a reasonably accurate standard, or adopting a safe harbor for good faith estimates within a specified tolerance. The Bureau generally concurs with the Board's reasoning in the May 2011 Proposed Rule that providing a list of approaches for calculating estimates would be more helpful to remittance transfer providers and consumers than a less specific standard for calculating estimates. The Bureau believes that requiring estimates be provided based on an approach listed in the regulation will facilitate compliance with the final rule. However, in response to comments received, the Bureau is clarifying proposed § 205.32(c). The safe harbor in proposed § 205.32(c) was intended to provide greater flexibility and to facilitate compliance for remittance transfer providers that may base an estimate on an approach that is not listed in the rule. However, the Bureau notes that under the proposal, the provider would have been required to compare any estimate based on its own approach with an estimate based on a listed approach in order to determine whether the sender would be harmed by such use. The Bureau believes that this comparison would unnecessarily increase the burden of using an unlisted approach and render the safe harbor meaningless. Therefore, the Bureau revises proposed § 205.32(c) to state that if a provider bases an estimate on an approach not listed in the rule, the provider is deemed to be in compliance with the rule so long as the designated recipient receives the same, or greater, amount of funds than the remittance transfer provider disclosed as required under § 1005.31(b)(1)(vii). The Bureau believes that this clarification also ensures that the sender is not harmed because the amount of funds received by the designated recipient will be the same or greater than the estimated total amount received as required to be disclosed under § 1005.32(b)(1)(vii). Accordingly, the Bureau is adopting proposed § 205.32(c) as § 1005.32(c) with amendment.

32(c)(1) Exchange Rate

Proposed § 205.32(c)(1) set forth the approaches that a remittance transfer provider may use as the basis of an estimate of the exchange rate required to be disclosed under § 1005.31(b)(1)(iv). The final rule adopts the proposed rule as § 1005.32(c)(1), with modifications and additional commentary to address issues raised in comments.

The approach in proposed § 205.32(c)(1)(i) stated that for remittance transfers qualifying for the § 1005.32(b)(1)(ii) exception, the estimate must be based on the most recent exchange rate set by the recipient country's central bank and reported by a Federal Reserve Bank. Proposed comment 32(c)(1)(i)–1 clarified that if the exchange rate for a remittance transfer sent via international ACH that qualifies for the proposed § 205.32(b)(2)

exception is set the following business day, the most recent exchange rate available for a transfer will be the exchange rate set for the day that the disclosure is provided, *i.e.,* the current business day's exchange rate. Consumer group commenters generally supported proposed § 205.32(c)(1)(i) and its commentary. Other commenters believed that the application of the proposed § 205.32(b)(2) exception should be broadened generally, as discussed above. Accordingly, proposed § 205.32(c)(1)(i) is adopted as proposed in renumbered § 1005.32(c)(1)(i). Comment 32(c)(1)(i)–1 is adopted substantially as proposed, but renumbered as comment 32(c)(1)–1 for organizational purposes.

The approach in proposed § 205.32(c)(1)(ii) provided that, for other transfers, the estimate must be based on the most recent publicly available wholesale exchange rate. Industry commenters argued that the wholesale interbank exchange rate would not be the rate actually applied to a consumer's remittance transfer, so using the wholesale exchange rate as an estimate would be misleading to consumers. For instance, basing an estimate on only the wholesale rate could consistently overestimate the amount of currency received by a recipient because the wholesale rate does not account for any spread applied to the rate for a sender's remittance transfer to a particular country. One commenter noted that estimates of exchange rates may be based on information from foreign exchange dealers as well as rates available in the marketplace.

Based on comments received and upon further analysis, the Bureau is adopting a revised basis for estimates in renumbered § 1005.32(c)(1)(ii) and its related commentary to address concerns regarding the proposed use of a wholesale exchange rate. Specifically, § 1005.32(c)(1)(ii) provides that, in disclosing the exchange rate as required under § 1005.31(b)(1)(iv), an estimate must be based on the most recent publicly available wholesale rate and, if applicable, the spread typically applied to such a rate by the remittance transfer provider or its correspondent to the wholesale rate for remittance transfers for a particular currency. The Bureau believes the revised subsection will result in an estimated exchange rate that better approximates the ''retail'' rate that will apply to a sender's remittance transfer.

New comment 32(c)(1)–3 provides guidance on applying any spread to the estimate of an exchange rate based on the wholesale exchange rate. If a remittance transfer provider uses the most recent wholesale exchange rate as a basis for an estimate of an exchange rate, the exchange rate estimate must also reflect any spread that is typically applied to such a rate for remittance transfers for a particular currency. For example, assume a remittance transfer provider (or its correspondent) typically applies a spread, such as a fixed percentage, to a wholesale rate in order to determine the exchange rate offered to a sender for remittance transfers for a particular currency. If the provider must estimate an exchange rate for another remittance transfer for the same currency, the remittance transfer provider must estimate the exchange rate by applying the same spread (*i.e.,* fixed percentage) to the most recent publicly available wholesale rate.

Proposed comment 32(c)(1)(ii)–1 provided that publicly available sources of information containing the most recent wholesale exchange rate for a currency include, for example, U.S. news services, such as Bloomberg, the Wall Street Journal, and the New York Times; a recipient country's national news service; and a recipient country's central bank or other government agency. The Bureau did not receive any comments on this aspect of the proposal. One industry commenter, however, noted that for currency exchange rates not listed by a U.S. news service, remittance transfer providers could rely on the basis for estimates provided under proposed § 205.32(c)(1)(iii). Accordingly, proposed comment 32(c)(1)(ii)–1 is adopted substantially as proposed, but renumbered as comment 32(c)(1)–2 for organizational purposes.

Industry commenters, however, stated that it was unclear which most recent publicly available wholesale exchange rate should apply because rates may fluctuate throughout the day and may be published on a Web site in addition to the rate that may be available in a news service publication. Based on these comments, the Bureau is adopting new comment 32(c)(1)–4 to provide guidance when an exchange rate for a currency is published or provided multiple times within a day. Specifically, comment 32(c)(1)–4 clarifies that if the exchange rate for a currency is published or provided multiple times throughout the day because the exchange rate fluctuates throughout the day, a remittance transfer provider may use any exchange rate available on that day for the purposes of determining the ''most recent'' exchange rate.

The approach in proposed § 205.32(c)(1)(iii) permitted the use of the most recent exchange rate offered by the person making funds available directly to the designated recipient as the basis for providing an estimate. However, in some instances the exchange rate used for a transfer may be set by other institutions, such as a foreign ACH counterpart or an intermediary institution in a transmittal route that is not a correspondent institution. For example, the first intermediary institution in the transmittal route that is in the recipient country may set the exchange rate and conduct the currency exchange before transmitting the remittance transfer to the recipient institution, which then makes the funds available to the designated recipient. Therefore, upon further consideration, proposed § 205.32(c)(1)(iii), in renumbered § 1005.32(c)(1)(iii), is revised to state that an estimate may be also based on the most recent exchange rate offered or used by the person in the transmittal route setting the exchange rate. The Bureau notes that § 1005.32(c)(1)(iii), as revised, addresses circumstances in which the local currency is infrequently traded or when wholesale exchange rates would not have been publicly available.

32(c)(2) Transfer Amount in the Currency Made Available to the Designated Recipient

Proposed § 205.32(c)(2) stated that, in disclosing the transfer amount in the currency made available to the designated recipient, as required under § 1005.31(b)(1)(v), an estimate must be based upon the estimated exchange rate provided in accordance with § 1005.32(c)(1). The Bureau did not receive comment on proposed § 205.32(c)(2), which is adopted with revision for consistency with § 1005.31(b)(1)(v) in renumbered § 1005.32(c)(2).

32(c)(3) Other Fees

Proposed § 205.32(c)(3) provided that one of two approaches must be used to estimate the fees imposed by intermediary institutions in connection with an international wire transfer required to be disclosed under § 1005.31(b)(1)(vi). Under the first approach, an estimate must be based on the remittance transfer provider's most recent transfer to an account at the designated recipient's institution. Under the second approach, an estimate must be based on the representations of the intermediary institutions along a representative route identified by the remittance transfer provider that the requested transfer could travel.

Proposed comment 32(c)(3)(ii)–1 clarified that a remittance transfer from a sender's account at an insured

institution to the designated recipient's institution may take several routes, depending on the correspondent relationships each institution in the transmittal route has with other institutions. Proposed comment 32(c)(3)(ii)–1 further clarified that, in providing an estimate of the fees required to be disclosed under proposed § 205.31(b)(1)(vi) pursuant to the temporary exception, an insured institution may rely upon the representations of the institutions that act as intermediaries in any one of the potential transmittal routes that it reasonably believes a requested remittance transfer may travel.

Industry commenters argued that insured institutions do not know what other fees an intermediary institution or the designated recipient's institution may charge. For example, a remittance transfer provider may not know the fees a receiving institution may charge its own customers for receiving a remittance transfer. Another commenter suggested that some small insured institutions may be unaware of the number of intermediary institutions involved in the transmittal route. Commenters also argued that it would be difficult to obtain sufficient information to be able to disclose any estimates, and that the requirement would impose operational burden on insured institutions, particularly on insured institutions that do not send international wire transfers frequently or are unable to obtain representations of intermediary institutions.

As discussed above, the Bureau believes that, consistent with the statute, it is appropriate to require remittance transfer providers to disclose fees imposed by intermediary institutions or the designated recipient's institution in order to determine the amount of currency received by the recipient. The Bureau further believes that the rule provides sufficient flexibility to facilitate compliance and that representative transmittal routes are readily determinable. In addition, the Bureau notes that a remittance transfer provider may be required to estimate other fees as required by § 1005.32(b)(1)(vi) in other circumstances. For example, if a remittance transfer provider estimates the exchange rate under the § 1005.32(b) permanent exception, a provider may be required to estimate other fees that are imposed as a percentage of the amount transferred to the designated recipient. Therefore, the Bureau believes it is appropriate to provide additional clarification. Accordingly, the Bureau is adopting a new § 1005.32(c)(3)(i) to provide that for other fees that are imposed as a percentage of the amount transferred to the designated recipient, an estimate must be based on the estimated exchange rate provided in accordance with § 1005.32(c)(1), prior to any rounding of the estimated exchange rate. Furthermore, the Bureau is adopting proposed § 205.32(c)(3) with a technical revision in renumbered § 1005.32(c)(3)(ii). Comment 32(c)(3)(ii)–1 is adopted substantially as proposed, but is renumbered as comment 32(c)(3)–1 for organizational purposes.

32(c)(4) Other Taxes Imposed in the Recipient Country

Proposed § 205.32(c)(4) stated that, in disclosing taxes imposed in the recipient country as required under § 1005.31(b)(1)(vi) that are a percentage of the amount transferred to the designated recipient, an estimate must be based on the estimated exchange rate provided in accordance with § 1005.32(c)(1) and the estimated fees imposed by institutions that act as intermediaries in connection with an international wire transfer provided in accordance with § 1005.32(c)(3). Proposed comment 32(c)(4)–1 clarified that proposed § 205.32(c)(4) permits a provider to give an estimate only when the taxes imposed in a recipient country are a percentage of the amount transferred to the designated recipient. In other contexts where taxes may be imposed, a remittance transfer provider can determine the exact amount, such as in the case of a tax of a specific amount. The Bureau did not receive comments on this aspect of the proposal. Accordingly, proposed § 205.32(c)(4) is adopted in renumbered § 1005.32(c)(4) with revisions for consistency with amended §§ 1005.31(b)(1)(vi) and 1005.32(c)(3). The Bureau is revising comment 32(c)(4)–1 to clarify that a remittance transfer provider can determine the exact amount of other taxes that are a percentage of the amount transferred if the provider can determine the exchange rate and the exact amount of other fees imposed on the remittance transfer. Accordingly, comment 32(c)(4)–1 is adopted with clarification.

32(c)(5) Amount of Currency That Will be Received by the Designated Recipient

Proposed § 205.32(c)(5) stated that, in disclosing the amount of currency that will be received by the designated recipient as required under § 1005.31(b)(1)(vii), an estimate must be based on the estimates provided in accordance with § 1005.32(c)(1), (c)(3), and (c)(4), as applicable. The Bureau did not receive significant comment on proposed § 205.32(c)(5); however, the Bureau clarifies that in disclosing an amount under § 1005.31(b)(1)(vii), an estimate must be based on estimates provided in accordance with § 1005.32(c)(1) through (4). Accordingly, proposed § 205.32(c)(5) is adopted in renumbered § 1005.32(c)(5) with this clarification.

Section 1005.33 Procedures for Resolving Errors

EFTA section 919(d) addresses procedures for resolving errors in connection with remittance transfers, and allows a sender to provide notice of an error within 180 days of the promised date of delivery of a remittance transfer. The sender's notice triggers a remittance transfer provider's duty to investigate the claim and correct any error within 90 days of receiving the notice. The statue generally does not define what types of transfers and inquiries constitute errors and gives the Bureau the authority to define ''error.'' The Board proposed § 205.33 to implement the new error resolution requirements for remittance transfers that adapted many of the same error resolution procedures that currently apply to a financial institution under § 1005.11. The Bureau adopts proposed § 205.33 as § 1005.33 with several changes based on recommendations from commenters, as discussed in detail below.

33(a) Definition of Error

Definition of Error Generally

Proposed § 205.33(a)(1) defined the term ''error'' for purposes of the remittance transfer error resolution provisions. Proposed § 205.33(a)(2) listed types of transfers or inquiries that do not constitute errors. The proposed commentary provided additional guidance illustrating errors under the rule.

Many industry commenters generally believed the proposed error definitions were overly broad because they would subject a remittance transfer provider to liability for errors caused by parties outside the control of the provider. Some of these commenters suggested that requiring providers to assume responsibility for errors when the provider has not erred nor controlled the circumstances that caused the error would undermine the safety and soundness of these transfer systems and could lead some financial institutions to eliminate remittance transfer services. Other industry commenters predicted that the financial impact of losses experienced as a result of errors caused

by another party could be significant enough for providers to exit the market.

The Bureau is amending certain error definitions in response to these comments, as discussed below. In general, under a number of financial consumer protection laws, the regulated entity has the responsibility to investigate errors asserted by consumers and generally assumes much of the liability when an error has occurred even where neither the regulated entity nor the consumer are at fault. *See, e.g.,* 15 U.S.C. 1693f and 1693g; 15 U.S.C. 1643; 12 CFR 1005.11; and 12 CFR 1026.13. Thus, consistent with other error resolution procedures in Federal financial consumer protection laws, the Bureau believes that where neither a sender nor a remittance transfer provider are necessarily at fault, a provider generally is in a better position than a sender to identify, and possibly recover from, the party at fault.

Furthermore, placing liability with the remittance transfer provider in these instances aligns the remittance transfer provider's incentives with those of the sender. Remittance transfer providers are likely better able to work with parties in the remittance transfer system or government entities to reduce errors to remittance transfers overall. Placing responsibility on providers increases the incentives of providers to develop such policies, procedures, and controls. As a result, the Bureau does not believe that whether a particular circumstance constitutes an error should necessarily depend on whether a provider is at fault. The Bureau further notes that this is similar to the approach taken in defining ''errors'' under § 1005.11 for EFTs where something may be considered an ''error'' even if the financial institution did not cause the error.

33(a)(1) Types of Transfers or Inquiries Covered

Proposed § 205.33(a)(1) listed the types of transfers or inquiries that would constitute ''errors.'' Each type of transfer or inquiry that constitutes an ''error'' is discussed below.

33(a)(1)(i) Incorrect Amount Paid by Sender

Proposed § 205.33(a)(1)(i) defined ''error'' to include an incorrect amount paid by a sender in connection with a remittance transfer. This element of the definition is similar to the error described in § 1005.11(a)(1)(ii) of an incorrect EFT to or from a consumer's account. The Board also proposed comment 33(a)–1 to clarify that proposed § 205.33(a)(1)(i) was intended to cover circumstances in which the amount paid by the sender differs from the total amount of the transaction stated in the receipt or the combined disclosure. Proposed comment 33(a)–1 also stated that an error under § 205.33(a)(1)(i) covered incorrect amounts paid by a sender regardless of the form or method of payment tendered by the sender for the transfer, including when a debit, credit, or prepaid card is used to pay an amount in excess of the amount of the transfer requested by the sender plus applicable fees.

Commenters did not specifically address proposed § 205.33(a)(1)(i) or proposed comment 33(a)–1. The Bureau adopts proposed § 205.33(a)(1)(i) substantially as proposed in renumbered § 1005.33(a)(1)(i). The Bureau also adopts comment 33(a)–1 substantially as proposed.

33(a)(1)(ii) Computational or Bookkeeping Error

Under proposed § 205.33(a)(1)(ii), an ''error'' also included ''a computational or bookkeeping error made by a remittance transfer provider relating to a remittance transfer.'' This provision is similar to an existing computational or bookkeeping error provision for EFTs in § 1005.11(a)(iv). In implementing this provision of Regulation E, the Board noted that § 1005.11(a)(iv) (formerly § 205.11(a)(iv)) is intended to include ''arithmetical errors, posting errors, errors in printing figures, and figures that were jumbled due to mechanical or electronic malfunction.'' *See* 44 FR 59480 (Oct. 15, 1979). Proposed § 205.33(a)(1)(ii) was meant to cover similar types of errors with respect to remittance transfers, such as circumstances in which a remittance transfer provider fails to reflect all fees that will be imposed in connection with the transfer or misapplies the applicable exchange rate in calculating the amount of currency that will be received by the designated recipient. As noted in the May 2011 Proposed Rule, notwithstanding that the designated recipient may receive the amount of currency stated on the receipt or combined disclosure, an error could be asserted because the provider incorrectly calculated the amount that should have been received. The Bureau did not receive any comments on proposed § 205.33(a)(1)(ii). The Bureau adopts this provision as proposed in renumbered § 1005.33(a)(1)(ii).

33(a)(1)(iii) Incorrect Amount Received by the Designated Recipient

The Board proposed § 205.33(a)(1)(iii) to provide that an ''error'' generally included the failure by a remittance transfer provider to make available to a designated recipient the amount of currency identified in the receipt or combined disclosure given to the sender, unless the disclosure provided an estimate made in accordance with proposed § 205.32 (adopted as § 1005.32 above). The Board also proposed guidance in comment 33(a)–2 regarding the scope of the error under proposed § 205.33(a)(1)(iii). Furthermore, proposed comment 33(a)–3 provided examples illustrating circumstances in which an incorrect amount of currency may be received by a designated recipient.

One industry commenter recommended that the exclusion of estimated disclosures made pursuant to § 1005.32 from the definition of ''error'' under renumbered § 1005.33(a)(1)(iii) should be applied to other errors listed in § 1005.33(a)(1). The Bureau notes, however, that none of the other errors in § 1005.33(a)(1) rely on the difference between what may be disclosed as an estimate and the actual amount. For example, suppose a remittance transfer is permitted to estimate disclosures under § 1005.32. If the remittance transfer provider fails to deliver any funds to the designated recipient, the sender should be able to assert an error even though the provider disclosed an estimate. As a result, the Bureau declines to make the requested change, and the exclusion of estimated disclosures made pursuant to § 1005.32 is adopted as renumbered § 1005.33(a)(1)(iii)(A).

In addition, the Bureau has added language to clarify that the exception in § 1005.33(a)(1)(iii)(A) from the definition of ''error'' applies if the difference results from application of the actual exchange rate, fees, and taxes, rather than any estimated amounts. This clarification prevents a remittance transfer provider from relying on the exception for estimates if it makes available to the designated recipient an amount that is completely unrelated to the amount calculated using the actual exchange rate, fees, and taxes. For example, if the remittance transfer provider estimated the amount to be received pursuant to § 1005.32 as 1,200 pesos in the receipt or combined disclosure, and the amount calculated using the applicable actual exchange rate, fees, and taxes is 1,150 pesos, the provider cannot use the § 1005.33(a)(1)(iii)(A) exception to claim that there is no error if it made only 100 pesos available to the designated recipient.

As discussed in more detail below, several industry commenters requested expansion of the exception to the error defined in § 1005.33(a)(1)(iv) for

extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated. The Bureau believes that it is appropriate to provide this exception for an error involving an incorrect amount received by the designated recipient. For example, suppose a foreign government in the country where a remittance transfer is to be delivered imposes an emergency tax on the transfer that was not in effect nor could have been reasonably anticipated at the time the provider was required to give the sender the receipt or combined disclosure. The failure to make available to the designated recipient the amount of currency identified in the receipt or combined disclosure given to the sender, which did not reflect the emergency tax, should not constitute an error if the designated recipient received the disclosed amount of currency less the emergency tax.

As a result, new § 1005.33(a)(1)(iii)(B) provides that the failure to make the amount of currency stated in the receipt or combined disclosure is not an error if the failure resulted from extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated. Furthermore, the Bureau adopts new comment 33(a)–4 to provide guidance on what types of extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated qualify for the exception. The comment is similar to the comment adopted as comment 33(a)–6 below, which describes extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated for purposes of the error for failure to make funds available by the disclosed date of availability in § 1005.33(a)(1)(iv).

Proposed comment 33(a)–2 is adopted with a change to clarify that if a provider rounds the exchange rate used to calculate the amount received consistent with § 1005.31(b)(1)(iv) and comment 31(b)(1)(iv)–2 for the disclosed rate, there is no error if the designated recipient receives an amount of currency that results from applying the exchange rate used, prior to any rounding of the exchange rate, to calculate fees, taxes, and the amount received rather than the disclosed rate. The change is intended to be consistent with the Bureau's general approach to rounding exchange rates as described above in the supplementary information to comment 31(b)(1)(iv)–2. Proposed comment 33(a)–3 is adopted substantially as proposed.

33(a)(1)(iv) Failure To Make Funds Available by Date of Availability

Proposed § 205.33(a)(1)(iv) generally defined an ''error'' to include a remittance transfer provider's failure to make funds in connection with a remittance transfer available to the designated recipient by the date of availability stated on the receipt or combined disclosure, subject to two specified exceptions, discussed below. The Board proposed comment 33(a)-4 to provide examples of the circumstances that would have been considered errors under proposed § 205.33(a)(1)(iv). These circumstances included: (i) The late delivery of a remittance transfer after the stated date of availability or non-delivery of the transfer; (ii) the deposit of a remittance transfer to the wrong account; (iii) retention of the transferred funds by a recipient agent or institution after the stated date of availability, rather than making the funds available to the designated recipient; and (iv) the fraudulent pick-up of a remittance transfer in a foreign country by a person other than the person identified by the sender as the designated recipient of the transfer. Fraudulent pick-up, however, did not include circumstances in which a designated recipient picks up a remittance transfer from the provider's agent as authorized, but subsequently the funds are stolen from the recipient.

Several industry commenters objected to the inclusion of fraudulent pick-up as an error. These commenters suggested that the remittance transfer provider should not be responsible for fraud that results in the pick-up of a remittance transfer by a person other than the designated recipient where the provider is unlikely to know or have control over all the intermediary institutions involved in the transfer or the final institution that will make the funds available to the designated recipient. Other commenters, including the OCC, suggested that this error might result in ''friendly fraud'' where a sender claims the amount was not an authorized pick-up when the pick-up was actually legitimate. The OCC was also concerned that the exposure to remittance transfer providers for this error may be aggravated in situations involving large dollar remittances and because of the long period of time that a sender could assert this error.

One industry commenter noted that while there may be certain instances when fraudulent pick-up should be considered an error, there may be other circumstances when fraudulent pick-up should not be an error. In particular, this commenter suggested that where the name of the person picking up the funds does not match the name of the designated recipient set forth in the receipt, the sender should be able to assert an error. However, if an individual presents fake identification in the name of the designated recipient, this commenter stated that this fraudulent pick-up is outside of the remittance transfer provider's control and therefore, should not be considered an error. Industry commenters also believed that a remittance transfer provider should not be liable for a fraudulent pick-up when a provider and its agent has complied with fraud and risk management policies and procedures.

As the Board noted in the May 2011 Proposed Rule, treating fraudulent pick-up of a remittance transfer as an error is consistent with the scope of unauthorized EFTs under § 1005.2(m), which includes unauthorized EFTs initiated through fraudulent means. *See* comment 2(m)-3. Although identity theft can present a challenge to remittance transfer providers, financial institutions face similar challenges with respect to unauthorized EFTs and bear most of the risk. Moreover, similar to remittance transfers, the entity in the best position to verify the identity of the person initiating the EFT (for example, the merchant at a store who initiates an EFT using a debit card) may not be known or controlled by the financial institution, though such entities may have agreed to abide by system rules (*e.g.,* payment card network rules, ACH system rules). However, under current laws governing EFTs, whether the financial institution knows or has control over that entity (*e.g.,* a merchant) does not affect whether an EFT could be an unauthorized EFT. Similarly, the Bureau believes that whether a fraudulent pick-up should be considered an error should not be affected by the relationship between the remittance transfer provider and the entity distributing the remittance transfer to the designated recipient.

Furthermore, the Bureau agrees with the Board's reasoning in the May 2011 Proposed Rule that it is appropriate to treat these circumstances as errors because the remittance transfer provider, rather than the sender, is in the best position to ensure that a remittance transfer is picked up only by the person designated by the sender. For example, in some models, remittance transfer providers could require or contract with the entity distributing the funds, if it is not the remittance transfer provider itself, to request and examine identification from the person picking up the funds. The Bureau believes that including fraudulent pick-up as an error

would better align the remittance transfer provider's incentives to prevent this occurrence with the interests of the sender.

One industry commenter suggested that a sender be required to inform the remittance transfer provider if the confirmation number or receipt is lost or stolen. For some remittance transfer providers, a designated recipient is required to give the confirmation number, which is generally printed on the receipt, in order to obtain access to the funds in a remittance transfer. The commenter suggested that this approach would be similar to the approach taken with respect to a lost or stolen access device in § 1005.6(b) with respect to unauthorized EFTs, where a consumer's liability for unauthorized EFTs is dependent on how quickly the consumer reports the lost or stolen access device to the account-holder financial institution.

The Bureau notes, however, the risk for a lost or stolen confirmation number is not the same as for a lost or stolen access device for EFTs. A lost or stolen access device could potentially be used to initiate an EFT by a person who is not the account holder immediately without an accomplice and without identification matching the name associated with the access device. By contrast, where a confirmation number given to the sender is lost or stolen, an unauthorized person who gains access to the number would not be able to take advantage of it unless he or she were located or had an accomplice in the recipient country. Furthermore, because access to funds sent by a remittance transfer provider is often limited to those with identification matching the designated recipient on the receipt, an unauthorized person who gains access to a lost or stolen confirmation number may be deterred from taking advantage of it. Consequently, the Bureau does not believe that a sender's liability should depend on whether he or she reports a confirmation number or receipt as lost or stolen.

Moreover, under § 1005.6(b), a consumer's liability for unauthorized EFTs is dependent on how quickly the consumer reports the lost or stolen access device because the speed with which a consumer reports the lost or stolen access device may be critical to preventing further unauthorized EFTs and further losses, and the possibility of increased liability provides incentives for a consumer to report quickly. In contrast, a lost or stolen confirmation number would not result in losses other than the specific remittance transfer in question. Therefore, the Bureau also does not believe that a sender's liability should depend on how quickly a sender reports a lost or stolen confirmation number.

The Bureau is adopting comment 33(a)–4, renumbered as comment 33(a)–5, generally as proposed. Specifically, the Bureau is including a statement to clarify that if only a portion of the funds were made available by the disclosed date of availability, then § 1005.33(a)(1)(iv) does not apply, but § 1005.33(a)(1)(iii) may apply instead.

Exceptions to the Failure To Make Funds Available by Date of Availability

As noted above, the proposed rule provided two exceptions to the definition of ''error'' in proposed § 205.33(a)(1)(iv). Under proposed § 205.33(a)(1)(iv)(A), the failure to make funds from a remittance transfer available by the stated date of availability did not constitute an error if the failure resulted from circumstances outside the remittance transfer provider's control. Under proposed § 205.33(a)(1)(iv)(B), the failure to make funds from a remittance transfer available on the stated date of availability did not constitute an error if it was caused by the sender providing incorrect information in connection with the remittance transfer to the provider, so long as the provider gives the sender the opportunity to correct the information and resend the transfer at no additional cost. The Bureau adopts one of these two exceptions with changes to respond to commenters' concerns, as discussed below. The other exception has been moved to the remedies section under § 1005.33(c)(2) for the reasons discussed below. The Bureau is also adopting two additional exceptions to the definition of ''error'' in proposed § 205.33(a)(1)(iv).

Exception for Extraordinary Circumstances Outside of the Remittance Transfer Provider's Control

Proposed § 205.33(a)(1)(iv)(A) provided that the failure to make funds from a remittance transfer available by the stated date of availability did not constitute an error if the failure resulted from circumstances outside the remittance transfer provider's control. Proposed comment 33(a)-5 clarified that the exception was limited to circumstances that are generally referred to under contract law as force majeure, or uncontrollable or extraordinary circumstances that cannot be reasonably anticipated by the remittance transfer provider and that prevent the provider from delivering a remittance transfer, such as war, civil unrest, or a natural disaster. The proposed comment also provided that the exception for circumstances beyond a provider's control covered government actions or other restrictions that occur after the transfer has been sent but that could not have been reasonably anticipated by the remittance transfer provider, such as the imposition of foreign currency controls or the garnishment or attachment of funds.

Many industry commenters stated that the proposed comment limiting the circumstances beyond the provider's control to instances of force majeure or to other uncontrollable or extraordinary circumstances was too narrow. Several industry commenters recommended that the exception should be more broadly interpreted to exclude errors caused by acts of a third party beyond a remittance transfer provider's control. Consumer group commenters believed the approach in the proposed rule was a reasonable limitation and recommended that the commentary specifically state that mistakes by a recipient institution do not fall under the exception to the error to deliver funds by the date of delivery. Other consumer group commenters suggested that the final rule limit the circumstances even further to only include acts of war or terrorism or natural disaster.

As discussed above, the Bureau does not believe that whether a particular circumstance constitutes an error or not should necessarily depend on whether a provider is at fault. Even if the error is caused by a third party beyond the remittance transfer provider's control, the Bureau believes that the remittance transfer provider is often in a better position to identify and recover the loss from the third party than a sender, especially when there are multiple intermediary institutions involved in a transfer. Accordingly, the Bureau believes that with respect to third-party errors, the circumstances in proposed § 205.33(a)(1)(iv)(A) should include only a narrow category of third-party errors caused by uncontrollable or extraordinary circumstances that cannot be reasonably anticipated by the remittance transfer provider and that prevent the provider from delivering a remittance transfer.

Furthermore, the Bureau believes the proposed comment is appropriately narrow in interpreting the limited set of circumstances for which the failure to make funds available by the disclosed date of delivery should not be an error. Therefore, proposed comment 33(a)–5 is adopted substantially as proposed in comment 33(a)–6. The Bureau is adopting proposed § 205.33(a)(1)(iv)(A) generally as proposed in renumbered § 1005.33(a)(1)(iv)(A). However, the Bureau is adding language to

§ 1005.33(a)(1)(iv)(A) to more accurately reflect the descriptions of the types of circumstances listed in comment 33(a)–6. Specifically, § 1005.33(a)(1)(iv)(A) provides that a failure to make funds available by the disclosed date of delivery is not an error if the failure resulted from extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated.

Exception for Sender Providing Incorrect or Insufficient Information

Proposed § 205.33(a)(1)(iv)(B) provided that the failure to make funds from a remittance transfer available on the stated date of availability did not constitute an error if it was caused by the sender providing incorrect information in connection with the remittance transfer to the provider, so long as the provider gives the sender the opportunity to correct the information and resend the transfer at no additional cost. Proposed comment 33(a)–6 clarified that if the failure to make funds from a transfer available by the stated date of availability occurred due to the *provider's* miscommunication of information necessary for the designated recipient to pick up the transfer, such as providing the incorrect location where the transfer may be picked up or providing the wrong confirmation number or code for the transfer, such failure would have been treated as an error under proposed § 205.33(a)(1)(iv).

Many industry commenters objected to the requirement that the remittance transfer provider absorb the costs of amending and resending a transfer when the sender is at fault. These commenters noted that modifying transfers can be expensive and that the proposed rule would, in effect, require the remittance transfer provider and other senders, through higher fees, to bear the responsibility for a sender's mistake.

The Bureau agrees with commenters that a sender's mistake should not obligate a remittance transfer provider to bear all the costs for resending the remittance transfer. However, the Bureau believes that while the remittance transfer provider should not bear all the costs in these circumstances, the failure should still be considered an error such that the error resolution procedures apply. Therefore, the Bureau is moving the concept in proposed § 205.33(a)(1)(iv)(B) to a new § 1005.33(c)(2)(ii)(A)(*2*), and proposed comment 33(a)–6 to renumbered comment 33(c)–2, as discussed further below.

Additional Exceptions

In the final rule, the Bureau is adding two additional exceptions to the definition of ''error'' in § 1005.33(a)(1)(iv) based on a consideration of comments received. New § 1005.33(a)(1)(iv)(B) provides that delays in making funds available to a designated recipient that are related to a provider's fraud screening procedures or in accordance with the Bank Secrecy Act (BSA), 31 U.S.C. 5311 *et seq.,* Office of Foreign Assets Control (OFAC) requirements, or similar laws or requirements would not constitute an error. Several industry commenters and the OCC noted that for fraud screening, BSA, or OFAC purposes, a remittance transfer provider may have further communications with the sender to ensure the legitimacy or the legality of a remittance transfer. This, in turn, may cause delays in making the funds available to a designated recipient. The Bureau believes it is appropriate to exclude these situations from the definition of ''error'' in order to encourage remittance transfer providers to continue to engage in activities that benefit the safety of the transfer system as a whole. The Bureau understands that under current procedures, these types of delays are generally infrequent, relative to the number of remittance transfers typically conducted by remittance transfer providers.

The Bureau is also adopting a new § 1005.33(a)(1)(iv)(C) in response to industry commenters' and the OCC's concerns about ''friendly fraud.'' Consequently, consistent with the definition of ''unauthorized electronic fund transfer'' under § 1005.2(m), and as suggested by the OCC to address its concerns regarding the error of fraudulent pick-up, § 1005.33(a)(1)(iv)(C) provides an exception to the ''error'' definition for remittance transfers made with fraudulent intent by the sender or any person in concert with the sender. Therefore, if a sender is involved in a scheme to defraud the remittance transfer provider, for example, by fraudulently claiming that the designated recipient did not pick up funds that the designated recipient in fact did pick up, such action would not be considered an ''error'' under § 1005.33(a)(1)(iv)(C).

33(a)(1)(v) Sender's Request for Documentation

Finally, under proposed § 205.33(a)(1)(v), an error included a sender's request for documentation provided in connection with a remittance transfer or additional information or clarification concerning a remittance transfer. This provision is similar to an existing provision in § 1005.11(a)(1)(vii) for EFTs. As the Board noted in the May 2011 Proposed Rule, an error under proposed § 205.33(a)(1)(v) would also cover a sender's request for information to determine whether an error exists. The Bureau did not receive any comments on proposed § 205.33(a)(1)(v). The Bureau adopts proposed § 205.33(a)(1)(v) substantially as proposed in renumbered § 1005.33(a)(1)(v).

33(a)(2) Types of Inquiries and Transfers Not Covered

Proposed § 205.33(a)(2) listed circumstances that would not constitute errors. In particular, proposed § 205.33(a)(2)(i) provided that an inquiry about a transfer of $15 or less does not constitute an error, since these small-value transfers do not fall within the scope of the definition of ''remittance transfer.'' *See* § 1005.30(e)(2), discussed above. Under proposed § 205.33(a)(2)(ii), an inquiry about the status of a remittance transfer—for example, if the sender calls to ask whether the funds have been made available in the foreign country—would also not be an error (unless the funds have not been made available by the disclosed date of availability). Finally, similar to § 1005.11(a)(2)(ii) for EFTs, a sender's request for information for tax or other recordkeeping purposes would not constitute an error under proposed § 205.33(a)(2)(iii).

The Bureau notes that because transfers of $15 or less are not ''remittance transfers'' under § 1005.30(e)(2), such transfers are not covered under the remittance transfer provisions in subpart B. Therefore, the Bureau believes it is not necessary to state that an inquiry involving a transfer of $15 or less is not an error, and is not adopting proposed § 205.33(a)(2)(i). A Federal Reserve Bank commenter noted that for certain assertions of error that exceed the $15 threshold, providers may still not have the ability to investigate the assertion because they are less than the minimum amount traceable in a foreign country. In order to ensure that senders are protected with respect to errors related to remittance transfers other than truly *de minimis* amounts, however, the Bureau is not inclined to create another threshold amount above the $15 coverage threshold for which an inquiry is not an error. The Bureau did not receive comments on proposed § 205.33(a)(2)(ii) or (iii). These provisions are adopted as proposed in

renumbered § 1005.33(a)(2)(i) and (ii), respectively.

In the final rule, the Bureau is adopting provisions describing two other circumstances that do not constitute errors in response to comments received. Section 1005.33(a)(2)(iii) provides that a change requested by the designated recipient is not an error. Comment 33(a)–7 clarifies new § 1005.33(a)(2)(iii) by providing that the exception is available only if the change is made solely because the designated recipient requested the change. The comment also includes an illustrative example. The example explains that if a sender requests a remittance transfer provider to send US$100 to a designated recipient at a designated location, but the designated recipient requests the amount in a different currency (either at the sender-designated location or another location requested by the recipient) and the remittance transfer provider accommodates the recipient's request, the change does not constitute an error.

The Bureau understands that as a service to the recipient, a remittance transfer provider may offer to provide the remittance transfer in a different currency or permit the transfer to be picked up at a location different than originally requested by the sender. In such cases, the Bureau believes that this type of customer service should be preserved. The Bureau, however, is concerned that remittance transfer providers may try to provide the remittance transfer to the designated recipient in a different currency simply because the provider or its agent do not have sufficient amounts of the sender-requested currency on hand. Therefore, the Bureau believes that this exception should only be available if the change is made solely because the designated recipient requested the change.

Section 1005.33(a)(2)(iv) is also new and provides that an error does not include a change in the amount or type of currency received by the designated recipient from the amount or type of currency stated in the disclosure provided to the sender under § 1005.31(b)(2) or (3) if the remittance transfer provider relied on information provided by the sender as permitted by the commentary accompanying § 1005.31 in making such disclosure. As discussed above, a remittance transfer provider may rely on the sender's representations in making certain disclosures. For example, a remittance transfer provider can rely on the representations of the sender regarding the currency that can be provided in the remittance transfer.

New comment 33(a)–8 elaborates on the exclusion by providing two illustrative examples. Under one example, a sender requests U.S. dollars to be deposited into an account of the designated recipient and represents that the account is U.S. dollar-denominated. If the designated recipient's account is actually denominated in local currency and the recipient account-holding institution must convert the remittance transfer into local currency in order to deposit the funds and complete the transfer, the change in currency does not constitute an error pursuant to § 1005.33(a)(2)(iv). Similarly, if the remittance transfer provider relies on the sender's representations regarding variables that affect the amount of taxes imposed by a person other than the provider for purposes of determining these taxes, the change in the amount of currency the designated recipient actually receives due to the taxes actually imposed does not constitute an error pursuant to § 1005.33(a)(2)(iv).

33(b) Notice of Error From Sender

Proposed § 205.33(b) set forth the timing and content requirements for a notice of error provided by a sender in connection with a remittance transfer. Consistent with EFTA section 919(d)(1)(A), proposed § 205.33(b)(1)(i) stated that a sender must provide a notice of error orally or in writing to the remittance transfer provider no later than 180 days after the date of availability of the remittance transfer stated in the receipt or combined disclosure. Under proposed § 205.33(b)(1)(ii), such notice of error must enable the remittance transfer provider to identify: the sender's name and telephone number or address; the recipient's name, and if known, the telephone number or address of the recipient; and the remittance transfer to which the notice of error applies. Proposed § 205.33(b)(1)(iii) stated that the notice must also indicate why the sender believes the error exists and include to the extent possible the type, date, and amount of the error, except in the case of requests for documentation, additional information, or clarification under proposed § 205.33(a)(1)(v).

Several industry commenters suggested that the time period for senders to assert an error is too long. Some industry commenters recommended that the time period be shortened to 60 days, similar to the time period that consumers have to assert errors for EFTs. *See* § 1005.11(b)(3). Other industry commenters suggested 30 days. The Bureau notes that the 180-day time period for senders to assert an error is expressly stated in the statute. Given the international nature of remittance transfers, the additional time a sender may need to communicate with persons abroad, and the lack of information about problems associated with this time period, the Bureau does not believe that using its authority under EFTA sections 904(a) and (c) to change this time period is currently warranted.

Industry commenters also requested that the sender be required to assert an error in writing at a centralized address. The Bureau believes that requiring senders to assert an error in writing would have a chilling effect on the error resolution process, especially given that some senders may not feel comfortable writing in English. Although in some cases, a sender may have the ability to assert the error in a foreign language and be assured a response in that language, that ability may depend on the foreign languages used at the office of the remittance transfer provider where the error is asserted to advertise, solicit, or market remittance transfers under § 1005.31(g), as discussed above. Moreover, the current error resolution process for EFTs does not require a consumer to assert an error in writing.[81] Therefore, the Bureau declines to make the requested change, and proposed § 205.33(b)(1) is adopted substantially as proposed in renumbered § 1005.33(b)(1).

Proposed § 205.33(b)(2) provided that when a notice of error was based on documentation, additional information, or clarification that the sender had previously requested under § 1005.33(a)(1)(v), the sender's notice of error would be timely if it were received by the provider no later than 60 days after the provider sends the requested documentation, information, or clarification. As the Board explained in the May 2011 Proposed Rule, the proposed 60-day time frame for the sender to provide a new notice of error following the sender's receipt of documentation, information, or clarification from the remittance transfer provider is consistent with the 60-day time frame established for similar circumstances under the general error resolution provisions in Regulation E, § 1005.11(b)(3).

The Bureau agrees with the Board's reasoning that under these circumstances, 60 days, rather than the 180-day error resolution time frame generally applicable to remittance

[81] *See* § 1005.11(b). Although a financial institution may request that a consumer assert the error in writing, a consumer's failure to do so does not cancel the error resolution process, but gives the financial institution 45 days to investigate the error without having to provide provisional credit. *See* § 1005.11(b)(2) and (c)(2).

transfers, provides sufficient time for a sender to review the additional information provided by the remittance transfer provider and determine whether an error occurred in connection with a transfer. The Bureau did not receive any comments on this issue. However, the Bureau believes it is appropriate to clarify that a sender always has the original 180 days after the disclosed date of availability to assert an error. Consequently, the Bureau is amending proposed § 205.33(b)(2), renumbered as § 1005.33(b)(2), to provide that when a notice of error is based on documentation, additional information, or clarification that the sender had previously requested under § 1005.33(a)(1)(v), the sender's notice of error is timely if received by the remittance transfer provider the later of 180 days after the disclosed date of availability of the remittance transfer or 60 days after the provider sent the documentation, information, or clarification requested.

The Board proposed commentary to clarify proposed § 205.33(b). Proposed comment 33(b)–1 clarified that the error resolution procedures for remittance transfers apply only when a notice of error is received from the sender of the transfer. Thus, a notice of error provided by the designated recipient would not trigger the remittance transfer provider's error resolution obligations. As the Board explained in the May 2011 Proposed Rule, this interpretation is consistent with EFTA section 919(d)(1)(A), which establishes error resolution obligations for a remittance transfer provider only when a notice is received from the sender.[82] Proposed comment 33(b)–1 also clarified that the error resolution provisions do not apply when the remittance transfer provider itself discovers and corrects an error. The Bureau did not receive any comments on the proposed comment, which the Bureau adopts as proposed.

The Board proposed comment 33(b)–2 to provide that a notice of error is effective so long as the remittance transfer provider is able to identify the remittance transfer in question. As explained in the May 2011 Proposed Rule, a sender could provide in the notice of error the confirmation number or code given to the sender for the pick-up of a remittance transfer to identify the particular transfer in their tracking systems and records, or any other identification number or code supplied by the provider in connection with the remittance transfer, if such number or code is sufficient to enable the provider to identify the transfer.

One industry commenter requested that, for an account-based remittance transfer, the final rule require senders to include the account number in the notice of error. The Bureau notes that under comment 11(b)(1)–1 for EFTs, consumers are not required to provide their account numbers and need only provide sufficient information to enable the financial institution to identify the account. Similarly, the Bureau believes that a sender need not provide the account number, but must provide enough information such that the remittance transfer provider can identify the account and the transfer in question. The Bureau adopts comment 33(b)–2 with this clarification, and also makes other clarifying changes to comment 33(b)–2 to make the comment consistent with § 1005.33(b)(1).

Proposed comment 33(b)–3 provided that a remittance transfer provider may request, or the sender may provide, an email address of the sender or the designated recipient, as applicable, instead of a physical address if the email address would be sufficient to enable the provider to identify the remittance transfer to which the notice applies. Proposed comment 33(b)–4 provided that if the sender fails to provide a timely notice of error within 180 days from the stated date of delivery, the remittance transfer provider would not be required to comply with the error resolution requirements set forth in the rule. As the Board noted in the May 2011 Proposed Rule, proposed comment 33(b)–4 is similar to comment 11(b)(1)–7 for EFTs. The Bureau did not receive any comments on these proposed comments. Therefore, the Bureau adopts comment 33(b)–3 substantially as proposed.

However, given that a sender may provide a second notice of error based on documentation, additional information, or clarification that the sender requested pursuant to § 1005.33(b)(2), as discussed above, the Bureau is revising comment 33(b)–4 to include the time periods relevant to § 1005.33(b)(2). Consequently, comment 33(b)–4 provides that, if applicable, a remittance transfer provider is not required to comply with the error resolution requirements for any notice of error from a sender that is received by the provider more than 60 days after a provider sent documentation, additional information, or clarification requested by the sender, provided such date is later than 180 days after the disclosed date of availability.

The Board proposed comment 33(b)–5 to provide that a notice of error from a sender received by a remittance transfer provider's agent is deemed to be received by the provider for purposes of the 180-day time frame for reporting errors under § 1005.33(b)(1)(i). Some industry commenters suggested that senders should only be permitted to assert an error at a centralized address or telephone number. These commenters noted that because remittance transfers are not the primary business for most or all of the agents of a remittance transfer provider, relying on an agent to properly forward disputes and relevant supporting documents to the remittance transfer provider would impose unnecessary costs on agents. Commenters also argued that introducing agents into the error resolution process would increase the likelihood that disputes would not be handled and resolved in a timely way.

As the Board noted in the May 2011 Proposed Rule, a sender that has a problem or issue with a particular remittance transfer may contact the agent location that the sender used to send the transfer to resolve the problem or issue, rather than notifying the provider directly. The Bureau agrees with the Board that because in many cases, for transfers sent through money transmitters, it will be the agent with whom the sender has a direct relationship, and not the provider, it is appropriate to treat a notice of error given to the agent as notice to the provider. This approach also ensures that a sender does not lose his or her error resolution rights merely because the sender was unaware of a need to directly notify the provider. This is consistent with the approach the Bureau is taking with respect to a sender asserting his or her right to cancel, as discussed in further detail below in comment 34(a)–4. Moreover, the Bureau notes that the comment does not require the agent to perform the error resolution procedures. Remittance transfer providers may require their agents to pass on any error notice they receive to the remittance transfer providers, who can then fulfill the requirements of § 1005.33. Therefore, the Bureau adopts proposed comment 33(b)–5 substantially as proposed.

Finally, proposed comment 33(b)–6 cross-referenced the disclosure requirements in § 205.31 to reiterate that a remittance transfer provider must include an abbreviated notice of the consumer's error resolution rights on the receipt under § 205.31(b)(2) or combined disclosure under § 205.31(b)(3), as applicable. In

[82] *See also* EFTA section 919(g)(1) (providing that a designated recipient ''shall not be deemed to be a consumer for purposes of this Act'').

addition, the proposed comment provided that the remittance transfer provider must make available to a sender upon request, a notice providing a full description of error resolution rights that is substantially similar to the model error resolution and cancellation notice set forth in Appendix A of this regulation (Model Form A–36). The Bureau did not receive any comments on the proposed comment. The Bureau adopts comment 33(b)–6 substantially as proposed.

33(c) Time Limits and Extent of Investigation

The Board proposed § 205.33(c) to implement the statutory time frame for investigating errors and set forth the procedures for resolving an error, including the applicable remedies. The Bureau is adopting proposed § 205.33(c) in renumbered § 1005.33(c) with the changes discussed below.

33(c)(1) Time Limits for Investigation and Report to Consumer of Error

Consistent with EFTA section 919(d)(1)(B), proposed § 205.33(c)(1) provided that a remittance transfer provider must promptly investigate a notice of error to determine whether an error occurred within 90 days of receiving the sender's notice. Some industry commenters suggested that the time to investigate a notice of error should be extended. One industry trade association commenter stated that for one of its member banks, while international wire ''exceptions'' (including non-timely delivery) averaged less than 1% of its international wire transfers, more than 15% of these exceptions took longer than 90 days to resolve.

The Bureau notes that the 90-day time period is set by the statute. Furthermore, compared to the time period to resolve errors for EFTs (including those a consumer may have initiated abroad), which can be either 10 business days or 45 calendar days, 90 days is twice the length of the longest allowable time period. *See* § 1005.11(c). Although a longer period than the one available for EFTs may be justified given the international nature of these transactions, the Bureau believes that senders should have errors resolved in a timely manner. Consequently, the Bureau does not believe use of its authority under EFTA sections 904(a) and (c) to extend the statutorily-imposed 90-day period is warranted.

To effectuate the purposes of the EFTA, the Board also proposed to include in proposed § 205.33(c)(1) a requirement that the remittance transfer provider report the results to the sender within three business days after completing its investigation. As the Board explained in the May 2011 Proposed Rule, this timing is consistent with the time frame for reporting the results of an error investigation under Regulation E, § 1005.11(c)(2)(iv). In addition, under proposed § 205.33(c)(1), the report or notice of results would have to alert the sender of any remedies available for correcting any error that the provider determines has occurred.

EFTA section 919(d)(1) does not expressly require a notice to be provided to the sender when the provider determines that an error has occurred. However, the Board proposed to require that a notice be given in these circumstances to alert the sender of the results of the investigation, as well as to inform the sender of available remedies. In proposing this requirement, the Board did not propose that the notice to a sender that an error occurred as asserted had to be in writing because such a requirement could unnecessarily delay a sender's ability to receive an appropriate remedy. Accordingly, the Board proposed comment 33(c)–1 to clarify that if the error occurred as described by the sender, the provider may inform the sender of its findings either orally or in writing. If the error did not occur as described, however, the remittance transfer provider would have to provide a written notice of its findings under § 1005.33(d), as discussed below. The Bureau agrees with the Board's reasoning in proposing both § 205.33(c)(1) and comment 33(c)–1. Accordingly, to effectuate the purposes of the EFTA, the Bureau believes it is necessary and proper to use its authority under EFTA sections 904(a) and (c) to adopt these provisions substantially as proposed in renumbered § 1005.33(c)(1) and comment 33(c)–1, respectively.

Consumer group commenters also requested that the Bureau specify that the burden of proof should be on the remittance transfer provider so that if a sender presents evidence that there has been an error, the burden should unequivocally shift to the remittance transfer provider to show that there was not an error. The Bureau notes that the EFTA establishes various burdens of proof. For example, under EFTA section 909(b), in any action involving a consumer's liability for an unauthorized EFT, the burden of proof is upon the financial institution to show that the EFT was authorized. However, under EFTA section 910(b), a financial institution is not liable for an incorrect or delayed EFT if it can show by a preponderance of the evidence that its action or failure to act resulted from an act of God or other circumstance beyond its control or a technical malfunction known to the consumer at the time the consumer attempted to initiate the EFT. Section 1073 of the Dodd-Frank Act did not amend the EFTA to adopt a specific burden of proof for errors related to remittance transfers that are not EFTs. Therefore, the Bureau does not believe it is appropriate to address this issue.

33(c)(2) Remedies

The Board proposed § 205.33(c)(2) to establish the procedures and remedies for correcting an error. Proposed § 205.33(c)(2)(i) and (ii) included the two remedies that are specified in EFTA section 919(d)(1)(B). Under proposed § 205.33(c)(2), the sender may designate the preferred remedy in the event of an error, consistent with EFTA section 919(d)(1)(B). Thus, under proposed § 205.33(c)(2)(i), the sender could choose to obtain a refund of the amount tendered in connection with the remittance transfer that was not properly transmitted, or an amount appropriate to resolve the error. Alternatively, under proposed § 205.33(c)(2)(ii), the sender could choose to have the remittance transfer provider send to the designated recipient the amount appropriate to resolve the error, at no additional cost to the sender or the designated recipient. The Bureau did not receive any comments objecting to these remedies. Therefore, the statutory remedies set forth in proposed § 205.33(c)(2)(i) and (ii) are adopted substantially as proposed in renumbered § 1005.33(c)(2)(i)(A) and (B), respectively, for errors under § 1005.33(a)(1)(i) through (a)(1)(iii), and § 1005.33(c)(2)(ii)(A)(*1*) and (*2*), respectively, for an error under § 1005.33(a)(1)(iv). Thus, the final rule clarifies that these remedies do not apply to a sender's request for documentation or for additional information or clarification under § 1005.33(a)(1)(v), where the appropriate remedy is the requested documentation, information, or clarification. *See* § 1005.33(c)(2)(iii) as discussed below.

However, as discussed above with respect to proposed § 205.33(a)(1)(iv)(B), the Bureau believes that if the failure to make funds from a remittance transfer available on the disclosed date of availability is caused by the sender providing incorrect information in connection with the remittance transfer to the provider, the sender's mistake should not obligate a remittance transfer provider to bear all the costs for resending the remittance transfer. As noted above, many industry commenters objected to the requirement

that the remittance transfer provider absorb the costs of amending and resending a transfer when the sender is at fault because doing so would require the remittance transfer provider and other senders, through higher fees, to bear the responsibility for a sender's mistake.

Therefore, § 1005.33(c)(2)(ii)(A)(*2*) does not require that providers send to the designated recipient the amount appropriate to resolve the error at no additional cost to the sender or the designated recipient if the sender provided incorrect information in connection with the remittance transfer to the provider. Instead, § 1005.33(c)(2)(ii)(A)(*2*) provides that if the sender provided incorrect information to the remittance transfer provider in connection with the remittance transfer, third party fees may be imposed for resending the remittance transfer with the corrected information. Section 1005.33(c)(2)(ii)(A)(*2*) permits third party fees and taxes that were actually incurred in the earlier transmission attempt to be imposed for the resend, but does not permit remittance transfer providers to charge senders a second time for the provider's own fees.

The Bureau is making this distinction in order to apply the rule without requiring complicated individualized analyses and allocations of the expenses actually incurred in connection with a failed transaction. The Bureau believes this approach strikes a more appropriate balance between the interests of providers and senders than the proposed rule of not permitting any fees to be imposed for the resend, given that third party fees and taxes are not controlled by the provider and are simply being passed on from other actors. Furthermore, the Bureau believes that affiliates of remittance transfer providers, like providers themselves, should not assess fees for resending a remittance transfer with corrected information.

The Bureau also believes that if a sender provides insufficient information to enable the remittance transfer provider to complete the transfer as requested, third party fees should be permitted to be imposed for resending the remittance transfer with the additional information. For example, a sender may only provide a partial name for the designated recipient such that the entity distributing the funds cannot determine whether the person picking up the funds or the name associated with the account is the intended designated recipient. Therefore, § 1005.33(c)(2)(ii)(A)(*2*) provides that if the sender provided insufficient information to the remittance transfer provider in connection with the remittance transfer, third party fees may be imposed for resending the remittance transfer with the additional information.

The Bureau is also adopting a new comment 33(c)–2 to clarify § 1005.33(c)(2)(ii)(A)(*2*). The comment generally incorporates proposed comment 33(a)–6 to clarify that if the failure to make funds from a transfer available by the disclosed date of availability occurred due to the provider's miscommunication of information necessary for the designated recipient to pick up the transfer, such as providing the incorrect location where the transfer may be picked up or providing the wrong confirmation number or code for the transfer, such failure would not be treated as a failure caused by the sender providing incorrect or insufficient information in connection with the remittance transfer to the provider. The comment also clarifies that while third party fees may be imposed for resending the remittance transfer with the corrected or additional information, the remittance transfer provider may not require the sender to provide the principal transfer amount again.

Furthermore, if funds were not exchanged in the first unsuccessful attempt of the remittance transfer, the provider must use the exchange rate it is using for such transfers on the date of the resend. The Bureau recognizes that this approach is different from the approach adopted for other errors, where the provider must apply the exchange rate stated in the receipt or combined disclosure. *See* comment 33(c)–3, discussed below. For errors where the failure was not caused by the sender providing incorrect or insufficient information, the Bureau believes that it is appropriate for the remedy to reflect what was promised to the sender. In contrast, when the failure is caused by the sender providing incorrect or insufficient information, the Bureau believes it is appropriate to generally put the provider and the sender in the same position as if the first unsuccessful attempt of the remittance transfer had never occurred.

For example, if a sender instructs a remittance transfer provider to send US$100 to a designated recipient in a foreign country in local currency, for which the remittance transfer provider charges a transfer fee of US$10, and the sender provided incorrect or insufficient information that resulted in non-delivery of the remittance transfer, the remittance transfer provider may not require the sender to provide another US$100 to the remittance transfer provider to send or charge the sender another US$10 transfer fee. If the funds were not exchanged in the first unsuccessful attempt of the remittance transfer, the provider must use the exchange rate it is using for such transfers on the date of the resend.

Based on this rule, if a remittance transfer is deposited in an account that does not belong to the designated recipient named in the receipt because the sender provided the wrong account number for the designated recipient, the provider may charge the sender for resending the remittance transfer, but may not have the sender provide the principal transfer amount again in the event that the remittance transfer provider is unable to have the funds extracted from the wrong account. The Bureau believes that this approach will encourage providers and other parties involved in the remittance transfer to develop security procedures to limit the risk of funds being deposited in an account when the name of the designated recipient named in the receipt does not match the name associated with the account number. The Bureau notes that remittance transfer providers will be supplied with both the name, and if provided by the sender, the telephone number and/or address of the designated recipient, which the provider must disclose on the receipt under § 1005.31(b)(2)(iii).

New comment 33(c)–2 clarifies that although third party fees may be imposed on the sender for resending the remittance transfer with the corrected or additional information, third party fees that were not incurred during the first unsuccessful remittance transfer attempt may not be imposed again for resending the remittance transfer. For example, suppose a sender instructed the remittance transfer provider to send US$100 to a designated recipient in a foreign country, for which a remittance transfer provider charges a transfer fee of US$10 and an intermediary institution charges a lifting fee of US$5, such that the designated recipient is expected to receive only US$95, as indicated in the receipt. If the sender provided incorrect or insufficient information that resulted in non-delivery of the remittance transfer and the US$5 lifting fee was incurred in the first attempt, the sender may choose to provide an additional amount to offset the US$5 lifting fee deducted in the first unsuccessful remittance transfer attempt and ensure that the designated recipient receives US$95 or may choose to resend the US$95 amount with the understanding that another fee may be deducted by the intermediary institution, as indicated in the receipt.

Otherwise, if the US$5 lifting fee was not incurred in the first attempt, then the remittance transfer provider must send the original US$100 for the resend, and the sender may expect a US$5 lifting fee to be imposed by the intermediary institution, as indicated in the receipt. Comment 33(c)–2 also reminds providers that a request to resend a remittance transfer is a request to send a remittance transfer. Therefore, a provider must provide the disclosures required by § 1005.31 for a resend of a remittance transfer.

In addition, the Board proposed to add a separate, cumulative remedy that would apply if the transfer was not made available to the designated recipient by the disclosed date of availability under § 1005.33(a)(1)(iv). This additional remedy was proposed pursuant to the Board's authority under EFTA section 919(d)(1)(B) to provide ''such other remedy'' as the Board determines appropriate ''for the protection of senders.'' Under proposed § 205.33(c)(2)(iii), if the remittance transfer was not sent or delivered to the designated recipient by the stated date of availability, the remittance transfer provider would be required to refund all fees charged or imposed in connection with the transfer, even if the consumer asks the provider to send the remittance transfer to the designated recipient as the preferred remedy. If the funds have already been delivered to the recipient, however, even if on an untimely basis, the sole remedy in such case would be the refund of fees.

Several industry commenters objected to the remedy to refund all fees associated with the remittance transfer. As the Board explained in the May 2011 Proposed Rule, requiring the provider to refund all fees imposed in connection with the remittance transfer, including the transfer fee, is appropriate under such circumstances because the sender did not receive the contracted service, specifically the availability of funds in connection with the transfer by the disclosed date. Furthermore, the Board noted that in some cases, the sender may have paid an additional fee for expedited delivery of funds.

Based on some industry comments, the Bureau believes there may be some confusion regarding when the proposed remedy of refunding fees associated with the remittance transfer may be available. As stated in proposed § 205(c)(2)(iii), the remedy is only available in the case of an error asserted under proposed § 205.33(a)(1)(iv) (adopted as § 1005.33(a)(1)(iv) above). Accordingly, if the remittance transfer provider finds that the error that occurred is, for example, an incorrect amount paid by a sender in connection with a remittance transfer under proposed § 205.33(a)(1)(i) (adopted as § 1005.33(a)(1)(i) above), the provider would be under no obligation to refund the fees associated with the remittance transfer to a sender. Instead, the only remedies required to be available to a sender would be a refund of the amount appropriate to resolve the error under proposed § 205(c)(2)(i) (adopted as § 1005(c)(2)(i)(A) above) or to have the amount appropriate to resolve the error sent to the designated recipient, at no additional cost to the sender or the designated recipient under proposed § 205.33(c)(2)(ii) (adopted as § 1005(c)(2)(i)(B) above).

The Bureau agrees with the Board that the remedy of refunding all fees imposed for the remittance transfer is appropriate if the remittance transfer was not made available to the designated recipient by the disclosed date of availability.

Furthermore, the Bureau believes that taxes should also be refunded. One industry commenter noted that for certain jurisdictions, the remittance transfer provider may be prohibited by law from refunding taxes. Therefore, the Bureau adopts proposed § 205.33(c)(2)(iii) in renumbered § 1005.33(c)(2)(ii)(B) with the additional requirement to refund taxes to the extent not prohibited by law.

Moreover, consistent with § 1005.33(c)(2)(ii)(A)(*2*), which provides that third party fees may be imposed for resending the remittance transfer if the sender provided incorrect or insufficient information to the remittance transfer provider in connection with the remittance transfer, § 1005.33(c)(2)(ii)(B) provides that the provider need not refund fees imposed for the remittance transfer if the sender provided incorrect or insufficient information to the remittance transfer provider in connection with the remittance transfer. The Bureau is also adopting new § 1005.33(c)(2)(iii) to clarify that in the case of an error asserted under § 1005.33(a)(1)(v), which is a request for documentation, additional information or clarification concerning a remittance transfer, the appropriate remedy is providing the requested documentation, information, or clarification.

Proposed § 205.33(c)(2) also provided that the remittance transfer provider must correct the error within one business day of, or as soon as reasonably practicable after, receiving the sender's instructions regarding the appropriate remedy. The Board explained that the proposed rule would provide additional flexibility to address the limited circumstances where the particular method of sending a remittance transfer may present practical impediments to a provider's ability to correct an error within one business day. For example, it may not be practicable for a wire transfer that goes through several intermediary institutions before reaching the designated recipient to make the amount in error available to the recipient within one business day in accordance with a sender's request. The Bureau agrees with the Board's rationale in requiring the remittance transfer provider to correct the error within one business day of, or as soon as reasonably practicable after, receiving the sender's instructions regarding the appropriate remedy. The Bureau retains this aspect of proposed § 205.33(c)(2) in renumbered § 1005.33(c)(2) and also includes other clarifying, non-substantive changes.

Proposed comment 33(c)–2 clarified that the remittance transfer provider may request that the sender designate the preferred remedy at the time the sender provides notice of error. As the Board explained in the May 2011 Proposed Rule, permitting such requests may enable providers to process error claims more expeditiously without waiting for the sender's subsequent instructions after notifying the sender of the results of the investigation. If the sender does not indicate the desired remedy at the time of providing notice of error, the proposed comment provided that the remittance transfer provider must notify the sender of any available remedies in the report provided under proposed § 205.33(c)(1) (adopted as § 1005(c)(1) above) after determining an error occurred. Proposed comment 33(c)–2 is adopted as comment 33(c)–3.

However, the Board recognized in the May 2011 Proposed Rule that by giving the sender the ability to choose the remedy, the statute, and thus the rule, may make it impossible for a remittance transfer provider to promptly correct an error if the consumer fails to designate an appropriate remedy either at the time of providing the notice of error or in response to the provider's notice informing the consumer of its error determination and available remedies. The Board therefore requested comment on whether remittance transfer providers should be permitted to select a default method of correcting errors.

Both industry and consumer group commenters agreed that there should be a default method of correcting errors. Industry commenters suggested that the remittance transfer provider should be permitted to select the default remedy. Consumer group commenters, however, recommended that the Bureau should

set the default remedy of refunding to the sender the appropriate amount.

Based on the comments received, the Bureau adopts a new comment 33(c)–4 to permit a remittance transfer provider to select a default remedy that the provider will use if the sender does not designate a remedy within a reasonable time after the sender receives the report provided under § 1005.33(c)(1). The Bureau believes that providing for a default remedy after a sender has had a reasonable opportunity to choose a remedy would balance the statute's aim to provide a sender the chance to choose his or her preferred remedy with the goal of promptly resolving the sender's outstanding error claim. Furthermore, allowing remittance transfer providers to select the default remedy reduces burden on providers without consumer harm because providers have the ability to provide a preferred remedy without compromising a sender's opportunity to choose.

In addition, new comment 33(c)–4 provides a safe harbor for the amount of time that would be considered reasonable after the report under § 1005.33(c)(1) is provided. Specifically, comment 33(c)–4 states that a provider that permits a sender to designate a remedy within 10 days after the provider has sent the report provided under § 1005.33(c)(1) before selecting the default remedy is deemed to have provided the sender with a reasonable time to designate a remedy. In selecting the 10-day time frame as a safe harbor, the Bureau notes the existence of a similar provision under Regulation Z. Under the commentary to 12 CFR 1026.5(b)(1)(i), a creditor that provides an account-opening disclosure in connection with a balance transfer may effectuate the balance transfer if the consumer has not withdrawn the balance transfer request within 10 days after the creditor has sent the account-opening disclosure. *See* comment 5(b)(1)(i)–5 under Regulation Z. New comment 33(c)–4 also clarifies that in the case a default remedy is provided, the remittance transfer provider must correct the error within one business day, or as soon as reasonably practicable, after the reasonable time for the sender to designate the remedy has passed.

Consumer group commenters also suggested that the Bureau adopt guidance on how to handle cases where a sender cannot be contacted after an error is discovered by the provider, sender, or recipient. These commenters recommended that three phone calls or emails should constitute a good faith effort to contact the sender. The Bureau notes that the error resolution procedures only apply if the sender asserts an error. *See* comment 33(b)–1 adopted above. A notice of error from a sender must contain information to enable the provider to identify the sender's name and telephone number or address. *See* § 1005.33(b)(1)(ii)(A) adopted above. Therefore, the Bureau believes that remittance transfer providers will have valid contact information from the sender when the sender asserts the error and that remittance transfer providers will make a reasonable effort to contact senders to fulfill their error resolution requirements.

Some industry commenters requested that the final rule clarify the meaning of ''amount appropriate to resolve the error.'' The Bureau agrees that clarification of this term would be helpful. New comment 33(c)–5 provides that for the purposes of the remedies set forth in § 1005.33(c)(2)(i)(A), (c)(2)(i)(B), (c)(2)(ii)(A)(*1*), and (c)(2)(ii)(A)(*2*), the amount appropriate to resolve the error is the specific amount of transferred funds that should have been received if the remittance transfer had been effected without error. New comment 33(c)–5 further clarifies that the amount appropriate to resolve the error does not include consequential damages.

Consumer group commenters requested further guidance on the form a refund may take. In particular, commenters were concerned that remittance transfer providers not be permitted to provide store credit in the refund amount. The Bureau agrees that the form of any refund provided under § 1005.33(c)(2)(i)(A) should generally be the same as the form of payment for the remittance transfer. The Bureau also believes that a provider should also be permitted to provide a refund in cash. Therefore, the Bureau adopts new comment 33(c)–6 to clarify that a remittance transfer provider may, at its discretion, issue a refund either in cash or in the same form of payment that was initially provided by the sender for the remittance transfer. The comment is similar to comment 34(b)–1, discussed below, regarding the form of refund after a cancellation.

The Bureau is, however, amending comment 34(b)–1 in one respect, which is also reflected in new comment 33(c)–6. Specifically, the Bureau recognizes that if a sender provided cash to the remittance transfer provider for the remittance transfer, there may be instances when a cash refund may not be possible or convenient to the sender. Generally, it is undesirable for a provider to mail cash, and agents may be prohibited from providing cash to consumers. Even if agents were permitted to provide cash refunds, it may be inconvenient to the sender to return to the remittance transfer provider or agent location to pick up the cash refund. Consequently, comments 33(c)–6 and 34(b)–1 state that a provider may issue a refund by check if a sender initially provided cash for the remittance transfer. For example, if the sender originally provided cash as payment for the transfer, the provider may mail a check to the sender in the amount of the payment.

Consumer group commenters also suggested that the Bureau consider emphasizing that remittance transfer providers should comply with applicable State escheat laws if the sender cannot be contacted to receive a refund. The Bureau believes that such clarification is unnecessary. Furthermore, the Bureau is concerned that an explicit reference to State escheat laws in this instance may imply that other State laws (for example, State disclosure requirements for money transmitters) do not apply. Consequently, the Bureau declines to adopt this suggestion.

Proposed comment 33(c)–3 provided additional guidance regarding the appropriate remedies where the sender has paid an excess amount to send a remittance transfer. Under that circumstance, the sender may request a refund of the amount paid in excess or may request that the remittance transfer provider make that excess amount available to the designated recipient at no additional cost. The Bureau did not receive any comments on the proposed comment. The Bureau adopts proposed comment 33(c)–3 substantially as proposed in comment 33(c)–7.

Under proposed comment 33(c)–4, fees that must be refunded to a sender for a failure to make funds from a remittance transfer available by the stated date of availability under § 1005.33(a)(1)(iv) include all fees imposed for the transfer, regardless of the party that imposed the fee, and are not limited to fees imposed by the provider. Some industry commenters objected to having to refund fees not imposed by the remittance transfer provider. As explained above, however, the Bureau believes that refunding all fees is appropriate if the remittance transfer service was not provided as contracted because the funds were not made available by the disclosed date of availability.

The Bureau is revising proposed comment 33(c)–4, however, to respond to a request from a Federal Reserve Bank commenter to resolve ambiguities in the relationship between the remedies in § 1005.33(c)(2)(ii)(A)(*1*) and (*2*) and the

remedy in § 1005.33(c)(2)(ii)(B). Specifically, the Bureau has revised proposed comment 33(c)–4, renumbered as comment 33(c)–8, to clarify that the remittance transfer provider must correct the error in accordance with § 1005.33(c)(2)(ii)(A), as applicable. Therefore, if the remittance transfer was made available to the designated recipient, but on an untimely basis, the remedies under § 1005.33(c)(2)(ii)(A) would not be applicable. In that circumstance, the ''amount appropriate to resolve the error'' would be zero since the entire transfer amount was made available to the designated recipient. The sender's only remedy in this case would be the refund of fees under § 1005.33(c)(2)(ii)(B). If, however, the funds were never made available to the designated recipient, then the sender would have one of the remedies available under § 1005.33(c)(2)(ii)(A)(*1*) or (*2*) in addition to the remedy of the fee refund under § 1005.33(c)(2)(ii)(B). The Bureau also believes the renumbering in § 1005.33(c)(2) should make this clear.

Proposed comment 33(c)–5 clarified that if an error occurred, whether as alleged or in a different amount or manner, a remittance transfer provider may not impose any charges related to any aspect of the error resolution process, including any charges for documentation or investigation. As discussed in the May 2011 Proposed Rule, the Board expressed concern that such fees or charges might have a chilling effect on a sender's good faith assertion of errors and noted that the proposed comment is similar to comment 11(c)–3 for EFTs. Proposed 33(c)–5, however, also stated that nothing would prohibit a remittance transfer provider from imposing a fee for making copies of documentation for non-error-resolution-related purposes, such as for tax documentation purposes under § 1005.33(a)(2)(iii). The Bureau did not receive any comments on the proposed comment. Therefore, the Bureau adopts proposed comment 33(c)–5 as proposed in comment 33(c)–9.

Finally, under proposed comment 33(c)–6, a remittance transfer provider may correct an error, without further investigation, in the amount or manner alleged by the sender to be in error. This is similar to comment 11(c)–4 for EFTs. As with comment 11(c)–4, the provider must otherwise comply with all other applicable requirements of the error resolution procedures, including providing notice of the resolution of the error. Commenters did not address this proposed comment. Therefore, the Bureau adopts proposed comment 33(c)–6 substantially as proposed in comment 33(c)–10.

33(d) Procedures if Remittance Transfer Provider Determines No Error or Different Error Occurred

The Board proposed § 205.33(d) to establish procedures in the event that a remittance transfer provider determines that no error or a different error occurred from that described by the sender. Specifically, proposed § 205.33(d)(1) stated that the remittance transfer provider must provide a written explanation of the provider's finding that there was no error or that a different error occurred, consistent with EFTA section 919(d)(1)(B)(iv). Such explanation would have to respond to the sender's specific complaint and note the sender's right to request the documents that the provider relied on in making its determination. Furthermore, under proposed § 205.33(d)(2), the remittance transfer provider would be required to promptly provide copies of such documentation upon the sender's request.

Under proposed comment 33(d)–1, if a remittance transfer provider determined that an error occurred in a manner or amount different from that described by the sender, the provider would be required to comply with applicable provisions of both § 1005.33(c) and (d) (proposed as § 205.33(c) and (d)). Similar to comment 11(d)–1 with respect to error investigations involving EFTs, the provider may choose to give the notice of correction of error under § 1005.33(c)(1) (proposed as § 205.33(c)(1)) and the explanation that a different error occurred under § 1005.33(d) (proposed as § 205.33(d)) separately or in a combined form. The Bureau did not receive any comments on the procedures set forth in proposed § 205.33(d) or comment 33(d)–1. The Bureau adopts these provisions substantially as proposed in renumbered § 1005.33(d) and comment 33(d)–1.

33(e) Reassertion of Error

As discussed in the May 2011 Proposed Rule, under proposed § 205.33(e), a remittance transfer provider that has fully complied with the error resolution requirements with respect to a particular notice of error would have no further responsibilities in the event the sender later reasserts the same error, except in the case of an error asserted following the sender's receipt of information provided under § 1005.33(a)(1)(v). Furthermore, proposed comment 33(e)–1 explained that the remittance transfer provider would have no further error resolution responsibilities if the sender voluntarily withdraws the notice alleging an error. In such case, however, the sender would retain the right to reassert the allegation within the original 180-day period from the disclosed date of availability unless the remittance transfer provider had already complied with all of the error resolution requirements before the allegation was withdrawn. As noted in the May 2011 Proposed Rule, the proposed provision and comment were modeled on similar provisions under § 1005.11(e). The Board requested comment on whether additional guidance is necessary regarding the circumstances in which a sender has ''voluntarily withdrawn'' a notice of error.

Commenters did not generally address proposed § 205.33(e) or proposed comment 33(e)–1. However, one industry commenter suggested that the error resolution process under proposed § 205.33 should be the exclusive remedy for the enumerated errors. EFTA section 916 provides that there is no civil liability for an error resolved in accordance with the error resolution procedures set forth in EFTA section 908, which are the error resolution procedures implemented in § 1005.11. The Bureau notes that EFTA section 916 was not amended to include the error resolution procedures for remittance transfers set forth in EFTA section 919(d). As such, under EFTA section 916, a court could find that there is civil liability even for an error that has been resolved in accordance with the error resolution procedures in § 1005.33. Accordingly, the Bureau adopts proposed § 205.33(e) as proposed in renumbered § 1005.33(e) . The Bureau adopts comment 33(e)–1 with one change to include the time period relevant to an error asserted pursuant to § 1005.33(b)(2) after a sender receives requested documentation, additional information or clarification from the remittance transfer provider.

33(f) Relation to Other Laws

As the Board noted in the May 2011 Proposed Rule, the error resolution rights for remittance transfers exist independently from other rights that a consumer may have under other existing Federal law. Proposed § 205.33(f) contains guidance regarding the interplay between the error resolution provisions for remittance transfers and error resolution rights that may exist under other applicable consumer financial protection laws.

The Board proposed § 205.33(f)(1) to implement the provision in EFTA section 919(e)(1) regarding the

applicability of the remittance transfer error resolution provisions to EFTs. The proposed rule provided that if an alleged error in connection with a remittance transfer involved an incorrect EFT to a sender's account and the account was also held by the remittance transfer provider, then the requirements of proposed § 205.33, and its applicable time frames and procedures, governed the error resolution process. If the notice of error was asserted with an account-holding institution that was not the same entity as the remittance transfer provider, however, proposed § 205.33(f)(1) provided that the error resolution procedures under § 205.11 (currently § 1005.11), and not those under § 205.33, would apply to the account-holding institution's investigation of the alleged error.

An electronic fund transfer from a consumer's account may also be a remittance transfer. But, as the Board explained in the May 2011 Proposed Rule, an account-holding institution would likely be unable to identify a particular EFT as a remittance transfer unless it was also the remittance transfer provider. In the absence of direct knowledge that a particular EFT was used to fund a remittance transfer, the account-holding institution would face significant compliance risk if the error resolution requirements under proposed § 205.33 were deemed to apply to the error.

The Bureau agrees with the Board that such an outcome would be undesirable. Accordingly, the Bureau is adopting proposed § 205.33(f)(1) in renumbered § 1005.33(f)(1) to permit an account-holding institution to comply with the error resolution requirements of § 1005.11 when the institution is not also the remittance transfer provider for the transaction in question. In such a case, the sender will also have independent error resolution rights against the remittance transfer provider itself under § 1005.33.

Some industry commenters thought the proposed guidance was confusing and would apply more than one error resolution procedure to a remittance transfer provider. Although certain remittance transfer providers may have multiple error resolution obligations, these provisions are meant to resolve conflicts and provide greater certainty about which error resolution provisions apply in certain situations. Therefore, the Bureau is revising comment 33(f)–1 to provide such clarification.

Revised comment 33(f)–1 provides that a financial institution that is also the remittance transfer provider may have error obligations under both §§ 1005.11 and 1005.33. The comment provides examples to illustrate when certain error resolution procedures apply to a remittance transfer provider that is also the account-holding institution from which the transfer is funded. In the first example, a sender asserts an error under § 1005.11 with a remittance transfer provider that holds the sender's account, and the error is not also an error under § 1005.33, such as an omission of an EFT from a periodic statement. In this case, the error-resolution provisions of § 1005.11 exclusively apply to the error. In the second example, a sender asserts an error under § 1005.33 with a remittance transfer provider that holds the sender's account, and the error is also an error under § 1005.11, such as when the amount the sender requested to be deducted from the sender's account and sent for the remittance transfer differs from the amount that was actually deducted from the account and sent. In this case, the error-resolution provisions of § 1005.33 exclusively apply to the error.

Proposed § 205.33(f)(2) addressed the scenario where the consumer provides a notice of error to the creditor that issued the credit card with respect to an alleged error involving an incorrect extension of credit in connection with a remittance transfer, such as when a consumer provides a credit card to pay for a remittance transfer. Proposed § 205.33(f)(2) provided that, in such a case, the error resolution provisions of Regulation Z, 12 CFR 1026.13, would apply to the creditor, rather than the requirements under proposed § 205.33. Proposed § 205.33(f)(2) also stated that if the sender instead provides a notice of error asserting an incorrect payment amount involving the use of a credit card to the remittance transfer provider, then the error resolution provisions of proposed § 205.33 would apply to the remittance transfer provider.

A creditor of a credit card or other credit account may also act as a remittance transfer provider in certain circumstances, such as when a cardholder sends funds from his or her credit card through a service offered by the creditor to a recipient in a foreign country. In this case, an error could potentially be asserted under either Regulation Z or the error resolution provisions applicable to remittance transfers in the case of an incorrect extension of credit in connection with the transfer. The Board proposed that under these circumstances, the error resolution provisions under Regulation Z § 1026.13 would apply to the alleged error, but solicited comment on the proposed approach.

One commenter suggested that if a remittance transfer provider is serving multiple roles, such as a creditor that is also a remittance transfer provider, the remittance transfer provider should have the ability to choose which error resolution procedure to follow. The Bureau does not believe that remittance transfer providers should be permitted to choose the error resolution procedure to apply because providers and senders would benefit from the application of consistent procedures in similar situations.

The Bureau agrees with the Board that it is reasonable to apply the Regulation Z error resolution provisions under circumstances where the remittance transfer provider is also the creditor because Regulation Z, 12 CFR 1026.13(d)(1) permits a consumer to withhold disputed amounts while an error is being investigated. However, the Bureau believes that the additional time afforded to a sender to assert an error under § 1005.33 may also be of value. Therefore, for a remittance transfer provider that is also the creditor, the Bureau is requiring that the time period to assert an error under § 1005.33(b) should apply instead of the time period under 12 CFR 1026.13(b). This will also ensure that the error resolution notice required under § 1005.31(b)(2)(iv) is consistent. Otherwise, disclosing to a sender that the time period to assert an error may in some instances be 60 days from the periodic statement reflecting the error and in other instances may be 180 days from the disclosed date of availability on the remittance transfer receipt could be confusing.

The Bureau also believes further clarification is warranted for errors other than incorrect extensions of credit in connection with the remittance transfer. For example, an error involving an incorrect amount of currency received under § 1005.33(a)(1)(iii) or the failure to make funds available by the disclosed date of availability under § 1005.33(a)(1)(iv) may be asserted as an error involving goods or services that have not been delivered as agreed under § 1026.13(a)(3). Accordingly, the Bureau is adding these references to the final rule to resolve any potential conflicts. The Bureau adopts § 205.33(f)(2) in renumbered § 1005.33(f)(2) with these revisions and amendments to clarify that the provision applies to all credit accounts rather than only credit card accounts.

In addition, the Bureau notes that in certain circumstances, a credit cardholder has a right to assert claims or defenses against a card issuer concerning property or services purchased with a credit card under

Regulation Z, 12 CFR 1026.12(c)(1). These rights are independent of other billing error rights a cardholder may have. *See* comment 12(c)–1 to 12 CFR 1026.12(c). Therefore, the Bureau is adopting a new comment 33(f)–2 to clarify that to the extent a credit cardholder has a right to assert claims and defenses against a card issuer under 12 CFR 1026.12(c)(1), nothing in § 1005.33 limits a sender's right in this regard.

The Board also proposed § 205.33(f)(3) to provide guidance where an alleged error involves an unauthorized EFT or unauthorized use of a credit card to send a remittance transfer, such as when a stolen debit or credit card is used to send funds to a foreign country. Specifically, proposed § 205.33(f)(3) clarified that the consumer would have rights under Regulation E §§ 1005.6 and 1005.11 in the case of an unauthorized EFT or Regulation Z §§ 1026.12(b) and 1026.13 in the case of an unauthorized use of a credit card. However, since the consumer holding the asset account or the credit card account is not the sender of the remittance transfer, proposed § 205.33(f)(3) stated that the error resolution provisions for remittance transfers would not apply. *See* comment 33(b)–1. The Bureau agrees with the Board's proposal, and § 205.33(f)(3) is adopted substantially as proposed in renumbered § 1005.33(f)(3) with an amendment to clarify application of the provision to credit accounts generally as opposed to only credit card accounts.

Some industry commenters suggested that the reasoning the Board used in applying Regulation E §§ 1005.6 and 1005.11 in the case of an unauthorized EFT and Regulation Z §§ 1026.12(b) and 1026.13 in the case of an unauthorized use of a credit card, should be used in applying UCC Article 4A provisions to an unauthorized wire transfer. As discussed above in the supplementary information to § 1005.30(e), UCC Article 4A–108 provides that Article 4A does not apply ''to a funds transfer, *any part of which is governed by the [EFTA]''* (emphasis added). Furthermore, as discussed above, the Bureau may only preempt State law to the extent that there is an inconsistency. Since the Bureau does not believe there is an inconsistency between the EFTA and UCC Article 4A–108, UCC Article 4A does not apply to wire transfers that are remittance transfers under § 1005.30(e). Therefore, the Bureau declines to implement commenters' suggestion with respect to unauthorized wire transfers.

Finally, the Board noted that in certain cases a consumer may be able to assert error resolution rights in connection with a remittance transfer with both the remittance transfer provider as well as the account-holding institution or credit card issuer or creditor. Proposed comment 33(f)–2 addressed this situation by providing that if a sender receives credit to correct an error of an incorrect amount paid in connection with a remittance transfer from either the remittance transfer provider or the sender's account-holding institution or creditor, and then subsequently asserts the same error with the other party, the other party would have no further responsibilities to investigate the error. The proposed comment also clarified that an account-holding institution or creditor may reverse amounts it has previously credited to correct an error if the consumer receives more than one credit to correct the same error and provided an example to illustrate this concept.

One industry commenter noted that the provisions in § 1005.33(f) could provide a consumer with potentially different error resolution procedures depending on who the consumer decides to contact. This may be the case if the remittance transfer provider is not also the account-holding institution or creditor. However, proposed comment 33(f)–2 explains that the second party has no error resolution obligations if the sender already received credit to correct an error of an incorrect amount paid in connection with a remittance transfer. This comment makes clear that a consumer may not receive a windfall by successfully asserting an error with both the provider and the account-holding institution and/or credit card issuer or creditor.

Another industry commenter suggested that the remittance transfer provider should be permitted to delay providing a remedy until expiration of the card issuer's chargeback right under network rules to prevent duplicate recoveries when remittances are funded by a debit card or a credit card. The Bureau believes that the delay would be disadvantageous for senders in getting a speedy resolution to an error and that proposed comment 33(f)–2 is a better method for dealing with the possibility of duplicate recoveries. The Bureau adopts this comment, renumbered as comment 33(f)–3, substantially as proposed.

Lastly, the Bureau received comment from an industry commenter questioning which error resolution provisions apply when a sender has multiple funding sources for the remittance transfer. For example, a sender could fund a remittance transfer partly by a balance in the sender's account held by the remittance transfer provider and partly by a credit card or an ACH transfer from the sender's checking account. In such cases, the Bureau notes that which error resolution procedure will apply depends on the error that is asserted. For example, if the error asserted is the incorrect extension of credit in connection with the remittance transfer, then § 1005.33(f)(2) provides that § 1026.13 applies to the creditor while § 1005.33 applies to the remittance transfer provider, but only with respect to the amount of the remittance transfer funded by the credit card. However, if the remittance transfer provider is also the creditor, only § 1026.13 applies to the remittance transfer provider with respect to the amount of the remittance transfer funded by the credit card.

Similarly, if the error asserted is an incorrect EFT from a sender's account, then § 1005.33(f)(1) provides that § 1005.11 applies to the account-holding institution while § 1005.33 applies to the remittance transfer provider, but only with respect to the amount of the remittance transfer funded by the debit card or the ACH transfer from the sender's account. However, if the remittance transfer provider is also the account-holding institution, only § 1005.33 applies to the remittance transfer provider with respect to the amount of the remittance transfer funded by the debit card or the ACH transfer from the sender's account. The Bureau believes the regulation and commentary as adopted provide sufficient guidance in this regard, and additional clarification is not necessary.

33(g) Error Resolution Standards and Recordkeeping Requirements

Pursuant to EFTA section 919(d)(2), the Bureau must establish clear and appropriate standards for remittance transfer providers with respect to error resolution relating to remittance transfers, to protect senders from such errors. EFTA section 919(d)(2) specifically provides that such standards must include appropriate standards regarding recordkeeping, including retention of certain error-resolution related documentation. The Board proposed § 205.33(g) to implement these error resolution standards and recordkeeping requirements.

Specifically, proposed § 205.33(g)(1) provided that a remittance transfer provider must develop and maintain written policies and procedures that are designed to ensure compliance with respect to the error resolution requirements applicable to remittance transfers. The proposed rule also stated that remittance transfer providers must

take steps to ensure that whenever a provider uses an agent to perform any of the provider's error resolution obligations, the agent conducts such activity in accordance with the provider's policies and procedures. As noted in the May 2011 Proposed Rule, this approach is similar to one taken by the Federal banking agencies in other contexts. *See, e.g.,* 12 CFR 1022.90(e) (requiring that an identity theft red flags program exercise appropriate and effective oversight of service-provider arrangements).

One industry commenter suggested that the failure to maintain written policies and procedures should not be an independent cause of action. The Bureau believes that remittance transfer providers must develop written policies and procedures in order to demonstrate compliance to the appropriate regulator. Therefore, the Bureau does not believe the requirement to maintain written policies and procedures that the remittance transfer provider must follow imposes any additional burden.

The Bureau is making one change to proposed § 205.33(g)(1). Specifically, the Bureau is deleting the provision in proposed § 205.33(g)(1) that requires remittance transfer providers to take steps to ensure that when a provider uses an agent to perform any of the provider's error resolution obligations, the agent conducts such activity in accordance with the provider's policies and procedures. The Bureau believes that this provision is no longer necessary in light of the decision under § 1005.35, discussed below, to provide that a remittance transfer provider is liable for any violation of subpart B by an agent when such agent acts for the provider. Proposed § 205.33(g)(1), as revised, is adopted in renumbered § 1005.33(g)(1).

Under proposed § 205.33(g)(2) a remittance transfer provider's policies and procedures concerning error resolution would be required to include provisions regarding the retention of documentation related to an error investigation. Such provisions would be required to ensure, at a minimum, the retention of any notices of error submitted by a sender, documentation provided by the sender to the provider with respect to the alleged error, and the findings of the remittance transfer provider regarding the investigation of the alleged error, which is consistent with EFTA section 919(d)(2).

Proposed comment 33(g)–1 clarified that remittance transfer providers are subject to the record retention requirements under § 1005.13, which apply to any person subject to the EFTA. Accordingly, remittance transfer providers would be required to retain documentation, including documentation related to error investigations, for a period of not less than two years from the date a notice of error was submitted to the provider or action was required to be taken by the provider. Similar to comment 13–1, proposed comment 33(g)–1 provided that the record retention requirements do not require a remittance transfer provider to maintain records of individual disclosures of remittance transfers that it has provided to each sender. Instead, a provider need only retain records to ensure that it can comply with a sender's request for documentation or other information relating to a particular remittance transfer, including a request for supporting documentation to enable the sender to determine whether an error exists with respect to that transfer. The Bureau did not receive any comments on proposed § 205.33(g)(2) or proposed comment 33(g)–1. The Bureau adopts proposed § 205.33(g)(2) substantially as proposed in renumbered § 1005.33(g)(2), but with an amendment to make clear that remittance transfer providers are subject to the record retention requirements under § 1005.13. The Bureau also adopts comment 33(g)–1 with amendments to conform the comment to comment 13–1 and to the changes in § 1005.33(g)(2).

Section 1005.34 Procedures for Cancellation and Refund of Remittance Transfers

EFTA section 919(d)(3) directs the Bureau to issue final rules regarding appropriate remittance transfer cancellation and refund policies for senders within 18 months of the date of enactment of the Dodd-Frank Act. Proposed § 205.34 set forth new cancellation and refund rights for senders of remittance transfers, and they are finalized in renumbered § 1005.34 with changes to the proposed rule, discussed below.

34(a) Sender Right of Cancellation and Refund

Proposed § 205.34(a) stated that a remittance transfer provider must comply with a sender's oral or written request to cancel a remittance transfer received no later than one business day from when the sender makes payment in connection with the remittance transfer provider. In the proposal, the Board recognized that remittance transfers sent by ACH or wire transfer generally cannot be cancelled once the payment order has been accepted by the sending institution. *See, e.g.,* UCC Article 4A–211 (providing that a payment order cannot be cancelled or amended once it has been accepted unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank). The Board stated that it believed that under such circumstances, a bank or credit union making transfers by ACH or wire transfer would likely wait to execute the payment order until the cancellation period had passed, which could delay the receipt of the funds in the foreign country. The Board stated that one business day would provide a reasonable time frame for a sender to evaluate whether to cancel a remittance transfer after providing payment for the transfer, but requested comment regarding whether the proposed minimum time period should be longer or shorter than proposed.

Many industry commenters objected to the proposed cancellation right. One industry commenter believed a cancellation right was unnecessary for remittance transfers because fees incurred by the sender for a remittance transfer were minimal. A Federal Reserve Bank commenter argued that a cancellation right would give senders less incentive to provide accurate information. One industry commenter believed senders could use the cancellation right to take advantage of more favorable exchange rates. The industry commenter believed remittance transfer providers would increase exchange rates to compensate for the risk of loss.

Industry and trade group commenters agreed with the Board that the proposed cancellation period would delay processing routine remittance transfers because remittance transfers sent by ACH or wire transfer would likely be held until the cancellation period passed. Some industry commenters believed that the delay in processing would make it more difficult to determine an exchange rate. A member of Congress urged the Bureau to take into consideration senders' expectation for timely execution of remittance transfers in determining the appropriate cancellation period. A Federal Reserve Bank commenter believed a sender would want to remit funds as quickly as possible, and that the proposed cancellation right could cause senders to make payments using remittance mechanisms that are not subject to Regulation E.

Consumer group commenters believed that the Bureau should require a one business day cancellation period, but suggested that the Bureau study when cancellations typically occur. These commenters suggested that a study

could help the Bureau determine that decreasing the cancellation period could adequately protect senders. Many industry commenters believed that if the Bureau required a cancellation period, the period should be shorter than one business day. The commenters suggested a variety of shorter cancellation periods that could be more appropriate. Some industry commenters believed the cancellation period should be shortened to the same day or an hour. Several industry commenters believed the right to cancel should end when the remittance transfer provider executes the payment instruction. Several industry commenters believed the cancellation period should be shortened to 30 minutes, noting that this time period would be consistent with Texas law.

Some industry commenters suggested that institutions sending remittance transfers through ACH or wire transfer should be exempt from the cancellation rules. Other industry commenters suggested that a sender should have the right to opt out of the cancellation right to have the transfer sent immediately. Another industry commenter suggested that the provider should only be required to cancel if the provider has a reasonable opportunity to act upon the request. One industry commenter believed a right to refund remittance transfers that are unclaimed was a more appropriate cancellation policy. An industry commenter believed the provider should not be required to honor cancellation requests that are made for fraudulent purposes.

Other industry commenters believed the cancellation rules should be disclosure-based. One industry commenter believed that instead of a cancellation right, the provider should disclose that once a sender signs the remittance transaction agreement, it cannot be cancelled and that a failure to carry out a sender's cancellation request once a remittance agreement has been signed is not an error. Another industry commenter believed that if a provider had a cancellation policy, that the Bureau should require that it be properly disclosed.

The Bureau believes that a cancellation right could be helpful to senders of remittance transfers. The Bureau also believes, however, that providers sending remittance transfers through ACH or wire transfer likely will delay transactions for the length of the cancellation period because such transfers are often difficult to retract once they are sent. A cancellation period of one business day thus could prevent a sender from sending a remittance transfer quickly. In addition, a long cancellation period could create an unfair competitive advantage for closed network money transmitters, who are less likely to delay sending a remittance transfer until the end of the cancellation period. Therefore, the Bureau believes a cancellation period shorter than one business day is appropriate.

The final rule requires a 30-minute cancellation period.[83] A 30-minute cancellation period provides the sender the opportunity to review both the pre-payment disclosure and the receipt to ensure that the transfer was sent as the sender intended. However, the 30-minute cancellation period should not substantially delay transactions for senders who want to send funds quickly. The Bureau notes that 30 minutes is the minimum time that a provider must allow senders to cancel transactions, but providers may choose to permit senders to cancel transactions after the 30 minute period has passed. Moreover, even after the cancellation period has passed, senders may still assert their rights under § 1005.33 and obtain a refund or other remedy for transactions where an error occurred.

As discussed above, the final rule sets forth new cancellation requirements in a new § 1005.36 with respect to certain remittance transfers that a sender schedules in advance, including preauthorized remittance transfers. As discussed below, the Bureau believes that when a sender schedules a remittance transfer more than three days in advance of when the remittance transfer is made, a cancellation period tied to when the transfer is made, rather than when the transfer is authorized, is more beneficial to a sender. In those circumstances, the Bureau believes a sender should have the flexibility to cancel the transfer more than 30 minutes after scheduling the transfer to be made, given the potentially significant delay between when the sender authorizes the remittance transfer and when the sender schedules the remittance transfer to be made. Circumstances could change in the intervening period that would negate the purpose of the transfer. At the same time, allowing the sender to cancel certain remittance transfers that a sender schedules in advance for up to 30 minutes after the transfer is made could be burdensome to both senders and providers. A sender may not know the precise time of day that the transfer is scheduled, and such a rule would extend the period of uncertainty for providers, who may delay a transfer until the cancellation period has expired. Consequently, the 30-minute cancellation period described in § 1005.34(a) does not apply to remittance transfers scheduled at least three business days before the date of the transfer, and a remittance transfer provider must instead comply with the cancellation requirements in § 1005.36(c).

Section 1005.34(a) of the final rule provides that, except as provided in § 1005.36(c), a remittance transfer provider shall comply with the requirements of § 1005.34 with respect to any oral or written request to cancel a remittance transfer from the sender that is received by the provider no later than 30 minutes after the sender makes payment in connection with the remittance transfer, if the following two conditions are met.

First, under proposed § 205.34(a)(1), a valid request to cancel a remittance transfer must enable the provider to identify the sender's name and address or telephone number and the particular transfer to be cancelled. Proposed comment 34(a)–1 clarified that the request to cancel a remittance transfer is valid so long as the remittance transfer provider is able to identify the remittance transfer in question. For example, the sender could provide the confirmation number or code that would be used by the designated recipient to pick up the transfer, or other identification number or code supplied by the provider in connection with the transfer. The proposed comment also permitted the provider to request, or the sender to provide, the sender's email address instead of a physical address, so long as the provider can identify the transfer to which the cancellation request applies.

Second, proposed § 205.34(a)(2) provided that a sender's timely request to cancel a remittance transfer is effective so long as the transferred funds have not been picked up by the designated recipient or deposited into an account held by the recipient.[84]

[83] The 30-minute cancellation period is the same time period as the remittance transfer cancellation period under Texas law. *See* TX Admin. Code § 278.052, which provides that a consumer may cancel a transfer for any reason within 30 minutes of initiating the transfer provided the customer has not left the premises. Unlike the Texas law, under § 1005.34(a), a sender may cancel within 30 minutes, regardless of whether the sender has left the premises.

[84] As discussed in the proposal, such accounts need not be accounts held by a financial institution so long as the recipient may access the transferred funds without any restrictions regarding the use of such funds. For example, some Internet-based providers may track consumer funds in a virtual account or wallet and permit the holder of the account or wallet to make purchases or withdraw funds once funds are credited to the account or wallet.

Proposed comment 34(a)–2 reiterated that a remittance transfer provider must include an abbreviated notice of the sender's right to cancel a remittance transfer in the receipt or combined notice, as applicable. In addition, the proposed comment clarified that the remittance transfer provider must make available to a sender upon request, a notice providing a full description of the right to cancel a remittance transfer.

The Bureau did not receive comment on the two conditions on the right to cancel. The final rule adopts the two conditions as proposed in renumbered § 1005.34(a)(1) and (a)(2). In addition, the Bureau adopts comments 34(a)–1 and 34(a)–2 substantially as proposed.

The Bureau is also adding comment 34(a)–3 to explain how a remittance transfer provider could comply with the cancellation and refund requirements of § 1005.34 if the cancellation request is received by the provider no later than 30 minutes after the sender makes payment. The comment states that a provider may, at its option, provide a longer time period for cancellation. The comment clarifies that a provider must provide the 30-minute cancellation right regardless of the provider's normal business hours. For example, if an agent closes less than 30 minutes after the sender makes payment, the provider could opt to take cancellation requests through the telephone number disclosed on the receipt. The provider could also set a cutoff time after which the provider will not accept requests to send a remittance transfer. For example, a financial institution that closes at 5:00 p.m. could stop accepting payment for remittance transfers after 4:30 p.m.

One industry commenter believed that the Bureau should require a sender to contact the remittance transfer provider directly in order to cancel a transaction. The commenter believed that agents should not be required to handle cancellation requests, noting that under certain State laws, the agent does not have a right to the funds paid for a remittance transfer and therefore could not make a refund.

The Bureau believes that a sender's cancellation request should be valid if the sender contacts the agent. Many participants in consumer testing indicated that they would contact an agent first if they encountered a problem with their remittance transfer. The Bureau also believes that requiring a sender to contact a remittance transfer provider by, for example, calling the telephone number listed on the receipt could frustrate the sender's ability to cancel within the 30-minute cancellation period. Consequently, the Bureau clarifies in comment 34(a)–4 that a cancellation request provided by a sender to an agent of the remittance transfer provider is deemed to be received by the provider under § 1005.34(a) when received by the agent. The Bureau understands, however, that an agent may not be able to provide a sender with the refund for legal or operational reasons, and, as discussed below, the final rule does not require an agent to provide a refund if the agent is unable to do so.

Finally, the Bureau is adding a comment to clarify when a sender makes a payment for a remittance transfer, for purposes of determining when the 30-minute cancellation period has passed. Comment 34(a)–5 clarifies that, for purposes of subpart B, payment is made, for example, when a sender provides cash to the remittance transfer provider or when payment is authorized.

34(b) Time Limits and Refund Requirements

Proposed § 205.34(b) established the time frames and refund requirements applicable to remittance transfer cancellation requests. The proposed rule stated that a remittance transfer provider must refund, at no additional cost to the sender, the total amount of funds tendered by the sender in connection with the remittance transfer, including any fees imposed in connection with the requested transfer, within three business days of receiving the sender's valid cancellation request.

Many industry commenters objected to the requirement in the May 2011 Proposed Rule to refund the total amount of funds to the sender. Industry commenters believed that requiring a refund of the total amount of funds raised significant safety and soundness concerns for institutions sending wire transfers because some remittance transfer providers would be unable to recover the funds from subsequent institutions in a transfer chain. One money transmitter commenter stated that once a transfer is booked at an agent location, the provider is obligated to pay the agent its portion of the transfer fees for the transaction. If a sender cancels the transaction after settlement, the provider would be required to negotiate the return of the fee from the agent or bear the total loss of the fee. Similarly, the commenter noted that it acted as an agent of international billers and is obligated to the billers for the funds when it sends data to the biller. Several industry commenters believed requiring a remittance transfer provider to refund all fees could increase costs for senders, since providers may increase fees to account for losses due to refund. A money transmitter commenter also argued that refunding a third party fee or tax could be impermissible under local law.

Industry commenters suggested that the Bureau permit a remittance transfer provider to charge reasonable fees, even if the sender cancels the transaction. Some of the commenters noted that this was consistent with a bank's ability to charge fees in connection with a stop payment order on a check to cover the bank's costs. An industry trade association believed providers should be permitted to charge a $45 fee to stop the transaction. Another industry commenter suggested that if the exchange rate changes between the time the order is placed and the refund is requested such that the amount of local currency originally promised would be equivalent to less U.S. dollars, the refund of the principal should be at the new exchange rate.

Some commenters believed a remittance transfer provider should not be required to provide a refund in certain circumstances. One industry commenter believed a provider should not be required to refund fees charged by intermediaries. Another industry commenter suggested that a provider should not have to refund the portion of any fees that are not attributable to costs incurred by them prior to receiving a cancellation request. A trade association believed a provider should not be required to refund fees when the provider has not made any errors.

The Bureau believes it is appropriate to require a provider to refund the total amount of funds provided by the sender in connection with the remittance transfer. The Bureau believes senders could be discouraged from exercising their cancellation rights if they could not recover the cost of the remittance transfer. Although the Bureau recognizes that a provider may not be able to recover some fees or taxes charged for a transfer, the Bureau believes that the shorter cancellation period adopted in the final rule helps address these concerns. Under the final rule, a provider can mitigate some of the risk of losing fees or taxes charged for a transfer by sending a transfer after the 30-minute cancellation period ends. Therefore, the Bureau is requiring the total amount of funds provided by the sender to be refunded in the final rule in § 1005.34(b) with the additional clarification that refunding the total amount of funds provided by the sender in connection with a remittance transfer requires a provider to refund taxes on the remittance transfer. However, as noted by one industry commenter, for certain jurisdictions, the remittance

transfer provider may be prohibited by law from refunding taxes. Consequently, the requirement in § 1005.34(b) to refund taxes is only to the extent such refund is not prohibited by law. In the final rule, § 1005.34(b) provides that a remittance transfer provider shall refund, at no additional cost to the sender, the total amount of funds provided by the sender in connection with a remittance transfer, including any fees and, to the extent not prohibited by law, taxes imposed in connection with the remittance transfer, within three business days of receiving a sender's request to cancel the remittance transfer.

Proposed comment 34(b)–1 addressed the permissible ways in which a provider could provide a refund. The proposed comment clarified that a remittance transfer provider may, at the provider's discretion, issue a refund in cash or in the same form of payment that was initially tendered by the sender for the remittance transfer. For example, if the sender originally provided a credit card as payment for the transfer, the remittance transfer provider may issue a credit to the sender's credit card account in the amount of the payment.

The Bureau did not receive comment on proposed comment 34(b)–1. However, as discussed above regarding comment 33(c)–6, the Bureau is amending comment 34(b)–1 with respect to refunds if a sender initially provided cash for the remittance transfer. Specifically, comment 34(b)–1 states that a provider may issue a refund by check if a sender initially provided cash for the remittance transfer. For example, if the sender originally provided cash as payment for the transfer, the provider may mail a check to the sender in the amount of the payment.

The Bureau is also finalizing comment 34(b)–2, which addresses costs that must be refunded upon a sender's timely request to cancel a remittance transfer. The comment is adopted substantially as proposed, with amendments clarifying that all funds provided by the sender in connection with the remittance transfer would include taxes that are assessed by a State or other governmental body, to the extent not prohibited by law. Therefore, the final comment states that if a sender provides a timely request to cancel a remittance transfer, a remittance transfer provider must refund all funds provided by the sender in connection with the remittance transfer, including any fees and, to the extent not prohibited by law, taxes that have been imposed for the transfer, whether the fee or tax was assessed by the provider or a third party, such as an intermediary institution, the agent or bank in the recipient country, or a State or other governmental body.

Finally, industry commenters suggested amendments to the requirement in the proposal to provide a refund within three business days of receiving a sender's request to cancel the remittance transfer. One industry commenter believed the refund rule should not require the refund to be delivered to the sender within three business days. The commenter cited examples of when it could be difficult to deliver the funds to the sender in three days, such as when the provider mails a refund check and the check takes several days to be delivered to the sender; when the refund is available at an agent location, but the sender takes several days to pick-up the refund; and when the provider issues a chargeback to the sender's credit or debit card account, but the credit takes several days to appear due to card processing systems. The Bureau notes that the requirement to refund funds to a sender does not require a provider to ensure that a refund is delivered to a sender within three business days after receiving the sender's request to cancel the remittance transfer.

Section 1005.35 Acts of Agents

In most cases, remittance transfers are sent through an agent of the remittance transfer provider, such as a convenience store that has contracted with the provider to offer remittance transfer services at that location. EFTA section 919(f)(1) generally makes remittance transfer providers liable for any violation of EFTA section 919 by an agent, authorized delegate, or person affiliated with such provider, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider. EFTA section 919(f)(2) requires the Bureau to prescribe rules to implement appropriate standards or conditions of liability of a remittance transfer provider, including one that acts through its agent or authorized delegate.[85]

The Board proposed two alternatives to implement EFTA section 919(f) with respect to acts of agents. Under the first alternative (proposed Alternative A), a remittance transfer provider would be strictly liable for violations of subpart B by an agent when such agent acts for the provider. Under the second alternative (proposed Alternative B), a remittance transfer provider would be liable under the EFTA for violations by an agent acting for the provider, unless the provider establishes and maintains policies and procedures for agent compliance, including appropriate oversight measures, and the provider corrects any violation, to the extent appropriate.

Consumer groups, State regulators, and a Federal Reserve Bank supported proposed Alternative A. These commenters stated that Alternative A would provide the greatest incentives for remittance transfer providers to avoid errors and to oversee and audit their agents. Some argued that proposed Alternative A would be consistent with many State laws, and that adopting proposed Alternative B could disrupt efforts to hold providers to stricter liability standards under State law.

In contrast, industry commenters supported the liability standard set forth in proposed Alternative B. These commenters argued that proposed Alternative B would more appropriately address the unique position of agents in the market, while providing protection for consumers by making them whole for the cost of the remittance transfer. These commenters also stated that proposed Alternative B would create an incentive for providers to take an active role in developing compliance policies and procedures and engaging in agent oversight. These commenters also expressed concern about the liability risks associated with proposed Alternative A for the misconduct or a single agent or isolated violations, and that proposed Alternative A could discourage the use of agents.

Based on comments received and the Bureau's further analysis, the final rule adopts proposed Alternative A in renumbered § 1005.35. The Bureau believes that the approach taken in proposed Alternative A is more consistent with the approach generally taken in other Bureau regulations, including Regulation E. For example, under Regulation E's payroll card rules, a financial institution is required to provide initial payroll card disclosures to a payroll account holder. If, by contractual agreement with the institution, a third-party service provider or the employer agrees to deliver these disclosures on the institution's behalf and fails to do so, the issuing financial institution is nonetheless liable for the violation.[86] Similarly, if an agent at a retail establishment fails to provide the disclosures required by § 1005.31, the remittance transfer provider would be liable. The Bureau also believes that proposed Alternative A provides a

[85] *See also* § 1005.30(a), which defines the term ''agent'' for purposes of the rule.

[86] 12 CFR 1005.18.

greater incentive for providers to monitor their agents' activities and to exercise appropriate supervision and oversight than proposed Alternative B.

One commenter suggested that proposed Alternative A could exculpate an agent from responsibility from its own conduct. However, nothing in the rule shields agents from liability, nor does it prevent providers from requiring specific agent conduct in their contracts or negotiating other contractual liability or indemnification clauses.

With respect to commenters' concerns about liability risk, EFTA section 919(f)(2) states that enforcement agencies may consider, in any action or other proceeding against a remittance transfer provider, the extent to which the provider had established and maintained policies or procedures for compliance, including policies, procedures, or other appropriate oversight measures designed to assure compliance by an agent or authorized delegate acting for such provider. Thus, enforcement agencies are permitted to tailor any remedies in light of single agent non-compliance or isolated violations.

Several commenters requested further guidance on what it means for an agent to act for a provider. As discussed in the proposal, some agents have a non-exclusive arrangement with several remittance transfer providers, so that a sender may choose from among the remittance transfer providers at that agent location. If a sender chooses to use Provider A to send funds at the agent location, then Provider B would not be liable for the agent's actions in connection with that transaction, because the agent would be acting for Provider A. As noted above regarding the definition of ''agent'' under § 1005.30(a), the Bureau believes that it is appropriate to defer to State or other applicable law with respect to the relationship between an agent and Provider A.

The final rule also adopts proposed Alternative A's comment 35–1 substantially as proposed. Comment 35–1 explains that remittance transfer providers remain fully responsible for complying with the requirements of this subpart, including, but not limited to, providing the disclosures set forth in § 1005.31 and remedying any errors as set forth in § 1005.33. This is the case even if a remittance transfer provider performs its functions through an agent, and regardless of whether the provider has an agreement with a third party that transfers or otherwise makes funds available to a designated recipient.

Section 1005.36 Transfers Scheduled in Advance

As discussed above in connection with the § 1005.30(e) definition of ''remittance transfer,'' the Board requested comment on whether the rule should exclude from coverage online bill payments, including preauthorized transfers. As noted above, most industry commenters argued that these transfers should be excluded from the final rule. These commenters argued that the provider would not be in a position to know, at the time disclosures are required, the applicable exchange rate for transfers that are scheduled to be sent at a later date.

For the reasons discussed above in the supplementary information to § 1005.30(e), the final rule does not exclude online bill payments from the definition of ''remittance transfer,'' nor does it exclude certain other remittance transfers that a sender schedules in advance, including preauthorized remittance transfers. Thus, the final rule generally requires that disclosures be provided in accordance with the timing and accuracy rules set forth in § 1005.31, both with respect to the required pre-payment disclosure and the required receipt. Estimates may be disclosed, to the extent permitted by § 1005.32.

However, the Bureau believes that preauthorized remittance transfers, whether for bill payments or for other reasons, raise issues relating to the practical aspects of compliance, and potential consumer confusion issues. As discussed above, § 1005.31(e) links the timing requirements for providing pre-payment disclosures and receipts to senders to the time when the transfer is requested and payment is made by the sender. Similarly, the disclosure accuracy rule in § 1005.31(f) relates to when the sender's payment is made. For purposes of subpart B, payment is made when payment is authorized. *See* comments 31(e)–2 and 34(a)–5. Accordingly, if all preauthorized remittance transfers were subject to § 1005.31, providers would have to provide both pre-payment disclosures and receipts at the time the preauthorized remittance transfers are requested and authorized by the sender. Moreover, these disclosures would need to be accurate for the first and all subsequent transfers scheduled in the future (except to the extent estimates are permitted by § 1005.32).

The Bureau believes that in some circumstances, it is impracticable for providers to provide accurate disclosures for subsequent transfers at the time preauthorized remittance transfers are authorized. For example, while a provider may be able to know or to hedge for a specified exchange rate with respect to the first transfer, the provider or the institution involved in the remittance transfer that sets the exchange rate may be reluctant to set a specified exchange rate applicable to all subsequent transfers that are scheduled to be made into the future. This reluctance could arise due to the risk associated with participating in foreign exchange markets, and the manners in which providers and their partners manage such risk. Many wholesale exchange rates are set largely through currency markets in which rates can fluctuate frequently.[87] As a result, whenever there are time lags in between the time when the retail rate applied to a transfer is set, the time when the relevant foreign currency is purchased, and the time when funds are delivered, a provider (and/or its business partner) may face losses due to unexpected changes in the value of the relevant foreign currency.

Providers and/or their partners generally use a variety of pricing, business processes, or hedging techniques to manage or minimize this exchange rate risk. For some, and perhaps many providers (or their partners), the task of managing or minimizing exchange risk may become more complicated or more costly if the amount of time between when the rate is set for a customer and when the transfer is sent increases. Setting the retail rate that applies to a transfer far in advance of when that transfer is sent may require the provider or other parties involved in processing the remittance transfer to use additional or more sophisticated risk management tools.

Some preauthorized remittance transfers may be set up to vary in amount (for example, based on the amount of a utilities bill). In such cases, while the remittance transfer provider may know the amount to be transferred in the first payment, the provider may not know, at the time the sender authorizes the preauthorized remittance transfer, the amounts that will be transferred in subsequent months. Moreover, even if the scheduled amounts to be transferred were fixed, and a provider were permitted to disclose an estimated exchange rate for

[87] Some foreign exchange rates are set by monetary authorities. There are a variety of business models that providers use to fund transfers that are received in foreign currency. The timing of when foreign currency is purchased, the role of the provider in such a purchase, and the role of other intermediaries, partners, agents, and other parties can vary.

future payments, providing estimated exchange rates at the time of the initial request for transfers beyond the first transfer may not be useful to senders—and could even be misleading—because currency fluctuations over several months could cause the actual rate applied to particular transfers to vary substantially. The Bureau recognizes that the market for preauthorized remittance transfers is still developing. Consequently, the Bureau is concerned that if providers were required to provide accurate disclosures for subsequent preauthorized remittance transfers at the time those transfers are authorized, in many cases providers would not be able to offer preauthorized remittance transfer products, which could limit consumer access to a potentially valuable product.

The Bureau also believes that the right to cancel a remittance transfer no later than 30 minutes after the sender makes payment as provided in § 1005.34(a) is not appropriate when applied to certain remittance transfers that a sender schedules in advance, including preauthorized remittance transfers. When a sender schedules a remittance transfer many days—or even months—in advance of when the transfer is to be made, a sender should have the flexibility to cancel the transfer more than 30 minutes after requesting the transfer, given the delay between when the sender authorizes the remittance transfer and when the sender schedules the remittance transfer to be made. In such circumstances, the Bureau believes that remittance transfer providers can accommodate a longer cancellation period without the risk that a sender's cancellation would delay the remittance transfer. Thus, the Bureau believes that a cancellation period tied to when the transfer is made, rather than when the transfer is authorized, is more beneficial to senders.

Therefore, to effectuate the purposes of the EFTA and to facilitate compliance, the Bureau believes it is necessary and proper to exercise its authority under EFTA sections 904(a) and (c) to adopt a new § 1005.36, which sets forth disclosure requirements specifically applicable to preauthorized remittance transfers, as well as specific cancellation requirements for any remittance transfer scheduled by the sender at least three business days before the date of the transfer. Section 1005.36(a) and (b) address specific requirements for the timing and accuracy of disclosures for preauthorized remittance transfers. Section 1005.36(c) addresses the cancellation requirements applicable to any remittance transfer scheduled by the sender at least three business days before the date of the transfer, including preauthorized remittance transfers. Because § 1005.36 only addresses timing, accuracy, and cancellation requirements, the other requirements of subpart B, such as content and formatting requirements and the foreign language requirements, continue to apply to remittance transfers subject to § 1005.36. *See* comment 36–1.

In addition, the Bureau's January 2012 Proposed Rule, published elsewhere in the Federal Register today, solicits comment on alternative disclosure and cancellation requirements with respect to remittance transfers subject to § 1005.36.

36(a) Timing

Section 1005.36(a) sets forth the disclosure timing requirements for disclosures relating to preauthorized remittance transfers. Under § 1005.36(a)(1), for the first scheduled transfer, the provider is required to provide both the pre-payment disclosure described in § 1005.31(b)(1) and the receipt described in § 1005.31(b)(2) in accordance with the timing rules set forth in § 1005.31(e) that generally apply to remittance transfers. In effect, under the final rule, the first scheduled transfer of a preauthorized remittance transfer is treated the same as other individual transfer requests by a sender.

However, under § 1005.36(a)(2), different timing requirements apply to disclosures relating to subsequent scheduled transfers. Under § 1005.36(a)(2)(i), the provider must mail or deliver a pre-payment disclosure, as described in § 1005.31(b)(1), within a reasonable time prior to the scheduled date of each subsequent transfer. If the general timing rule in § 1005.31(e) applied, the provider would be required to provide a pre-payment disclosure at the time the scheduled payments are authorized. By requiring a pre-payment disclosure at this alternative time for each subsequent transfer, senders will receive information about their transfers in closer proximity to the scheduled transfer date, and the provider should be in a better position to make the required disclosures. This approach also reminds senders about the pending transfer, which will enable them to confirm that sufficient funds are available for the transfer. In the January 2012 Proposed Rule published elsewhere in today's **Federal Register**, the Bureau is also soliciting comment on a safe harbor with respect to the reasonable time requirement.

In addition, under § 1005.36(a)(2)(ii), the provider must provide the receipt described in § 1005.31(b)(2) for each subsequent transfer. As with pre-payment disclosures, the Bureau does not believe a receipt given at the time payment for the transfer is authorized would be as useful to senders as a receipt received closer in time to the actual transfer that contains more relevant information about the particular scheduled transfer. The final rule requires the receipt to be mailed or delivered to the sender no later than one business day after the date on which the transfer is made. However, if the transfer involves the transfer of funds from the sender's account held by the provider, the receipt may be provided on or with the next regularly scheduled periodic statement for that account or within 30 days after payment is made for the remittance transfer if a periodic statement is not provided. Section 1005.36(a)(2)(ii) closely tracks the receipt timing rule for receipts in transactions conducted entirely by telephone under § 1005.31(e)(2).

The Bureau believes that these special timing rules for pre-payment disclosures and receipts for subsequent preauthorized remittance transfers will result in more meaningful disclosures to senders than if providers were required to provide these disclosures at the time the transfers were authorized.

36(b) Accuracy

Section 1005.36(b) sets forth requirements for the accuracy of disclosures for preauthorized remittance transfers. For the first scheduled transfer, the disclosure requirements follow the accuracy rule set forth in § 1005.31(f) that generally applies to remittance transfers. *See* § 1005.36(b)(1). Thus, except as permitted by § 1005.32, the pre-payment disclosure and receipt provided for the first scheduled transfer must be accurate when payment is made; that is, at the time the transfer is authorized.

However, for subsequent scheduled transfers, the disclosures described in § 1005.36(a)(2) must be accurate when the transfer is made. *See* § 1005.36(b)(2). Thus, for subsequent preauthorized remittance transfers, the final rule provides that senders must receive an accurate pre-payment disclosure shortly before the transfer is made, and then an accurate receipt shortly after the transfer is made. Providers may continue to disclose estimates to the extent permitted by § 1005.32.

As discussed above, the Bureau believes that it would be problematic to apply the general rule about accuracy in § 1005.31(f) to subsequent preauthorized

remittance transfers. For example, some preauthorized remittance transfers are set up to vary in amount, so the provider cannot predict, at the time such transfers are authorized, the amount to be transferred in subsequent months. Therefore, the provider could not provide an accurate pre-payment disclosure and receipt at the time the preauthorized remittance transfers, and payment for the transfers, are authorized. The accuracy requirement in § 1005.31(f) also would present a challenge to determining an applicable exchange rate for subsequent transfers, in that the provider may not know the exchange rate that will apply to subsequent transfers at the time of authorization. Accordingly, to effectuate the purposes of the Act and to facilitate compliance, the Bureau believes it is necessary and proper to exercise its authority under EFTA sections 904(a) and (c) to adopt special requirements for accurate disclosures about subsequent scheduled transfers in § 1005.36(b). In the January 2012 Proposed Rule published elsewhere in today's **Federal Register**, the Bureau is also soliciting comment on the use of estimates for certain disclosures with respect to the first scheduled transfer.

36(c) Cancellation

Under § 1005.34(a), senders are permitted to cancel a remittance transfer if the request to cancel the remittance transfer is received by the provider no later than 30 minutes after the sender makes payment in connection with the remittance transfer, if certain conditions are met. As noted above, for purposes of subpart B, payment is made when payment is authorized. The Bureau believes that requiring a sender to cancel a transaction no later than 30 minutes after payment is authorized would not be appropriate for certain remittance transfers that a sender schedules in advance, including preauthorized remittance transfers. Such a rule would permit cancellation only for a short time after the transfers are authorized, even though the remittance transfer may not occur for many days, weeks, or months. For example, if on March 1 a sender scheduled a remittance transfer for March 23, under the general cancellation rule, the sender would be required to cancel 30 minutes after the transfer was authorized on March 1, despite the fact that the transfer is not being made until March 23. The Bureau believes it is appropriate to adopt a different cancellation period in these circumstances because payment is authorized well before the transfer is to be made.

Consequently, the Bureau is adopting a special cancellation rule in § 1005.36(c) that it believes is more appropriate for these types of transfers. Section 1005.36(c) states that, for any remittance transfer scheduled by the sender at least three business days before the date of the transfer, a remittance transfer provider shall comply with any oral or written request to cancel the remittance transfer from the sender if the request to cancel: (i) Enables the provider to identify the sender's name and address or telephone number and the particular transfer to be cancelled; and (ii) is received by the provider at least three business days before the scheduled date of the remittance transfer.

The Bureau believes that this time period is more beneficial to senders because it generally provides them more time to decide whether to go through with a scheduled transfer. Senders will have the opportunity to change their minds about sending a transfer if, for example, circumstances change between when the transfer is authorized and when the transfer is to be made. At the same time, the Bureau believes that requiring a sender to cancel at least three days before a transfer is made gives providers sufficient time to process any cancellation requests before a transfer is made. Many financial institutions that permit senders to schedule remittance transfers at least three business days before the date of the transfer are already subject to the stop payment provisions in Regulation E for preauthorized transfers that are EFTs, which require consumers to notify the institution at least three business days before the scheduled date of a preauthorized EFT. *See* § 1005.10(c).

The cancellation provisions in both §§ 1005.34(a) and 1005.36(c) permit a sender to cancel a remittance transfer after the transfer has been authorized. Under both provisions, a cancellation period may expire before the transfer itself is made. As noted above, the Bureau expects financial institutions making transfers by ACH or wire transfer may decide to wait to execute the payment order until the cancellation period has passed because these types of remittance transfers generally cannot easily be cancelled once the payment order has been accepted by the sending institution. For the same reason, the Bureau believes it is appropriate to require a sender to cancel before a transfer is made in § 1005.36(c).

Under § 1005.36(c), a transfer must be cancelled only if the request to cancel is received by the provider at least three business days before the scheduled date of the remittance transfer, so that a provider has sufficient time to prevent the transfer from taking place on the scheduled date. Therefore, under the final rule, only transfers scheduled by the sender at least three business days before the date of the transfer are subject to the cancellation requirements in § 1005.36(c). Remittance transfers that are scheduled less than three business days before the date of the transfer are subject to the cancellation requirements in § 1005.34(a). For example, if a sender on March 1 requests a remittance transfer provider to send a wire transfer to pay a bill in a foreign country on March 3, the sender may cancel up to 30 minutes after scheduling the payment on March 1. Thus, in every case, a sender has an opportunity to cancel a remittance transfer.

The Bureau is adopting commentary to provide further guidance on the application of § 1005.36(c). Comment 36(c)–1 clarifies that a remittance transfer is scheduled if it will require no further action by the sender to send the transfer after the sender requests the transfer. For example, a remittance transfer is scheduled at least three business days before the date of the transfer, and § 1005.36(c) applies, where a sender on March 1 requests a remittance transfer provider to send a wire transfer to pay a bill in a foreign country on March 15, if it will require no further action by the sender to send the transfer after the sender requests the transfer.

Comment 36(c)–1 also clarifies three circumstances where the provisions of § 1005.36(c) do not apply, such that a provider should instead comply with the 30-minute cancellation rule in § 1005.34. For example, § 1005.36(c) does not apply when a sender on March 1 requests a remittance transfer provider to send a wire transfer to pay a bill in a foreign country on March 3. In this instance, § 1005.36(c) does not apply because the transfer is scheduled less than three business days before the date of the transfer. Section 1005.36(c) also does not apply when a sender on March 1 requests that a remittance transfer provider send a remittance transfer on March 15, but the provider requires the sender to confirm the request on March 14 in order to send the transfer. In this example, § 1005.36(c) does not apply because the transfer requires further action by the sender to send the transfer after the sender requests the transfer.

The other example in comment 36(c)–1 demonstrates situations where § 1005.36(c) does not apply because a transfer occurs more than three days after the date the sender requests the transfer solely due to the provider's

processing time and not because a sender schedules the transfer at least three business days before the date of the transfer. For example, § 1005.36(c) does not apply when a sender on March 1 requests that a remittance transfer provider send an ACH transfer, and that transfer is sent on March 2, but due to the time required for processing, funds are not deducted from the sender's account until March 5.

Comment 36(c)–2 clarifies how a remittance transfer provider should treat requests to cancel preauthorized remittance transfers in a manner consistent with the stop payment provisions of Regulation E. *See* § 1005.10(c) and comment 10(c)–2. The comment clarifies that for preauthorized remittance transfers, the provider must assume the request to cancel applies to all future preauthorized remittance transfers, unless the sender specifically indicates that it should apply only to the next scheduled remittance transfer.

Finally, comment 36(c)–3 clarifies that a financial institution that is also a remittance transfer provider may have both stop payment obligations under § 1005.10 and cancellation obligations under § 1005.36. If a sender cancels a remittance transfer under § 1005.36 with a remittance transfer provider that holds the sender's account, and the transfer is a preauthorized transfer under § 1005.10, then the cancellation provisions of § 1005.36 exclusively apply. The Bureau notes that in these circumstances, a provider would not be permitted to require the sender to give written confirmation of a cancellation within 14 days of an oral notification, as is permitted for stop payment orders in § 1005.10(c)(2). The Bureau believes that a sender should be able to orally cancel any remittance transfer, including a remittance transfer that is scheduled at least three business days before the date of the transfer, without the additional burden of providing written confirmation of the cancellation.

In the January 2012 Proposed Rule published elsewhere in today's **Federal Register**, the Bureau is also soliciting comment on the cancellation period for a remittance transfer scheduled by the sender at least three business days before the date of the transfer.

Appendix A—Model Disclosure Clauses and Forms

The Board proposed in Appendix A twelve model forms that a remittance transfer provider could use in connection with remittance transfers. The disclosures were proposed as model forms pursuant to EFTA section 904(a), rather than model clauses pursuant to EFTA section 904(b), in order to clearly demonstrate the general form and specific format requirements of proposed § 205.31(a) and (c). Proposed Model Forms A–30 through A–32 were developed in consumer testing and reflect a format in which the flow and organization of information effectively communicates the remittance disclosures to most consumers. Proposed Model Forms A–30 through A–41 were intended to demonstrate several formats a remittance transfer provider may use to comply with the disclosure requirements of proposed § 205.31.[88]

The Board proposed to amend instruction 2 to Appendix A regarding the use of model forms and added instruction 4 to Appendix A to describe how a remittance transfer provider may properly use and alter the model forms. Specifically, the Board proposed to amend instruction 2 to Appendix A to include references to remittance transfer providers and remittance transfers and updated the numbering of the liability provisions of the EFTA as sections 916 and 917. The proposed instruction therefore clarified that the use of the proposed model forms in making disclosures would protect a remittance transfer provider from liability under sections 916 and 917 of the EFTA if they accurately reflected the provider's remittance transfer services. The Bureau did not receive comments on proposed instruction 2, and it is adopted substantially as proposed, with an addition to reference § 1005.36 that was added in the final rule.

The Bureau also did not receive any comments on proposed instruction 4 to Appendix A, and it is adopted substantially as proposed. The instruction includes one change to address the Bureau's role in reviewing and approving disclosure forms. The instruction also contains modifications to address the addition of § 1005.36 in the final rule. Accordingly, instruction 4 to Appendix A states that the Bureau will not review or approve disclosure forms for remittance transfer providers, but that the appendix contains 12 model forms for use in connection with remittance transfers. The instruction explains that Model Forms A–30 through A–32 demonstrate how a provider can provide the required disclosures for a remittance transfer exchanged into local currency. Model Forms A–33 through A–35 demonstrate how a provider can provide the required disclosures for U.S. dollar-to-U.S. dollar remittance transfers. These forms also demonstrate disclosure of the required content, in accordance with the grouping and proximity requirements of § 1005.31(c)(1) and (2), in both a register receipt format and an 8.5 inch by 11 inch format. Model Form A–36 provides long form model error resolution and cancellation disclosures required by § 1005.31(b)(4), and Model Form A–37 provides short form model error resolution and cancellation disclosures required by § 1005.31(b)(2)(iv) and (vi).

Instruction 4 to Appendix A also explains that a remittance transfer provider may use the language and formatting provided in Forms A–38 through A–41 for disclosures that are required to be provided in Spanish, pursuant to the requirements of § 1005.31(g). It also clarifies that the model forms may contain certain information that is not required by subpart B, such as a confirmation code and the sender's name and contact information. This information is included on the model forms to demonstrate one way of displaying this information in compliance with § 1005.31(c)(4). Any additional information must be presented consistent with a remittance transfer provider's obligation to provide required disclosures in a clear and conspicuous manner.

Instruction 4 to Appendix A further clarifies that use of the model forms is optional. A remittance transfer provider may change the forms by rearranging the format or by making modifications to the language of the forms, without modifying the substance of the disclosures. The instruction clarifies that rearrangement or modification of the format of the model forms is permissible, as long as it is consistent with the form, grouping, proximity, and other requirements of § 1005.31(a) and (c). Providers making revisions that do not comply with this section will lose the benefit of the safe harbor for appropriate use of Model Forms A–30 to A–41.

Instruction 4 to Appendix A also provides examples of permissible changes a remittance transfer provider may make to the language and format of the model forms without losing the benefit of the safe harbor. For example, a remittance transfer provider may substitute the information contained in the model forms that is intended to demonstrate how to complete the information in the model forms—such

[88] Proposed Model Forms A–33 through A–35 and proposed Model Form A–37 were variations of the forms that were developed in consumer testing. Proposed Model Forms A–38 through A–40 were Spanish translations of proposed Model Forms A–30 through A–32. The language in the long form error resolution and cancellation notice in proposed Model Form A–36, and its Spanish translation in Model Form A–41, were based on the model form for error resolution in Regulation E. *See* 12 CFR part 1005, Appendix A to part 1005, Form A–3.

as names, addresses, and Web sites; dates; numbers; and State-specific contact information—with information applicable to the remittance transfer. A remittance transfer provider may also eliminate disclosures that are not applicable to the transfer, as permitted under § 1005.31(b), or provide the required disclosures on a paper size that is different from a register receipt and 8.5 inch by 11 inch formats. A remittance transfer provider may correct or update telephone numbers, mailing addresses, or Web site addresses that may change over time. This example applies to all telephone numbers and addresses on a model form, including the contact information of the provider, the State agency, and the Consumer Financial Protection Bureau. The instruction clarifies that adding the term ''Estimated'' or a substantially similar term and in close proximity to the estimated term or terms, as required under § 1005.31(d), is a permissible change to the model forms. A provider may provide the required disclosures in a foreign language, or multiple foreign languages, subject to the requirements of § 1005.31(g), without losing the benefit of the safe harbor.

Instruction 4 to Appendix A includes an additional example of a permissible change a remittance transfer provider may make to the language and format of the model forms without losing the benefit of the safe harbor to reflect the addition of § 1005.36 in the final rule. The instruction clarifies that a remittance transfer provider may substitute cancellation language to reflect the right to a cancellation made pursuant to the requirements of § 1005.36(c). For example, for disclosures provided for a preauthorized remittance transfer, a provider could replace the statement that a sender can cancel the remittance transfer within 30 minutes with a statement that a sender may cancel up to three business days before the date of each transfer. Finally, instruction 4 to Appendix A also clarifies that adding language to a form that is not segregated from the required disclosures is impermissible, other than as permitted by § 1005.31(c)(4).

Although the Bureau did not receive comments on the instructions to Model Forms A–30 through A–41, the Bureau did receive suggested changes to the terminology used in and the formatting of the model forms. For example, consumer group commenters believed that the amount of the cost of the transaction expressed as ''Total'' in the proposal should be labeled in bold as ''Total cost to you of this transfer'' and that ''Total to recipient'' should be labeled in bold as ''Total amount recipient should receive.'' The commenters also believed the term ''Total Amount'' was too generic and instead should be ''Amount Transferred.'' An industry commenter believed that fees and taxes charged by entities other than the remittance transfer provided should be labeled as ''Receive'' or ''Payout'' fees and taxes, rather than ''Other'' fees and taxes.

The Bureau believes that the proposed terms sufficiently describe the amounts disclosed on the model forms. The proposed terms were used in consumer testing, and nearly all participants understood the amounts that were disclosed. Moreover, the Bureau believes that requiring bolding or similar font requirements could pose compliance difficulties for remittance transfer providers that print the disclosures on a register or other printing device that does not permit such font changes, and participants in consumer testing did not have difficulty finding this information on the forms. Thus, the Bureau is adopting the terms and format as proposed.

Consumer group commenters asserted that the content of the long form error resolution and cancellation notice in Model Form A–36 was misleading and not consumer friendly. The commenters provided edits to the disclosure that the commenter believed would be more helpful to a sender. The long form error resolution and cancellation disclosure is based on the model form for error resolution in Regulation E. *See* 31 CFR part 1005, Appendix A to part 1005, Form A–3. The Bureau believes that any changes to this model form should be made in conjunction with the corresponding changes to existing Regulation E model forms and that such changes should be subject to consumer testing. Therefore, the Bureau is adopting the content of Model Form A–36 as proposed.

Other commenters suggested substantive changes that, if adopted, would result in changes to the model forms. For example, some industry commenters suggested that the Bureau eliminate the requirement to disclose fees and taxes charged by a person other than the remittance transfer provider and that the model forms should instead indicate generally that other fees and charges may apply. Similarly, industry commenters suggested the exchange rate and funds availability date should be permitted to be estimated and, therefore, the model forms should state that these disclosures are subject to change. As discussed above, the Bureau is not adopting these substantive changes in the final rule. Consequently, the Bureau is not adopting the corresponding changes to the model forms.

Finally, a consumer advocate suggested that a fraud warning should be added to the model forms. Such a warning is not required in the statute, and the Bureau believes that the disclosures should be limited to information relating to cost, error resolution, and cancellation. Adding more information and warnings to forms could overwhelm a sender and result in the sender not reading any of the information on the form. Therefore, the Bureau is not adding such a fraud warning to the model disclosures.

The Bureau is, however, making two changes to the model forms that reflect changes from the proposal to the final rule, as discussed above. First, the Bureau is requiring that fees and taxes must be disclosed separately. *See* comment 31(b)(1)–1. As such, the model forms have been amended to demonstrate how a remittance transfer provider would disclose fees separately from taxes. Second, the final rule provides that a sender may cancel a transaction within thirty minutes of making payment, rather than within one business day, as proposed, and the model forms have been amended to reflect this change.[89]

The Bureau is making additional changes to Model Form A–37 in the final rule. The Bureau is removing sample phone number, Web site, and remittance transfer company name that was included in the proposed form. Unlike the model pre-payment disclosures, receipts, and combined disclosures, sample information is not necessary to demonstrate how the short form error resolution and cancellation disclosures should be completed. Thus, in the final rule, Model Form A–37 includes brackets indicating where this information should be entered by a provider. The forward slash used in the proposal to indicate that funds may be picked up or deposited is also replaced with the word ''or.'' The Bureau is also amending the abbreviated statement about senders' error resolution rights on Model Form A–37 to include a more explicit statement informing senders that they have such rights.[90]

The Bureau is also making minor technical changes in some of the model forms in the final rule for clarity. Plus signs are added to some forms to indicate where fees and taxes will be added to a transfer amount to better

[89] As noted above, this cancellation language may be amended to the extent § 1005.36(c) applies.

[90] These changes were also made to Model Forms A–31, A–32, A–34, and A–35 where the language in Model Form A–37 is used. The changes are also reflected in the Spanish language disclosures.

demonstrate the calculation of the total amount paid by the sender.[91] The internet address for the sample State regulatory agency is also amended on some forms with the suffix ''.gov'' rather than ''.com.'' [92] The toll-free telephone numbers for the Bureau have also been added to some forms.[93]

As discussed above, Model Forms A–38 through A–41 may be used when disclosures are required to be disclosed in Spanish, pursuant to the requirements in § 1005.31(g). The Board proposed model disclosures in Spanish to facilitate compliance with this foreign language requirement and requested comment on the disclosures. One commenter submitted spelling, grammar and verb tense revisions to the Spanish language disclosures. The commenter believed the Spanish language disclosures, as proposed, did not adequately communicate the intent of the language used in the English disclosures.

Certain commenter-suggested revisions have been made in Model Forms A–38 through A–41 to correct inaccuracies in the proposed Spanish language disclosures. However, in other instances, the suggested revisions have not been made. Although the proposed language and the commenter-suggested revisions reflected stylistic variations, both contained accurate translations of the English language model forms. Therefore, the technical corrections are included in Model Forms A–38 through A–41 in the final rule. The Bureau also made stylistic changes to the Spanish language model forms that it believes better tracks the language in the English language disclosures.[94]

Effective Date

The Dodd-Frank Act requires the Bureau to issue final rules on certain provisions of EFTA section 919 within 18 months from the date of enactment. However, the statute does not specify an effective date for these provisions. The Board solicited comment in the May 2011 Proposed Rule on whether an effective date of one year from the date the final rule is published, or an alternative effective date would be appropriate.

One industry commenter agreed that 12 months would be an appropriate time period to implement the remittance transfer provisions. However, several other industry commenters recommended that the effective date of the final rule be set 18 to 24 months from the date that the final rule is issued. In suggesting this time period, money transmitter commenters stated that they would need time to change hardware printers and software. Agents of remittance transfer providers would also need time to integrate software from the remittance transfer provider with their point of sale systems. Industry commenters also requested time to deplete their existing form stock, develop and implement proper training programs, and amend contracts with agent locations worldwide.

Financial institution commenters cited the need for messaging, settlement, and payment systems, such as the ACH network and SWIFT, to evaluate and possibly amend operating rules, message formats, contracts, and participant agreements. These commenters also stated they would need time to: Complete processing system modifications; develop disclosures, operating procedures, marketing and employee training materials; and make modifications to agreements with correspondents and other intermediaries. They further requested that the Bureau take into account other regulatory requirement set forth in the Dodd-Frank Act that financial institutions must implement in addition to the remittance transfer provisions.

Given the time period set for compliance with other consumer financial protection regulations, the Bureau believes it is appropriate to set an effective date one year from the date of publication of the final rule in the **Federal Register**. In setting this effective date, the Bureau believes that this time frame best balances the significant consumer protection interests addressed by this rule against industry's need to make systems changes to comply with the final rule. Therefore, the disclosure requirements in § 1005.31 will apply to remittance transfers that are requested by a sender on or after the effective date. Only remittance transfers for which a sender made payment on or after the effective date will be eligible for the error resolution and refund and cancellation requirements of §§ 1005.33 and 1005.34. For preauthorized remittance transfers, the disclosure requirements in § 1005.36(a) and (b) will apply to preauthorized remittance transfers authorized by a sender on or after the effective date. For transactions subject to § 1005.36(c), the error resolution and refund requirements of §§ 1005.33 and 1005.34 and the cancellation requirements of § 1005.36(c) will apply to transfers authorized by a sender on or after the effective date.

VII. Section 1022 Analysis

A. Overview

Section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential costs, benefits, and impacts of its regulations. Specifically, the Bureau is to consider the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services; the impact of proposed rules on insured depository institutions and insured credit unions with less than $10 billion in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

The final rule implements section 1073 of the Dodd-Frank Act, which creates a comprehensive system of consumer protections for consumers who electronically transfer funds to recipients in foreign countries. Specifically, as discussed above, the statute: (i) Mandates disclosure of the exchange rate and the amount to be received by the remittance recipient, prior to and at the time of payment by the consumer for the transfer; (ii) provides for Federal rights on consumer cancellation and refund policies; (iii) requires remittance transfer providers to investigate disputes and remedy errors regarding remittance transfers; and (iv) establishes standards for the liability of remittance transfer providers for acts of their agents and authorized delegates.

Prior to the Dodd-Frank Act amendments, international money transfers fell largely outside the scope of Federal consumer protections. In the absence of a consistent Federal regime, legal requirements and practices regarding disclosure have varied. Congressional hearings prior to enactment of the Dodd-Frank Act focused on the need for standardized and reliable pre-payment disclosures, suggesting that disclosure of the amount of money to be received by the designated recipient is particularly critical.

The analysis below considers the benefits, costs, and impacts of the key provisions of the final rule: the provisions regarding disclosures and estimates, error resolution, cancellation and refund, and agent liability. With respect to each provision, the analysis

[91] *See,* Model Forms A–30 through A–35 and A–38 through A–40.

[92] *See,* Model Forms A–31, A–32, A–34, A–35, A–39, and A–40.

[93] *See,* Model Forms A–31, A–32, A–34, A–35, A–39, and A–40.

[94] One of the stylistic changes made to the Spanish language model forms was to change the format for the dates to eliminate possible consumer confusion as to the day, the month, and the year. Similar changes have been made to the English language model forms for consistency.

considers the benefits to consumers and the costs to providers, as well as possible implications of these costs for consumers.[95] The analysis also considers certain alternative provisions that were considered by the Bureau in the development of the rule.

The analysis examines the benefits, costs, and impacts of the key provisions of the final rule against a pre-statutory baseline (*i.e.,* the benefits, costs, and impacts of the statute and the regulation combined). The Bureau has discretion in future rulemakings to choose the most appropriate baseline for that particular rulemaking.

The Bureau notes at the outset that there is a limited amount of data that is publicly available and representative of the full universe or population of remittance transfers with which to quantify the potential benefits, costs, and impacts of the rule. Specifically, though some surveys have measured the characteristics of certain types of remittance consumers or certain types of remittance transfers, there is little publicly available data that represents the entire remittance transfer market and that links the characteristics of consumers who send remittance transfers to the frequency, size and cost of the transfers and the specific services and channels used. There is also limited data on remittance consumer shopping, error resolution, and purchase behavior from which to estimate how new protections might change consumer behavior and the amount consumers pay for remittance transfers. This data would be essential for quantifying the benefits to consumers of the provisions of the rule.

Regarding costs to providers of complying with the rule, there is no representative and publicly available data on the current provision, accuracy, and completeness of pre-payment disclosures and receipts across the remittance transfer market, the frequency and treatment of cancellations and errors, or the frequency of practices by agents for which providers would become liable under the regulation. Additionally, industry commenters did not provide precise or comprehensive information from which to estimate such figures. Such data would provide the starting point for quantifying the cost to providers of complying with the rule. To measure such costs fully would also require quantifying the cost of closing the gap between current practices and those provided for by the rule, including the costs of providing disclosures or addressing errors. Industry commenters did not provide the Bureau with any quantitative data regarding such costs.

In light of the lack of data, this analysis generally provides a qualitative discussion of the benefits, costs, and impacts of the final rule. General economic principles, together with the limited data that is available, provides considerable insight into these benefits, costs and impacts but they do not support a quantitative analysis.

As discussed above, the May 2011 Proposed Rule was issued by the Board prior to the transfer of rulemaking authority to the Bureau. The May 2011 Proposed Rule therefore did not contain a proposed Dodd-Frank Act section 1022 analysis, and although the Board did generally request comment on projected implementation and compliance costs, commenters provided little data in response. Furthermore, because of the short time period for publication of the final rule imposed by the statutory deadline, the Bureau's ability to gather additional information or develop new data sources after it assumed rulemaking authority was constrained.

B. Potential Benefits and Costs to Consumers and Covered Persons

Disclosure of Accurate Exchange Rates, Fees, and Taxes

The final rule generally requires remittance transfer providers to provide to senders a pre-payment disclosure with accurate information about, among other things, the exchange rate, fees, and taxes applicable to the transaction, and the amount to be provided to the designated recipient. In addition, the provider must generally give the sender a receipt that contains, among other things, the date of availability of funds to the designated recipient, as well as the information contained in the pre-payment disclosure.

The disclosures required by the Dodd-Frank Act and the final rule provide many benefits to consumers. Consumers who have reliable information about how much they must spend in order to deliver a specific amount of foreign currency to a recipient are better able to manage all of their household income than are consumers who lack this information. This may be particularly important for low-income immigrants who are trying both to manage their personal budgets in the United States and support friends or family abroad.

Disclosing the amount of currency to be provided to the recipient enables consumers to engage in comparison shopping, since it accounts for both the exchange rate used by the remittance transfer provider and fees and taxes that are deducted from the amount transferred. Consumers also benefit, however, from having reliable information about the individual components of remittance transfer pricing (*i.e.,* exchange rates, fees, and taxes). If the amount the provider commits to deliver is different from the amount the consumer is expecting, the information about the components will help the consumer identify the reason for the difference. The consumer can then better determine the benefits to additional comparison shopping. Consumers may also be less susceptible to deceptive and unfair business practices, and those practices may be less common, when the exchange rate, fees, and taxes are all clearly and reliably disclosed and the consumer knows (and can communicate to the recipient) the amount that the recipient should expect to receive.

Finally, consumers who shop for remittance transfers place competitive pressure on providers, who may lower their prices in response. This benefits all consumers who send remittance transfers, by either allowing them to send more money abroad for the same price, or by allowing them to save on the amount they spend on such transfers.

By requiring remittance transfer providers to provide accurate disclosures to consumers, the Dodd-Frank Act and the final rule thus require providers to lock in their prices (at the time of the transaction, except when estimates are allowed). As discussed below, providers that operate through closed network systems will face different costs of making this commitment than will providers that operate through open network systems.

Providers that use closed network systems are generally money transmitters, though some depository institutions and credit unions may also offer remittance transfers through closed networks. Insofar as they use the closed network system, money transmitters or other providers often have contractual relationships with agents in the United States through which consumers initiate transfers, as well as agents abroad, which may be used to distribute transfers in cash to recipients. Alternatively, these providers may instead have direct relationships with intermediaries that, in turn, contract with and manage individual agents.

Providers that use closed network systems, through the terms of their contractual relationships, usually have

[95] Costs incurred by providers may, in practice, be shared among providers' business partners, such as agents or foreign exchange providers. To the extent that any of these business partners are covered persons, the rule may impose some cost on them as well.

some ability and authority to obtain the information needed for the disclosures from their agents or other network partners. Nevertheless, the disclosure requirements will likely impose some costs on closed network providers (and potentially some of their business partners), to the extent that such institutions need to update systems, revise contracts, change communication protocols and business practices in order to receive the necessary information and comply with the disclosure requirements. Furthermore, closed network providers that currently offer ''floating rate'' products will need to adjust their business processes and relationships for setting exchange rates, and change the way they manage foreign exchange rate risk.

On the other hand, providers that operate through open network systems are in a different situation. This group primarily includes depository institutions and credit unions, although comments from industry stated that some institutions that are not depositories or credit unions (including some money transmitters) also use open network systems for certain transactions. Providers that operate through open networks generally do not have direct relationships with all disbursing entities. In some cases, intermediary institutions and recipient institutions may charge fees in connection with the transaction; often these fees are deducted from the principal amount transferred, although some fees may be charged to the sending institution instead. With regard to open networks today, there is no global practice of communications by intermediary and recipient institutions that do not have direct relationships with a sending institution regarding fees deducted from the principal amount or charged to the recipient, exchange rates that are set by the intermediary or recipient institution, or compliance practices. Similar challenges exist for some types of international ACH transactions. Thus, to the extent providers that use open networks are required to disclose information about fees or taxes, they may find it difficult to obtain information that must be provided in the disclosures.

These considerations are relevant for all open network providers, but § 1005.32(a) of the final rule provides insured depositories and credit unions with an exception to the requirements to provide accurate disclosures under certain circumstances until July 21, 2015. Thus, to the extent applicable, insured depository institutions and credit unions are in a separate category for purposes of this analysis and are discussed in the next section below. The discussion that follows applies to money transmitters or other institutions that are not insured depository institutions or insured credit unions that send remittance transfers through open network systems.[96] Comments on the proposed rule did not provide the Bureau with data on the volume of transactions done by such entities.

Comments on the proposed rule did not provide data on the number of entities that use open network systems (besides insured depository institutions and credit unions), how costly it may be for them to obtain the required information, or how difficult it may be for them to change practices so the information is not required. These costs may not be knowable until some providers attempt to meet the new requirements in the year before the implementation date. The required changes may be extensive, however. It is possible that money transmitters or other institutions using open network systems may increase prices on the products that use open network systems or stop providing those products altogether.

Disclosure of Estimated Exchange Rates, Fees, and Taxes

Section 1005.32 of the final rule implements two statutory exceptions that permit remittance transfer providers to disclose ''reasonably accurate estimates'' of the amount of currency to be received, rather than the actual amount, under certain narrow circumstances. The first exception, which sunsets on July 21, 2015 unless the Bureau makes a finding to support an extension for up to five additional years, permits estimates where an insured depository institution or insured credit union is unable for reasons beyond its control to know the actual amount of currency to be received at the time that a consumer requests a transfer to be conducted through an account held with the provider. The second exception enables remittance transfer providers of all types to provide estimates where foreign countries' laws or methods of transfer to a country prevent the providers from knowing the amount to be received. Section 1005.32(c) of the final rule prescribes methods that may be used to provide the estimates permitted by the exceptions. Providers may also use any other method to disclose estimates as long as the amount of funds the recipient actually receives is the same as or greater than the disclosed estimate of the amount of funds to be received.

First Exception

The first exception applies when an insured depository institution or insured credit union is unable for reasons beyond its control to know the actual amount of currency to be received at the time that a consumer requests a transfer to be conducted through an account held with the provider. The Bureau assumes that the exception will most frequently apply to wire transfers by insured depository institutions and credit unions, though it may also apply, for example, to some transactions sent through the FedGlobal ACH system, or other mechanisms.[97]

Data from the Federal Deposit Insurance Corporation and the National Credit Union Administration indicate that there are about 7,445 insured depository institutions and 7,325 insured credit unions that may be eligible for the exception. Regulatory filings by insured depository institutions, however, do not contain information about the number that send consumer international wire transfers. Data from the National Credit Union Administration indicate that there are approximately 7,325 insured credit unions in the United States as of September 2011. About half offer international wire transfers. Additionally, regulatory filings by insured credit unions contain an indicator for ''low cost wire transfers.'' These are wire transfers offered to members for less than $20 per transfer, and about half of insured credit unions offer low cost wire transfers. Though the Bureau does not have exact data on the number of credit unions that offer wire transfers to consumers, the Bureau assumes that a similar fraction offer consumer international wire transfers.

The above discussion on the qualitative benefits to consumers from accurate disclosures also generally applies where estimates are used. Although disclosures with ''reasonably accurate estimates'' are somewhat less reliable than those with actual amounts, they still provide consumers with valuable information that they currently do not generally receive from insured

[96] More precisely, the discussion applies to entities that use open network systems to direct and make payment to a beneficiary. This is in contrast to entities that may direct and effectuate payment to the recipient through a closed network system but use wire transfers to facilitate settlement among the various parties.

[97] The Board reported in July 2011 that only around 410 U.S. depository institutions had enrolled in the FedGlobal ACH service; that only about a third of those institutions sent transfers in a typical month; and that some of the enrolled institutions do not offer the FedGlobal ACH services to consumer customers. *Board ACH Report* at 12 & n.53.

depository institutions or credit unions. The exception also benefits consumers by, as discussed below, reducing the costs on insured depository institutions and credit unions of providing disclosures, and therefore making it less likely that they will increase costs to consumers or decrease services.[98] Thus, relative to accurate disclosures, estimated disclosures strike a different balance between accuracy and access, offering less accuracy but potentially preserving greater access.

Comments on the proposed rule did not provide any data on how costly it may be for insured depositories and credit unions to use the allowed methods of estimation. The methods do not necessarily require that sending institutions obtain information from receiving institutions with which they have no contractual or control relationship. To calculate estimates, providers may choose to rely on information about typical or most recent fees charged by the recipient institution and intermediaries in the transmittal route to that institution (or other institutions that set exchange rates that apply to remittances). Information is also required about foreign tax rules and rates. Thus, as discussed below, the final rule may require revisions of contract arrangements and communication systems, to ensure that depository institutions can receive the information needed for estimates (when permitted) or exact disclosures (when required) and provide that information to customers at a branch or elsewhere at the appropriate time. Third parties may have some incentive to gather this information and deliver it to depositories and credit unions, in order to preserve the remittance transfer line of business. However, the costs of doing so may be high and potentially prohibitive for transfers to some countries.

The rule also permits insured depositories and credit unions to use methods not specified in the rule to calculate estimates, provided the estimate for the amount of funds the recipient will receive proves to be less than or equal to the amount of funds the recipient actually receives. Insured depositories and credit unions will differ in their capacity and willingness to make these estimates and to manage the risk and error resolution expenses for estimates of currency to be received that are too high. For insured depositories and credit unions that undertake this approach, the incentive to attract consumers who comparison shop makes it likely that they will disclose reasonable estimates and that the estimates will improve over time.

The costs of compliance will ultimately be shared among the consumers and businesses involved in remittance transfers in ways that are difficult to predict. One credit union submitted data showing that little revenue, as a share of total income, came from consumer international wire transfers.[99] Other credit union and credit union trade association commenters indicated that consumer international wire transfer services are not a financially significant line of business for them. In some cases, commenters stated, the service is provided as a convenience to customers and prices just cover costs. This suggests that some credit unions may fold the costs of complying with the rule into the prices they charge consumers or stop offering the service. Depository institutions that provide consumer international wire transfer services similar to those provided by credit unions may face similar costs of compliance.

The statutory exception for insured depository institutions and credit unions expires on July 21, 2015, unless the exception is extended by the Bureau as permitted by the statute. Once the exception expires, insured depository institutions and credit unions will need to provide accurate disclosures. At that time, the benefit to consumers from the expiration, in terms of increased accuracy, will be minimal if the estimated disclosures tend to be accurate but significant if the estimated disclosures tend to be inaccurate. The cost to providers from the expiration, and thus to consumers in terms of higher prices or reduced access, will depend on business practices by depository institutions and credit unions currently eligible for the exception at that time. The Bureau lacks data to predict such practices with reasonable confidence.

Second Exception

The second exception permanently permits use of reasonably accurate estimates where a foreign country's laws or methods of transfer to a country prevent remittance transfer providers from determining the actual amount of currency to be received. The rule provides a safe harbor for reliance on a list of countries to be published and periodically updated by the Bureau. Consumers benefit from the exception since it reduces the chance that remittance transfer services to these countries will be discontinued or disrupted. Consumers will also benefit from the Bureau's publication and periodic update of a safe harbor country list since such a list will reduce the chance that consumers will receive estimated disclosures when they should receive accurate ones. Likewise, transfer providers will benefit from the Bureau's publication and periodic update of a list since this will reduce the burden on them of having to assess the laws of and transfer methodologies used in countries with which they do not conduct frequent transfers.

Formatting, Retainability, and Language Requirements in Disclosures

EFTA section 919(a)(3)(A) states that disclosures must be clear and conspicuous. The final rule incorporates this requirement and adds grouping, proximity, prominence, size and segregation requirements to ensure that it is satisfied. The grouping requirement ensures that the disclosures present, in logical order, the computations that lead from the amount of domestic currency paid by the sender to the amount of foreign currency received by the recipient. The other requirements ensure that senders see important information and are not overloaded or diverted by less critical information. The final rule provides model forms that meet these requirements. These forms were consumer-tested for effectiveness.[100]

The specific format requirements impose a one-time cost on certain providers, for programing or updating their systems to produce disclosures that comply with the requirements. The cost is mitigated by the fact that the rule provides model forms and permits providers to use any size paper. Furthermore, as discussed below, the final rule provides certain exceptions to certain of the formatting requirements for transactions conducted entirely by telephone orally or via mobile application or text message. For transactions that must comply with the formatting requirements, the cost depends on the systems in place and the

[98] Consumers generally benefit from having access to both open network products like wire transfers and closed network products like those used offered by money transmitters, to the extent that both types of products meet any particular consumer's needs.

[99] Navy Federal Credit Union has about $45 billion in assets. It states that it processed 19,248 wire transfers in 2010 and charged $25 per transfer. It had total income of over $3 billion in 2010, so the wire income of about $500,000 was about two tenths of one percent of total income. United Nations Federal Credit Union did submit data indicating that wire transfers were about 2% of total income. However, UNFCU serves a distinctively international community.

[100] For a discussion of how the design of disclosures can help consumers, *see Bureau 2011 Report.*

extent to which providers already give disclosures that comply with the requirements.

EFTA section 919(a)(2) and § 1005.31(a)(2) generally require disclosures to be retainable. Retainable disclosures generally provide greater benefits to consumers than do non-retainable disclosures. For example, it is usually easier for consumers to track the costs of remittance transfers over time and across providers when disclosures are retainable. For transactions conducted entirely by telephone, however, providing a retainable pre-payment disclosure may be inconvenient or impracticable.

EFTA section 919(a)(5)(A) allows the Bureau to permit oral pre-payment disclosures for transactions conducted entirely by telephone. In addition to implementing this general statutory exception, the regulation provides an additional alternative for transfers conducted entirely by telephone via mobile application or text message. Specifically, § 1005.31(a)(5) of the final rule provides that for such transfers, the pre-payment disclosure may be provided orally or via mobile application or text message. Disclosure provided via such methods need not be retainable by the consumer. *See* § 1005.31(a)(2). When used, this provision likely benefits consumers who initiate transfers via mobile application or text message. First, it allows the transaction to proceed more quickly using the tools that the consumer used to initiate the transaction (mobile application or text message). Second, while the disclosures may not be permanently retainable in this format as compared to an email or paper disclosure, may be able to be retained temporarily without further action by the consumer and thus may be more useful and convenient to consumers than oral disclosures.

The final rule permits providers, at their option, to provide pre-payment disclosures orally or via mobile application or text message for transactions conducted entirely by telephone via mobile application or text message. Thus, this provision of the rule does not in itself impose additional costs on providers, and a provider determines whether to incur the cost of the alternative. Overall, this provision of the final rule benefits consumers and facilitates the development of additional modes of remittance transfer compared to the alternative in which the only non-retainable pre-payment disclosure is an oral disclosure.

Finally, EFTA section 919(b) provides that disclosures required under EFTA section 919 must be made in English and in each of the foreign languages principally used by the remittance transfer provider, or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office. The final rule incorporates and modifies the statutory provision in § 1005.31(g). In particular, § 1005.31(g)(1)(ii) reduces the number of foreign language disclosures that would otherwise be required to be disclosed by the statute. Under the statute, the provider must provide the sender with written disclosures in English and in each foreign language principally used by the provider to advertise, solicit, or market remittance transfers at a particular office. Section 1005.31(g)(1)(ii) allows providers instead to provide written disclosures in English and in the one foreign language primarily used by the sender with the provider to conduct the transaction or assert the error, provided such foreign language is principally used by the provider to advertise, solicit or market remittance transfers at a particular office. The rule therefore provides a closer link between the disclosures and the language a sender uses with a provider to conduct a particular transaction or to assert an error.

Consumers generally benefit from disclosures that effectively convey information that is relevant and accurate in a language that they can understand. A written disclosure that consists of information in languages the consumer does not understand provides a substantial amount of information that is not relevant to that individual consumer. Thus, relative to the statute, this provision of the final rule allows providers to offer consumers a more effective written disclosure that may be tailored to the language the sender uses with the provider to conduct a particular transaction or to assert an error. This provision of the final rule does not, however, require providers to offer different written disclosures from those required by the statute. Thus, this provision of the rule does not in itself impose costs on providers other than those required by the statute, and a provider determines, at its option, whether to incur the cost of the alternative.

Error Resolution

EFTA section 919(d) requires remittance transfer providers to investigate and resolve errors upon receiving oral or written notice from the sender within 180 days of the promised date of delivery. The obligation includes situations in which the recipient did not receive the amount of currency by the date of availability stated in the disclosures provided under other parts of the rule. The statute requires the Bureau to establish ''clear and appropriate'' standards for error resolution to protect senders from such errors, including recordkeeping standards relating to senders' complaints and providers' findings of investigation. As explained above, the Bureau has taken an approach that is generally similar to existing error resolution rights for electronic fund transfers under EFTA and Regulation E.

An error may occur if the provider fails to deliver the promised amount of foreign currency to the recipient by the guaranteed date.[101] There are generally three cases of this type of error. In one case, funds are delivered on time but the amount is less than the amount disclosed. As designated by the sender, the provider must either refund to the sender or transfer to the recipient the portion of the funds at no additional charge that were not received. In the second case, the funds are delivered late but the amount delivered is as correctly disclosed. In this case the provider must refund all of the fees, and to the extent not prohibited by law, taxes imposed on the transfer. In the final case, all of the funds are delivered late, and the amount is wrong or the funds are never delivered. In this case the consumer receives both remedies described above—the provider must either refund or transfer the funds that were not received at no additional charge (unless the sender provided incorrect or insufficient information) and the provider must refund all of the fees, and to the extent no prohibited by law, taxes imposed on the transfer (unless the sender provided incorrect or insufficient information). The discussion above refers to this refund provision as ''a separate cumulative remedy.''

The benefits to senders from the error resolution procedures specified in the rule are straightforward. When an error occurs, senders benefit from the provision that providers must complete the transaction at no additional charge or return undelivered funds. Senders may also benefit from knowing that the error resolution procedures exist since they make remittance transfers less risky. The magnitude of these benefits depends on the frequency of errors, the financial and other costs that senders currently bear when errors occur, and the risk aversion of senders. Senders may also benefit from the fact that providers are likely to be deterred from committing errors by having to complete the transaction at no additional charge or return undelivered funds and also refunding fees and, to the extent not

[101] Other errors are also defined in § 1005.33(a).

prohibited by law, taxes when none of the funds are delivered on time, provided the failure was not caused by the sender providing incorrect or insufficient information. The magnitude of this benefit depends on the extent to which providers are not already sufficiently deterred by reputational concerns, and the extent to which providers have sufficient control over the entities responsible for any errors such that they can reduce the incidence of any errors. Although these benefits cannot be quantified, errors can always occur and the error resolution provisions will therefore always provide benefits to senders.

Providers will incur additional costs from the error resolution procedures. In some instances, providers may be required to refund funds or fees and taxes that have already been received by and which cannot easily be recouped from other institutions involved in a remittance transfer or government entities. Alternatively, in refunding or making available funds to a recipient to resolve an error, a provider may face additional exchange rate risk, due to changes in a foreign exchange market between the time of the transfer and the resolution of the error. Furthermore, providers (and their business partners) may need to adjust communication practices and business processes to comply with the error resolution requirements.

The magnitude of these and other costs depends on the frequency of errors and the financial costs that providers incur. While providers cannot charge senders directly for error resolution activities, they may build the cost of these activities into their general fees. Industry commenters suggests that scenarios in which the entire amount transferred must be returned to the sender before the provider has recovered it from other institutions may be of particular concern. Since this type of error appears to be rare, the quantity of funds never recovered would have to be substantial for this particular error to have a significant impact on fees.[102]

The Bureau considered a number of alternatives in developing the error resolution procedures. In the final rule, if funds are not available by the date of availability because the sender provided incorrect or insufficient information and the sender chooses to have the transfer resent as a remedy for the error, the provider may re-charge third party fees actually incurred. The proposed rule, by contrast, did not permit the imposition of such third-party fees. The effect of this change is to reduce the costs for providers of correcting errors caused by the sender's provision of inaccurate or incomplete information, and, conversely, to prevent such costs from being passed along to all senders, as opposed to keeping those costs with the senders at fault.

On the other hand, the Bureau was asked to use its exception authority to reduce the 180-day statutory time period in which senders may assert an error to 60 or 30 days. Given the international nature of remittance transfers, the additional time a sender may need to communicate with persons abroad, and the lack of information about problems associated with this time period, the Bureau concluded that using its exception authority to reduce the statutory 180-day time period is not currently warranted. As noted above, errors are infrequent enough that the incremental cost to providers of the 180-day period is likely to be small.

Cancellation and Refund

EFTA section 919(d)(3) also requires the Bureau to establish appropriate remittance transfer cancellation and refund policies for consumers. The Board originally proposed a one business day cancellation period. The final rule instead requires providers to give consumers at least 30 minutes to cancel the transaction for a full refund, including fees, and to the extent not prohibited by law, taxes, if the transferred funds have not yet been picked up by the recipient. If they wish, providers can hold the funds until the cancellation period expires.

The Bureau believes that a brief cancellation period may provide benefits to both consumers and providers by allowing and perhaps encouraging consumers to review disclosure documents one additional time to confirm that they wish to complete the transaction and to identify any scrivener's errors on the receipt. For instance, the cancellation period affords consumers an opportunity to raise any discrepancies between the two documents or identify errors that might otherwise cause the funds not to be made available on the disclosed date. These actions in turn would allow remittance transfer providers to address and correct errors early in the process, when it may be faster and less expensive to remedy the problem.

The Bureau considered a number of alternatives, including longer cancellation periods of. It is not clear that a longer cancellation period would provide much additional benefit to consumers given that the final rule already provides consumers opportunity to engage in cost comparison based on the detailed pre-payment disclosures. Conversely, a longer cancellation period may impose costs on consumers who want to send funds as quickly as possible if, as some commenters suggested, providers would delay the transmission of funds until the cancellation period expired. Given these conflicting factors, it does not seem likely that a longer cancellation period would provide consumers with substantial additional net benefits, though the exact difference in benefits provided is not known and may differ, depending on the consumer. If, as some commenters suggested, providers decide to delay transmission of funds until the cancellation period expires, under the final rule, they will likely only hold funds for 30 minutes. Compliance therefore likely imposes minimal costs on providers.

Conditions of Agent Liability

The final rule holds a remittance transfer provider liable for any violation by an agent when the agent acts for the provider. However, EFTA section 919(f)(2) states that enforcement agencies may consider, in any action or other proceeding against a provider, the extent to which the provider has established and maintained policies or procedures for compliance.

In States where the strict liability standard for acts of agents is already in place, consumers derive no additional benefit from this rule provision and providers incur no additional costs. In other States, consumers may benefit from the additional incentive the rule gives providers to oversee and police their agents. Providers are likely to incur some additional costs in these States, but the magnitude of such costs much cannot be determined. These costs are mitigated somewhat by the discretion that the statute grants enforcement agencies to consider the extent to which a provider has established and maintained policies or procedures for compliance.

C. Impact of the Final Rule on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, As Described in Section 1026

Given the general lack of data on the frequency and other characteristics of remittance transfers by depository institutions and credit unions, it is not

[102] The Credit Union National Association reports error rate of less than 1% for international wire ''exceptions'' (including non-timely delivery). Navy Federal Credit Union reports that 75% of its wire transfers are between $500 and $10,000 dollars. The full principal may rarely be lost when errors occur. However, assuming all of the principal is lost 10% of the time (or 10% of the principal is lost all of the time), the 1% error rate implies the expected loss to the transmitter is 50 cents on a $500 transfer and $10 on a $10,000 transfer.

possible for the Bureau to distinguish the impact of the final rule on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act from the impact on depository institutions and credit unions in general. Overall, the impact of the rule on depository institutions and credit unions depends on a number of factors, including whether they offer consumer international wire transfers or other remittance transfers, the importance of consumer wire transfer and other remittance transfers as a business line for the institution, how many institutions or countries they send to, and the cost of complying with the rule. The institution's general asset size is not necessarily a good proxy for estimating impacts, since some small institutions which conduct frequent transfers particularly to specific countries may be better positioned to implement the new requirements than larger institutions that may conduct consumer remittance transfers to a larger number of countries on an infrequent basis.

The impact of the rule on small depository institutions and credit unions is discussed in further detail in the Regulatory Flexibility Act analysis below.

D. Impact of the Final Rule on Consumers in Rural Areas

The Bureau consulted a number of sources for data with which to study consumers and providers of remittance transfers in rural areas and to consider the impact of the rule. The Bureau consulted research done by the Federal Reserve Bank of Kansas City, which specializes in research on agricultural and rural economies, and surveys done by Economic Research Service of the U.S. Department of Agriculture. The Bureau also consulted surveys done by the Census Bureau and reports published by the Government Accountability Office. The Bureau believes there is no data or body of research with which to study this subject at this time.

There are likely to be concentrations of individuals in rural areas who want to send remittance transfers and who provide an attractive base of customers for a provider. For example, money transmitters could serve these individuals with agents that have other lines of business and that do not rely exclusively on sending international remittances.

It is likely more difficult for consumers in rural areas than for consumers elsewhere to send large remittance transfers. Both demand and competition for this business is likely stronger outside rural areas. Large remittance transfers are more commonly sent through depository institutions and credit unions than through money transmitters. Insofar as the rule may cause insured depository institutions and credit unions to raise prices or reduce remittance transfer services, and insofar as there are fewer alternative providers in rural areas, consumers in rural areas may be more heavily affected by the rule than consumers outside rural areas. However, insofar as these factors are uncertain, it is not clear that rural consumers who use money transmitters would be more heavily affected by the rule than consumers elsewhere.

The Bureau believes that the disclosures required by the rule are as beneficial to consumers in rural areas as they are to those residing in non-rural areas. These disclosures help them identify the lowest-cost providers among those they find on the internet and in-person. Similarly, the Bureau expects that the error resolution procedures and the other benefits of the rule are as beneficial to consumers in rural areas as they are to those residing in non-rural areas.

E. Consultation With Federal Agencies

In developing the final rule,[103] the Bureau consulted or offered to consult the Board, Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), and the Federal Trade Commission (FTC), including with respect to consistency with any prudential, market, or systemic objectives that may be administered by such agencies. As discussed above, the Bureau also held discussions with FinCEN regarding the impact of extending the EFTA to regulate remittance transfers on application of regulations administered by that agency.

In the course of the consultation, the OCC submitted written objections to the proposed rule pursuant to section 1022(b)(2)(C) of the Dodd-Frank Act [104] urging modification of certain aspects of the proposed error resolution rules to address risk of fraud and the need for financial institutions to conduct monitoring pursuant to Office of Foreign Assets Control (OFAC) requirements. The OCC also urged extension of the temporary exception permitting depository institutions and credit unions to provide estimated disclosures as a means of mitigating impacts on community banks and consumers who may rely on them for remittance transfer services. Finally, the OCC urged the Bureau to mitigate the potential regulatory gaps created by Congress's extension of the EFTA to regulate remittance transfers, given that Article 4A of the Uniform Commercial Code and certain Bank Secrecy Act regulations currently exclude transactions subject to EFTA.

As discussed in detail in the section-by-section analysis, the Bureau takes seriously all of the concerns raised in the OCC letter, which were also generally raised during the comment period. The final rule adopts both of the error resolution changes advocated by the OCC, specifically, excluding from the definition of error instances of ''friendly fraud'' by a sender or persons acting in concert with the sender and delays due to OFAC requirements or other similar monitoring activities. The Bureau believes that it is premature to extend the sunset date of the exception allowing estimates by depository institutions and credit unions, but is working in other ways to provide greater certainty to community banks and other small remittance transfer providers. For instance, the Bureau is working to develop safe harbors that will provide greater clarity as to what remittance transfer providers are excluded from the regulations because they do not provide transfers in the ''normal course of business'' and to publish a list of countries for which estimated disclosures may be used because the laws of the country or the method of transfer to a country prevents remittance transfer providers from determining the amount to be provided to the recipient. The Bureau will also develop a compliance guide for small remittance transfer providers and continue dialogue with industry regarding implementation issues.

Finally, the Bureau shares concerns regarding the potential gaps in State law and Federal anti-money laundering regulation created by the expansion of

[103] Section 1022(b)(2)(B) of the Dodd-Frank Act requires the Bureau to conduct consultations with appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with any prudential, market, or systemic objectives that may be administered by such agencies. In this case, the May 2011 Proposed Rule was developed by the Board, which is not subject to section 1022(b)(2)(B), prior to the transfer of rulemaking authority to the Bureau. Accordingly, the Bureau held its first consultation meeting after the closing of the comment period on the proposed rule. The Bureau also consulted with other agencies regarding the January 2012 Proposed Rule.

[104] Although the OCC's letter was not designated as a written objection pursuant to section 1022(b)(2)(C), OCC staff orally confirmed that it was intended as such. The Bureau has asked that agencies designate objections under section 1022(b)(2)(C) as such to distinguish them from other communications.

the EFTA to regulate remittance transfer providers. The Bureau does not have authority to amend either State law or the Federal anti-money laundering regulations to override their exclusion of transfers regulated by EFTA, and as discussed above, does not believe that it can fill the gaps through operation of preemption or by incorporating these separate bodies of law into Regulation E. The Bureau is therefore working to coordinate with State governments and FinCEN to facilitate action.

VIII. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (''RFA'') generally requires an agency to publish an initial and final regulatory flexibility analysis on the impact a rule is expected to have on small entities. In the May 2011 Proposed Rule, the Board conducted an initial regulatory flexibility analysis (IRFA) and concluded that the proposed rule could have a significant economic impact on small entities that are remittance transfer providers for international wire transfers. The Board solicited comment on the impact of the rule on small remittance transfer provides, and in particular, on remittance providers for consumer international wire transfers. The Board also solicited comment in its broader Notice of Proposed Rulemaking on a number of proposed provisions that could mitigate the impact on small entities, such as whether to adopt safe harbors and the length of the implementation period.

The Bureau received a number of comments on the Board's IRFA and the broader Notice of Proposed Rulemaking addressing the burden imposed by the proposed rule and potential mitigation measures and alternatives. These included comments by the Small Business Administration's Office of Advocacy (SBA). Section 1601 of the Small Business Jobs Act of 2010 generally requires Federal agencies to respond in a final rule to written comments submitted by the SBA on a proposed rule, unless the public interest is not served by doing so. As described further below, the Bureau carefully considered the comments received and performed its own independent analysis of the potential impacts of the rule on small entities and alternatives to the final rule. Based on the comments received and for the reasons stated below, the Bureau is not certifying that the final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Bureau has prepared the following final regulatory flexibility analysis (FRFA) pursuant to section 604 of the RFA.

Section 604(a)(2) of the RFA generally requires that the FRFA contain a summary of significant issues raised by public comments in response to the IRFA, the Bureau's assessment of such issues, and a statement of any changes made in the proposed rule as a result of such comments. For organizational purposes, this FRFA generally addresses public comments received by the Bureau in the topical section that relates to the subject matter of the comment, *i.e.,* Section 2 addresses comments relating to compliance and other requirements, Section 3 addresses comments relating to the number of small entities affected, and Section 5 addresses other comments received.

1. *Statement of the need for, and objectives of, the final rule.* The EFTA, as amended by the Dodd-Frank Act, was enacted to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems. The primary objective of the EFTA is the provision of individual consumer rights. 15 U.S.C. 1693. The EFTA authorizes the Bureau to prescribe regulations to carry out the purpose and provisions of the statute. 15 U.S.C. 1693b(a). The EFTA expressly states that the Bureau's regulations may contain ''such classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions * * * as, in the judgment of the Bureau, are necessary or proper to effectuate the purposes of [the EFTA], to prevent circumvention or evasion [of the EFTA], or to facilitate compliance [with the EFTA].'' 15 U.S.C. 1693b(c).

Section 1073 of the Dodd-Frank Act adds a new section 919 to the EFTA to create a new comprehensive consumer protection regime for remittance transfers sent by consumers in the United States to individuals and businesses in foreign countries. Consumers transfer tens of billions of dollars from the United States each year, but these transactions previously were largely excluded from existing Federal consumer protection regulations in the United States. Congress concluded that there was a need to fill this gap. Specifically, the Dodd-Frank Act requires: (i) The provision of disclosures concerning, among others, the exchange rate and amount to be received by the remittance recipient, prior to and at the time of payment by the consumer for the transfer; (ii) Federal rights regarding transaction cancellation periods; (iii) investigation and remedy of errors by remittance transfer providers; and (iv) standards for the liability of remittance transfer providers for the acts of their agents.

Furthermore, section 1073 of the Dodd-Frank Act specifically requires the Bureau to issue rules to effectuate these four requirements. The objective of the final rule is therefore to implement section 1073 of the Dodd-Frank Act consistent with congressional intent and the general purposes of the Bureau as specified in section 1021 of the Dodd-Frank Act. Accordingly, the final rule generally requires remittance transfer providers to provide the sender a pre-payment disclosure containing information about the specific remittance transfer, such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. The remittance transfer provider generally must also provide a written receipt for the remittance transfer that includes the above information, as well as additional information such as the date of availability and the recipient's contact information. Alternatively, the final rule permits remittance transfer providers to provide the sender a single written pre-payment disclosure containing all of the information required on the receipt.

As required by statute, the Bureau is also adopting provisions in the final rule which require remittance transfer providers to furnish the sender with a brief statement of the sender's error resolution and cancellation rights, and require providers to comply with related recordkeeping, error resolution, cancellation, and refund policies. The final rule also implements standards of liability for remittance transfer providers that act through an agent.

The Bureau believes that the revisions to Regulation E discussed above fulfill the statutory obligations and purposes of section 1073 of the Dodd-Frank Act, in a manner consistent with the EFTA and within Congress's broad grant of authority to the Bureau to adopt provisions and to provide adjustments and exceptions that carry out the purposes of the EFTA.

2. *Description of the projected reporting, recordkeeping, and other compliance requirements of the rule.*

The final rule does not impose new reporting requirements. The final rule does, however, impose new recordkeeping and compliance requirements on certain small entities. For the most part, these requirements appear specifically in the statute. Thus, for the most part, the impacts discussed below are impacts of the statute, not of the regulation *per se*—that is, the Bureau discusses impacts against a pre-statute baseline. The Bureau uses a pre-statute baseline here to facilitate

comparison of this FRFA against the Board's IRFA, which uses a pre-statute baseline.[105]

Compliance Requirements

As discussed in detail in **VI. Section-by-Section Analysis** above, the final rule imposes new compliance requirements on remittance transfer providers. For example, remittance transfer providers generally are required to implement new disclosure and related procedures or to review and potentially revise existing disclosures and procedures to ensure compliance with the content, format, timing, and foreign language requirements of the rule, as described above. Remittance transfer providers are also required to review and potentially update their error resolution and cancellation procedures to ensure compliance with the rule, also as described above. For remittance transfer providers that employ agents, remittance transfer providers are liable for any violations of the rule by their agents, which may require providers to revise agreements with agents or develop procedures for monitoring agents.

Recordkeeping Requirements

Because section 1073 of the Dodd-Frank Act incorporates the remittance transfer provisions in the EFTA, small remittance transfer providers that were not previously subject to the EFTA and Regulation E would now be subject to 12 CFR 1005.13, which requires such entities to retain evidence of compliance with the requirements of EFTA and Regulation E for a period of not less than two years from the date disclosures are required to be made or action is required to be taken. Moreover, under section 1073, the Bureau must establish clear and appropriate standards for remittance transfer providers with respect to error resolution relating to remittance transfers, to protect senders from such errors. The statute specifically provides that such standards must include appropriate standards regarding recordkeeping, including retention of certain error-resolution related documentation. The Bureau adopted § 1005.33(g) to implement these error resolution standards and recordkeeping requirements.

As discussed above in **VI. Section-by-Section Analysis**, § 1005.33(g)(1) requires remittance transfer providers, including small remittance transfer providers, to develop and maintain written policies and procedures that are designed to ensure compliance with respect to the error resolution requirements applicable to remittance transfers. Furthermore, under § 1005.33(g)(2), a remittance transfer provider's policies and procedures concerning error resolution would be required to include provisions regarding the retention of documentation related to an error investigation. Such provisions would be required to ensure, at a minimum, the retention of any notices of error submitted by a sender, documentation provided by the sender to the provider with respect to the alleged error, and the findings of the remittance transfer provider regarding the investigation of the alleged error, which is consistent with EFTA section 919(d)(2).

Comments Received

The IRFA conducted by the Board stated that the proposed rule could have a significant economic impact on small financial institutions that are remittance transfer providers for consumer international wire transfers. The Board solicited comment on the impact of the rule on small remittance transfer providers, and in particular, on remittance providers for consumer international wire transfers. Although the Bureau did not receive very specific comment on costs, as discussed in the **SUPPLEMENTARY INFORMATION**, depository institution and credit union commenters expressed concern about the burden and complexity associated with complying with the rule, and in particular providing the required disclosures for remittances that are sent by international wire transfer. Some commenters argued that the implementation and compliance costs would be prohibitive for depository institutions and credit unions that are small entities. Commenters also warned that the burden associated with the rule would force depository institutions and credit unions that are small entities out of the international wire and ACH business. The SBA also urged the Bureau to conduct more outreach to small providers to further assess the economic impacts of the compliance and recordkeeping requirements.

The Bureau carefully considered these comments from the SBA and other commenters regarding impacts on small entities, and discusses the relative implementation burdens and impacts for different types of remittance transfer providers in this section and Section 3 below. The Bureau conducted further outreach to industry trade associations, financial institutions, consumer groups, and nonbank money transmitters. The Bureau agrees as discussed elsewhere in the FRFA and **SUPPLEMENTARY INFORMATION** that implementation is likely to be most challenging for depository institutions and credit unions that engage in open network wire transactions, though similar challenges may be associated with some types of international ACH transactions.

For instance, the final rule may require revision of existing contract arrangements and improvement of communications systems and methodologies between contractual partners, as well as between headquarters and branches of financial institutions. Depository institutions and credit unions that provide transfers will need to obtain exchange rate and fee information from correspondent banks and other contractual partners, and possibly third parties, in order to provide required disclosures, and they will need mechanisms to ensure that such information can be provided at the appropriate time to the customer, who may be waiting at a branch, or transacting by phone or online. Current contracts, information technology systems, and practices may not provide for the exchange of such information in order to comply with the timing required by the final rule. Accordingly, modifications may be required, and remittance transfer providers that are small entities may incur implementation costs to comply with the rule.

The final rule may also expose depository institutions and credit unions to new types of risk. In some cases, commenters have suggested, small depository institutions and credit unions may be required by § 1005.33(c)(2) to refund funds or fees or taxes that were already received by other entities, and which they cannot easily recoup, due to the lack of contractual arrangements among the entities involved or an applicable comprehensive worldwide legal regime. The legal right of a depository institution or credit union to recoup previously transmitted funds or fees or taxes from other entities may depend on a number of factors, including the exact nature of the error involved, the source of the mistake, the payment systems involved in the error, and the relationships among the entities involved. In other cases, compliance with § 1005.33(c)(2) may expose small depository institutions and credit unions (as well as other providers) to additional exchange rate risk, due to changes in a foreign exchange market between the time of the transfer and the resolution of the error.

[105] The Bureau has discretion in future rulemaking to use a post-statute baseline when it applies Regulatory Flexibility Act analysis.

However, as discussed elsewhere, Congress crafted a very specific accommodation (*i.e.,* a temporary exception) to address some of the challenges involved in collecting information required for disclosures, and the Bureau must implement the statutory regime consistent with the language and intent of section 1073 of the Dodd-Frank Act. Furthermore, as discussed above, the Bureau expects that the incidence of errors requiring investigation and resolution under § 1005.33 will be small. The statutory requirements the regulation implements may prompt small depositories and credit unions to increase their prices or stop providing consumer international wire or ACH transfers altogether.

3. *Description of and an estimate of the number of small entities affected by the final rule.* Under regulations issued by the Small Business Administration, banks and other depository institutions are considered ''small'' if they have $175 million or less in assets, and for other financial businesses, the threshold is average annual receipts that do not exceed $7 million.[106] The initial regulatory flexibility analysis stated that the number of small entities that could be affected by the rule was unknown. That analysis stated that there were approximately 9,458 depository institutions (including credit unions) that could be considered small entities. The analysis also stated based on data from the Department of Treasury that there were approximately 19,000 registered money transmitters, of which 95% or 18,050 were small entities. The SBA comments urged the Bureau to reexamine the determination of the number of small money transmitters impacted by the rule, asserting based on a telephone conversation with a trade association that the number was 200,000 to 300,000, including a large number of agents. The Bureau notes that this trade association did not assert this estimate in its comment letter nor was any evidence provided to support this estimate. In response to SBA's comments, the Bureau has reviewed and updated these calculations for the final regulatory flexibility analysis, as discussed below.

Depository Institutions and Credit Unions

Of the 7,445 insured depository institutions, 3,989 are small entities.[107] Of the 7,325 insured credit unions, 6,386 are small entities.[108] These institutions could offer remittance transfers through wire transfers, international ACH, or other means.

Regulatory filings by insured depositories do not contain information about the number that send consumer international wire transfers. The Bureau believes that the number is substantial, and the analysis below assumes that all 3,989 small depository institutions send consumer international wire transfers.

Data from the National Credit Union Administration indicate that there are approximately 7,325 insured credit unions in the United States as of September 2011. About half offer international wire transfers. Additionally, regulatory filings by insured credit unions contain an indicator for ''low cost wire transfers.'' These are wire transfers offered to members for less than $20 per transfer. Also about half of insured credit unions offer low cost wire transfers. Though the Bureau does not have exact data on the number of credit unions that offer wire transfers to consumers, the Bureau assumes that a similar fraction offer consumer international wire transfers. Specifically, the Bureau assumes that half of the 6,386 credit unions that are small entities, or 3,193, offer consumer international wire transfer.

Thus, in total, there are approximately 7,182 depository institutions and credit unions that are small entities that could be affected by the statute.[109]

Regulatory filings by insured depositories and credit unions do not report the revenue these institutions earn from consumer international wire transfers, international ACH transactions, or other remittance transfers. One credit union that is not a small entity for purposes of RFA showed that little revenue, as a share of total income, came from this source.[110] Another credit union that is not a small entity for purposes of RFA submitted data indicating that wire transfers were a noticeable share of gross income.[111] The Bureau has no other data from commenters on the amount of revenue that small depository institutions and credit unions obtain from consumer international wire transfers.

Non-Bank Money Transmitters and Agents

In response to the SBA's comments, the Bureau has reviewed the estimated number of money transmitters and agents, which may be affected by the statute. As stated above, the numbers in IRFA were originally reported by the Financial Crimes Enforcement Network (FinCEN).[112] The Bureau understands that FinCEN derived its estimates using data from the registration database for money services businesses (MSBs).[113] As the registration instructions for the database make clear, the estimated 19,000 figure (of which 18,050 have less than $7 million in gross receipts annually) includes some, but not all, agents of remittance transfer providers. Businesses that are MSBs solely because they are agents of another MSB are *not* required to register. Businesses that are agents and also engage in MSB activities on their own behalf are required to register.[114] Thus, the database would include a money transmitter that is an agent of a remittance transfer provider only if it also engages in MSB activities as a principal, such as cashing checks or selling money orders.

The Bureau has searched for additional data with which to refine its estimate of the number of small remittance transfer providers and agents. No comments on the proposed rule provided administrative or survey

[106] 13 CFR 121.201; SBA, Table of Small Business Size Standards (available at: *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf).*

[107] Federal Deposit Insurance Corporation, *http://www2.fdic.gov/idasp/main_bankfind.asp*. Data as of September 2011.

[108] National Credit Union Administration, *http://webapps.ncua.gov/customquery/*. Data as of September 2011.

[109] Only a small number of depository institutions and credit unions offer FedGlobal ACH or other international ACH services. In July 2011, the Board reported that smaller depository institutions and credit unions were the early adopters of the FedGlobal ACH service, but that only about 410 such institutions offered the service, and that some enrolled institutions do not offer the service for consumer-initiated transfers. Furthermore, only a very small fraction of depository institutions and credit unions send any kind of international ACH transaction, and the Bureau does not know which of those are small entities. *See Board ACH Report* at 9, 12 & n.53. The Bureau assumes that any small depository institutions or credit unions that offer international ACH services to consumers also offer international wires to consumers, though the Bureau has not found any exact data. Similarly, the Bureau understands that some depository institutions offer remittance transfers through means other than wire or international ACH, but assumes that any such depository institutions also offer international wires to consumers.

[110] Navy Federal Credit Union has about $45 billion in assets. It states that it processed 19,248 wire transfers in 2010 and charged $25 per transfer. It had total income of over $3 billion in 2010, so the wire income of about $500,000 was about two tenths of one percent of total income.

[111] United Nations Federal Credit Union has about $3 billion in assets. It states that it processes over 120,000 consumer wire transfers every year. It charges between $20 and $35 per transfer and had total income of about $146 billion, so the wire income of $2.5 to $4.2 million was 2% to 3% of total income.

[112] Notice of Proposed Rulemaking, Cross-Border Electronic Transmittal of Funds, 75 FR 60377, 60392 (Sept. 30, 2010) (estimates based on FinCEN's February 2010 Money Service Business Registration List).

[113] FinCEN, *http://www.fincen.gov/financial_institutions/msb/msbstateselector.html.*

[114] FinCEN, *http://www.fincen.gov/forms/files/fin107_msbreg.pdf. See also Money Services Business Registration Fact Sheet, http://www.fincen.gov/financial_institutions/msb/pdf/FinCENfactsheet.pdf.*

data on the number of small providers, and this information cannot be constructed from public sources. The Bureau used other information, however, to construct useful lower and upper bounds on the number of nonbank money transmitters and agents.[115]

In 2005, one survey of the money services business industry estimated there were about 67,000 principal money transmitters and agents involved in international money transfers.[116] From 2005 through 2010 employment in the broader sector to which money transmitters belong shrunk almost 19%.[117] The Bureau chooses to use the 67,000 figure recognizing that it may overestimate the number of providers and agents, and that persons who act as agents on behalf of another provider generally will not be providers themselves unless they are engaged in activities on their own behalf that would otherwise qualify them as providers. In public comment, one trade association estimated there are about 500 state-licensed principal money transmitters. Deducting 500 providers from the 67,000 estimate of total money transmitters and agents would suggest that there are currently approximately 66,500 agents.

To estimate how many of these money transmitters are small entities, the Bureau relied on survey research done by the World Bank in 2006 that found that the median money transmitter had $2 million in annual revenue while the average had $10 million.[118] Fitting an exponential function to this revenue data suggests that about 350 of the 500 providers had $7 million or less in revenue. By assuming that the agents are distributed across providers in proportion to revenue, the Bureau estimates that roughly 5,500 of the 66,500 agents are working for small entity money transmitters and the remaining 61,000 agents are working for larger money transmitters.[119]

The Bureau has no way to estimate directly how many of the agents working for larger money transmitters are small entities. However, the Bureau expects that such small agents are not likely to bear a significant economic impact as a result of the rule. The Bureau believes that large money transmitters are likely to facilitate compliance for their agents, achieve substantial benefits to scale and widely leverage the systems and software investments required for compliance across a large base of agent locations.

With regard to agents working for small entity money transmitters, the Bureau assumes that these agents are all small entities themselves. Thus, the Bureau estimates there are approximately 5,500 small agents working for approximately 350 small money transmitters. Sensitivity analysis suggests the actual figure of small agents lies between 4,000 and 7,000 giving a total of between 4,350 and 7,350 small entities.

In general, money transmitters are likely to have significantly less burden in implementing the new regime than depository institutions and credit unions because they generally rely on closed networks.[120] The parties to closed network transactions are interconnected by contractual agreements, making it easier to predict fees and taxes deducted over the course of a transaction, to obtain information about exchange rates and other matters, and to ensure compliance with procedures designed to reduce and resolve errors. Furthermore, because some small providers focus only on transfers to a few specific countries, they may have significant contacts and expertise that may facilitate determining information necessary to generate the disclosures. Nevertheless, small providers managing their own networks are less likely to have extensive legal and professional staffs to help minimize the costs of compliance for themselves and their agents. They may not maintain as sophisticated information technology systems to facilitate generation of receipts and communications necessary to exchange information with which to provide the required disclosures. Finally, some one-time investments that may not be significant for larger providers will be more significant for small providers, who must amortize them against a smaller base of revenues and agents.[121] Finally, many of these providers may pass on significant costs to any agents, in part because the agents themselves may have particular customers and specialized knowledge that is useful in serving them.

Conclusion

Assuming that nearly all of the estimated 67,000 money transmitters and agents are small entities and adding that total to the number of depository institutions and credit unions that are small entities that may engage in wire transfers, the total number of small entities that could be affected by the rule is approximately 74,000.

[115] Commenters state that there may be other entities that serve as remittance transfer providers and that are not depository institutions, credit unions, or money transmitters, as traditionally defined. These entities could include, for example, brokerages that send remittance transfers. Though the Bureau does not have an estimate of the number of any such providers, the Bureau believes that they account for a number of entities that is significantly less than the sum of remittance transfer providers and agents of money transmitters. Similarly, the Bureau believes that the number of any such providers that is a small entity for purposes of RFA is much less than the sum of small remittance transfer providers and small agents of money transmitters.

[116] KPMG, *2005 Money Services Business Industry Survey Study,* September 2005; Table 20.

[117] The Bureau of Labor Statistics publishes data on Credit Intermediation and Related Activities (NAICS 5223), which encompasses electronic funds transfer services (NAICS 52232) and money transmission services (NAICS 52239).The 2010 employment figure is 262,300, available at *http://www.bls.gov/oes/current/naics4_522300.htm;* the 2005 employment figure is 323,920, available at *http://www.bls.gov/oes/2005/may/naics4_522300.htm.*

[118] Ole Andreassen, *Remittance service providers in the United States: how remittance firms operate and how they perceive their business environment,* The World Bank, Financial Sector Discussion Series, June 2006, p. 15.

[119] Since median revenue is far less than average revenue, a two-parameter exponential function provides a straightforward way to model the distribution of firm revenue. The parameters *(a,b)* in the exponential function $y=b*exp(a*x)$ are calculated using two equations, where y is firm revenue and x is the rank of the firm when firms are ordered from smallest to largest by revenue. The equation $2{,}000{,}000=b*exp(a*250)$ formalizes the condition that the 250th largest firm (the median firm) has $2 million in revenue. The second equation formalizes the condition that the average firm has $10 million in revenue. To keep the analysis simple, firms are assumed to be identical in groups of 50, so firms 1–50 are the same, firms 51–100 are the same, and so forth. The second equation is then $50*b*[exp(a*50)+exp(a*100)+* * *+exp(a*450)+exp(a*500)]/500 = 10{,}000{,}000$. Solving the two equations gives $(.0126,85,340)$ for the parameters (a,b). These parameters in the equation $y = b*exp(a*x)$ imply that if $x = 350$ then approximately $y = 7{,}000{,}000$. Thus, the firm ranked 350th has approximately $7 million in revenue and the smallest 350 firms are small businesses for purposes of RFA. The function can also be used to compute the distribution of revenue over the industry and then the distribution of agents, all exclusive of two large providers, Moneygram and Western Union (which were not part of Andreassen's analysis). For example, assume 30,000 of the 66,500 agents work for Moneygram and Western Union. Allocating the remaining 36,500 agents across firms by firm revenue implies that approximately 5,500 agents work for the 350 small firms and the remaining 31,000 agents work for the 150 large firms. If instead 20,000 of the 66,500 agents work for Moneygram and Western Union then about 7,000 agents work for the 350 small firms; if 40,000, then the corresponding number is about 4,000 agents work for the 350 small firms.

[120] Commenters also stated that some money transmitters, as well as some other entities that are not insured depository institutions or insured credit unions, offer open network transfers. To the extent that any such money transmitters are small entities, they may face costs that are similar to or more extensive than those faced by insured depository institutions or insured credit unions offering open network transfers.

[121] Andreassen finds that median firm in his sample, which is a small business for purposes of RFA, has a 3% after-tax profit margin. The average firm in his sample, which is not a small business for purposes of RFA, has a 12% after-tax profit margin. *See Andreassen,* p. 15.

4. *Steps to minimize the significant adverse economic impact on small entities and reasons for selecting the alternative adopted in the final rule.* As discussed above in the **SUPPLEMENTARY INFORMATION**, section 1073 of the Dodd-Frank Act imposes a comprehensive new consumer protection regime for remittance transfers and prescribes specific requirements for remittance transfer providers. The statute requires four major elements: (i) The provision of reliable disclosures concerning, among others, the exchange rate and amount to be received by the remittance recipient; (ii) consistent Federal rights regarding transaction cancellation periods; (iii) investigation and remedy of errors by remittance transfer providers; and (iv) standards for the liability of agents who work for remittance transfer providers.

The statute also prescribes certain accommodations that will reduce potential adverse economic impacts. First, in order to address potential difficulties in implementing the disclosure requirements for open network transactions, section 1073 of the Dodd-Frank Act prescribes specific and limited accommodations which allow financial institutions to provide ''reasonably accurate estimates'' of the amount received where the institutions are unable to know the actual numbers for reasons beyond their control. Second, the Dodd-Frank Act also prescribes an accommodation for remittance transfer providers to provide estimates of certain disclosures if a recipient nation does not legally allow remittance transfer providers to know the amount of currency to be received or the method by which transactions are conducted in the recipient nation prevents that determination as of the time that disclosures are required. Pursuant to this statutory accommodation, the Bureau expects to publish and maintain a list of affected countries as a safe harbor, which will significantly reduce compliance burdens for remittance transfer providers that are small entities.

The specific and prescriptive nature of the Dodd-Frank Act requirements and accommodations works to constrain the range of possible alternatives to the final rule. For instance, as discussed above in VI. Section-by-Section Analysis, the Bureau believes that the plain language of the statute precludes interpretations urged by various commenters that would relieve remittance transfer providers from the general requirement of having to determine fees and taxes that may be deducted from the amount to be received by the designated recipient. In such instances, the Bureau believes it is not necessary or proper to exercise its authority under EFTA sections 904(a) and 904(c).

The Bureau has sought to reduce the regulatory burden associated with the rule in a manner consistent with the purposes of section 1073 of the Dodd-Frank Act.[122] For example, as discussed above in VI. Section-by-Section Analysis, the Bureau has provided model forms in order to ease compliance and operational burden on small entities. The rule offers flexibility that will mitigate its impact on remittance transfer providers that are small entities. For example, the rule gives remittance transfer providers some flexibility in drafting their disclosures, consistent with formatting requirements needed to ensure that senders notice and can understand the disclosures. In addition, disclosures may be provided on a register receipt or 8.5 inches by 11 inches piece of paper, consistent with current practices in the industry.

Additionally, EFTA section 919(a)(5) provides the Bureau with exemption authority with respect to several statutory requirements. The Bureau is exercising its exemption authority in the rule in order to reduce providers' compliance burden. For instance, the Bureau is exercising its authority under EFTA Section 919(a)(5)(C) to permit remittance transfer providers to provide the sender a single written pre-payment disclosure under the conditions described above, instead of both pre-payment and receipt disclosures. Similarly, consistent with EFTA section 919(a)(5)(A), the rule permits remittance transfer providers to provide pre-payment disclosures orally when the transaction is conducted entirely by telephone. The Bureau has also used its authority under section 919(a)(5)(A) and other provisions of EFTA to tailor the disclosure requirements to reduce potential burdens for transactions conducted by telephone via text message or mobile application and for preauthorized transactions.

One commenter urged the Bureau to consider consolidating federal regulation of remittance transfer providers and money services businesses, citing FinCEN regulations covering money services businesses. The Bureau notes that those regulations implement the Bank Secrecy Act and effectuate other purposes, such as imposing anti-money laundering program requirements. The Bureau believes that alternative would be inconsistent with the statutory mandate in section 1073 of the Dodd-Frank Act to create a comprehensive new consumer protection regime for consumers who send remittance transfers. The suggested alternative would not effectuate the key protections under section 1073 of the Dodd-Frank Act, such as the requirement to provide reliable disclosures prior to and at payment by the consumer and the establishment of cancellation rights and error resolution procedures. Furthermore, the Bureau believes consolidating the requirements of two statutes would be impracticable under the respective authorities of two agencies.

Other measures intended to provide flexibility to remittance transfer providers are discussed above in this **SUPPLEMENTARY INFORMATION** and in the Bureau's Notice of Proposed Rulemaking that is being published elsewhere in today's **Federal Register**.

5. *Summary of other significant issues raised by public comments in response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.* In addition to the SBA's comments discussed above regarding the number of small entities affected and various other substantive issues, the SBA's comment letter urged the Bureau to publish a supplemental IRFA prior to issuing a final rule in order to determine the impact on small entities and to consider less burdensome alternatives. The Bureau has taken the substantive issues raised by the SBA into careful account in developing the FRFA. However, the Bureau concluded that publishing a supplemental IRFA prior to issuance of the rule was not required under the RFA and was not practicable in light of statutory deadlines.

The IRFA described the types of small entities that would be affected by the rule (both depository institution/credit union and nonbank money transmitter), specifically acknowledged that the rule would impose implementation costs on such entities, described the nature of those implementation burdens, and noted ways in which the rule had been drafted to reduce some of those burdens. The IRFA also sought public comment on all aspects of its analysis,

[122] The statute and rule establish federal rights in connection with remittance transfers by consumers. The statute and rule do not apply to credit transactions or to commercial remittances. Therefore the Bureau does not expect the rule to increase the cost of credit for small businesses. The statute and rule impose compliance costs on depositories and credit unions, many of which offer small business credit. Any effect of this rule on small business credit, however, would be highly attenuated. In any case the Bureau has taken steps to reduce regulatory burdens associated with this rule in a manner consistent with the purposes of section 1073 of the Dodd-Frank Act, as described in Parts VI and VIII (including this subpart) of the **SUPPLEMENTARY INFORMATION**, and in the proposal issued concurrently with this rule.

particularly on the anticipated costs to small entities. Further, the Board in the proposed rule solicited comment on any alternatives that would reduce the regulatory burden on small entities associated with the rule. These specifically included the types of alternatives suggested for consideration by the Regulatory Flexibility Act, including the length of time that remittance transfer providers may need to implement the new requirements, whether to create certain limited exemptions under the new regime, whether to adopt certain safe harbors to reduce implementation burdens, whether particular standards could be less prescriptive, and alternative standards for agency liability.

In light of these elements, the public's opportunity to comment on the IRFA's analysis, and the statutory deadlines set by Congress, the Bureau concluded that it would best serve small entities affected by this rule to focus its resources on development of the final rule, the FRFA, and the concurrent proposal being published elsewhere in today's **Federal Register**.

IX. Paperwork Reduction Act

The Bureau's information collection requirements contained in this final rule have been submitted to the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507(d)) as an amendment to a previously approved collection under OMB control number 3170–0014. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid OMB control number. Upon receipt of OMB's final action with respect to this information collection, the Bureau will publish a notice in the **Federal Register**.

The information collection requirements in this final rule are in 12 CFR part 1005. This information collection is required to provide benefits for consumers and is mandatory. *See* 15 U.S.C. 1693 *et seq*. The respondents/recordkeepers are financial institutions and entities involved in the remittance transfer business, including small businesses. Respondents are required to retain records for 24 months, but this regulation does not specify types of records that must be retained.

Any entities involved in the remittance transfer business potentially are affected by this collection of information because these entities will be required to provide disclosures containing information about consumers' specific remittance transfers. Disclosures must be provided prior to and at the time of payment for a remittance transfer, or alternatively, in a single pre-transaction disclosure containing all required information. Remittance transfer providers also must make available a written explanation of a consumer's error resolution, cancellation and refund rights upon request. Disclosures must be provided in English and in each foreign language principally used to advertise, solicit or market remittance transfers at an office.

Entities subject to the rule will have to review and revise disclosures that are currently provided to ensure that they accurately reflect the disclosure requirements in this rule. Entities subject to the rule may need to develop new disclosures to meet the rule's timing requirements.

Data from the Federal Deposit Insurance Corporation indicate that there are approximately 7,445 insured depository institutions in the United States. Regulatory filings by insured depository institutions do not contain information about the number that offer consumer international wire transfers. The Bureau assumes that the 152 large insured depositories and the approximately 7,293 other insured depositories all send consumer international wire transfers.

Data from the National Credit Union Administration indicate that there are approximately 7,325 insured credit unions in the United States as of September 2011. About half offer international wire transfers. Additionally, regulatory filings by insured credit unions contain an indicator for ''low cost wire transfers.'' These are wire transfers offered to members for less than $20 per transfer. Furthermore, about half of insured credit unions offer low cost wire transfers. Though the Bureau does not have exact data on the number of credit unions that offer wire transfers to consumers, the Bureau assumes that a similar fraction offer consumer international wire transfers. Specifically, the Bureau assumes that the three largest credit unions offer consumer international wire transfers and as do approximately 3,662 of the other federally insured credit unions. In summary, the Bureau has responsibility for purposes of the PRA for 155 (=152+3) large depository institutions and credit unions (including their depository and credit union affiliates) that send consumer international wire transfers. The Bureau does not have responsibility for the approximately 11,000 other insured depository institutions and credit unions that send consumer international wire transfers.[123]

In 2005, one survey of the money services business industry estimated there were about 67,000 money transmitters, including agents, sending international remittances.[124] From 2005 through 2010 employment in the broader sector to which money transmitters belong shrunk almost 19%.[125] The Bureau chooses to use the 67,000 figure, recognizing that it may overestimate the number of providers and agents. All of these money transmitters are likely either to have direct responsibilities for compliance with the rule, or to be indirectly involved in assisting business partners in complying with the rule. Thus, the Bureau assumes that all 67,000 money transmitters will have ongoing annual burden to comply with the rule. Based on the Bureau's estimate of the number of money transmitters as discussed above in Section VIII. Final Regulatory Flexibility Analysis, the Bureau estimates that the rule would also impose a one-time annual burden on 6,000 money transmitters (500 network providers and 5,500 agents).[126]

The current annual burden to comply with the provisions of Regulation E is estimated to be 1,904,000 hours. This estimate represents the portion of the burden under Regulation E that transferred to the Bureau in light of the changes made by the Dodd-Frank Act. The estimates of the burden increase associated with each major section of the rule are set forth below and represents averages for the institutions described. The Bureau expects that the amount of time required to implement each of the changes for a given institution may vary based on the size and complexity of the institution.

[123] The Bureau assumes that any depository institutions or credit unions that offer international ACH services or other forms of remittance transfers to consumers also offer international wires to consumers.

[124] *KPMG Report* at Table 20.

[125] The Bureau of Labor Statistics publishes data on Credit Intermediation and Related Activities (NAICS 5223), which encompasses electronic funds transfer services (NAICS 52232) and money transmission services (NAICS 52239). The 2010 employment figure is 262,300, available at: *http://www.bls.gov/oes/current/naics4_522300.htm;* the 2005 employment figure is 323,920, available at: *http://www.bls.gov/oes/2005/may/naics4_522300.htm*.

[126] Commenters state that there may be other entities that serve as remittance transfer providers and that are not depository institutions, credit unions, or money transmitters, as traditionally defined. These entities could include, for example, brokerages that send remittance transfers. Though the Bureau does not have an estimate of the number of any such providers, the Bureau believes that they account for a number of entities that is significantly less than the sum of money transmitters and their agents.

A. Insured Depository Institutions and Credit Unions

Insured Depositories and Credit Unions Supervised by the Bureau

The Bureau estimates that the 155 large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau would take, on average, 120 hours (three business weeks) to update their systems to comply with the disclosure requirements addressed in § 1005.31. This one-time revision would increase the burden by 18,600 hours. Several commenters believed that the compliance burden developed by the Board generally was underestimated. In particular, one commenter claimed that the one-time burden associated with compliance could be as much as 1000 hours (25 business weeks). Although the Bureau understands that the number of hours to update systems may vary, the Bureau's estimate of the one-time burden increase is based on the average hours the 155 respondents supervised by the Bureau would take to comply with the rule. Therefore, the Bureau believes its estimate of the one-time revision is appropriate.

On a continuing basis the Bureau estimates that the 155 large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau would take, on average, 8 hours (one business day) monthly to comply with the requirements under § 1005.31 and would increase the ongoing burden by 14,880 hours. In an effort to minimize the compliance cost and burden, particularly for small entities, the rule contains model disclosures in appendix A (Model Forms A–30 through A–41) that may be used to satisfy the statutory requirements. The Bureau received several comments with concerns and suggestions about the terminology and formatting of the model forms. These comments are addressed elsewhere in the **SUPPLEMENTARY INFORMATION**.

The Bureau estimates on average 262,500 consumers would spend 5 minutes in order to provide a notice of error as required under § 1005.33(b). This would increase the total annual burden for this information collection by approximately 21,875 hours.

The Board estimated that 1,133 respondents supervised by the Board would take, on average, 1.5 hours (monthly) to address a sender's notice of error as required by § 1005.33(c)(1). One commenter estimated that the ongoing burden would take, on average, 15 hours (monthly). Based on the comment received and upon consideration, the Bureau estimates that the 155 large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau would take, on average, approximately 12 hours (monthly) to address a sender's notice of error as required by § 1005.33(c)(1). This would increase the total annual burden for this information collection by 21,875 hours.

The Bureau estimates that the 155 respondents supervised by the Bureau would take, on average, 40 hours (one business week) to develop written policies and procedures designed to ensure compliance with respect to the error resolution requirements applicable to remittance transfers under § 1005.33. This one-time revision would increase the burden by 6,200 hours. On a continuing basis the Bureau estimates that the 155 respondents would take, on average, 8 hours (one business day) annually to maintain the requirements under § 1005.33 and would increase the ongoing burden by 1,240 hours.

The Bureau estimates that the 155 respondents supervised by the Bureau would take, on average, 40 hours (one business week) to establish policies and procedures for agent compliance as addressed under § 1005.35. This one-time revision would increase the burden by 6,200 hours. On a continuing basis the Bureau estimates that 155 respondents would take, on average, 8 hours (one business day) annually to maintain the requirements under § 1005.35 and would increase the ongoing burden by 1,240 hours.

In summary, the rule would impose a one-time increase in the estimated annual burden on these institutions of approximately 31,000 hours. On a continuing basis the rule would increase the estimated annual burden by approximately 61,000 hours.

Insured Depositories and Credit Unions Not Supervised by the Bureau

Other Federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the entities for which they have administrative enforcement authority under this rule. They may, but are not required to, use the following Bureau estimates. The Bureau estimates that the 11,000 insured depositories and credit unions not supervised by the Bureau would take, on average, 120 hours (three business weeks) to update their systems to comply with the disclosure requirements addressed in § 1005.31. This one-time revision would increase the burden by 1,320,000 hours. On a continuing basis the Bureau estimates that 11,000 institutions would take, on average, 8 hours (one business day) monthly to comply with the requirements under § 1005.31 and would increase the ongoing burden by 1,056,000 hours. In an effort to minimize the compliance cost and burden, particularly for small entities, the rule contains model disclosures in appendix A (Model Forms A–30 through A–41) that may be used to satisfy the statutory requirements.

The Bureau estimates on average 875,000 consumers would spend 5 minutes in order to provide a notice of error as required under section 1005.33(b). This would increase the total annual burden for this information collection by about 73,000 hours. The Bureau estimates that the 11,000 institutions would take, on average, 73,000 hours annually to address a sender's notice of error as required by § 1005.33(c)(1).

The Bureau estimates that the 11,000 institutions would take, on average, 40 hours (one business week) to develop written policies and procedures designed to ensure compliance with respect to the error resolution requirements applicable to remittance transfers under § 1005.33. This one-time revision would increase the burden by 440,000 hours. On a continuing basis the Bureau estimates that 11,000 institutions would take, on average, 8 hours (one business day) annually to maintain the requirements under § 1005.33 and would increase the ongoing burden by 88,000 hours.

The Bureau estimates that 11,000 institutions would take, on average, 40 hours (one business week) to establish policies and procedures for agent compliance as addressed under § 1005.35. This one-time revision would increase the burden by 440,000 hours. On a continuing basis the Bureau estimates that 11,000 institutions would take, on average, 8 hours (one business day) annually to maintain the requirements under § 1005.35 and would increase the ongoing burden by 88,000 hours.

In summary, the rule would impose a one-time increase in the estimated annual burden of approximately 2,200,000 hours. On a continuing basis the rule would increase the estimated annual burden by approximately 1,378,000.

B. Money Transmitters

Based on the Bureau's estimate of the number of money transmitters as discussed above in Section VIII. Final Regulatory Flexibility Analysis, the Bureau estimates that the rule would impose a one-time annual burden on 6,000 money transmitters (500 networks and 5,500 agents) and an ongoing

annual burden on all 67,000 money transmitters. The Bureau estimates the one-time annual burden of 200 hours and an ongoing annual burden of 42 hours. The Bureau therefore estimates that the rule would impose a one-time annual burden of 1,200,000 hours and an annual burden of 2,814,000 hours.

C. Summary

In summary, the Bureau estimates that the total annual burden to comply with the new provisions of Regulation E is 7,684,000 hours. The Bureau estimates that the total one-time annual burden of the rule is 3,431,000 hours. The Bureau estimates that the one-time annual burden of the rule includes 31,000 hours for large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau and 600,000 hours for money transmitters supervised by the Bureau. The Bureau estimates that the total ongoing burden of the rule is 4,253,000 hours. The ongoing burden of the rule includes 61,000 hours for large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau and 1,407,000 hours for money transmitters supervised by the Bureau.

The Bureau is currently discussing appropriate methodologies and burden sharing arrangements with other Federal agencies that share administrative enforcement authority under this regulation and other regulations for which certain rulewriting and administrative enforcement transferred to the Bureau on July 21, 2011. The Bureau will publish a **Federal Register** notice upon conclusion of these discussions and receipt of OMB's final action with respect to this collection. The notice will include any changes to the estimates discussed in this section.

The Bureau has a continuing interest in the public's opinion of the collection of information. Comments on the collection of information should be sent to: Chris Willey, Chief Information Officer, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (3170–0014), Washington, DC 20503.

List of Subjects in 12 CFR Part 1005

Banking, Banks, Consumer protection, Credit unions, Electronic fund transfers, National banks, Remittance transfers, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends 12 CFR part 1005 and the Official Interpretations as follows:

PART 1005—ELECTRONIC FUND TRANSFERS (REGULATION E)

■ 1. The authority citation for part 1005 is revised to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1693b. Subpart B is also issued under 12 U.S.C. 5601; Pub. L. 111–203, 124 Stat. 1376 (2010).

Subpart A—General

■ 2. Designate §§ 1005.1 through 1005.20 as subpart A under the heading set forth above.

■ 3. In § 1005.1, revise paragraph (b) to read as follows:

§ 1005.1 Authority and purpose.

* * * * *

(b) *Purpose.* This part carries out the purposes of the Electronic Fund Transfer Act, which establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer and remittance transfer services and of financial institutions or other persons that offer these services. The primary objective of the act and this part is the protection of individual consumers engaging in electronic fund transfers and remittance transfers.

■ 4. In § 1005.2, revise the introductory text to read as follows:

§ 1005.2 Definitions.

Except as otherwise provided in subpart B, for purposes of this part, the following definitions apply:

* * * * *

■ 5. In § 1005.3, revise paragraph (a) to read as follows:

§ 1005.3 Coverage.

(a) *General.* This part applies to any electronic fund transfer that authorizes a financial institution to debit or credit a consumer's account. Generally, this part applies to financial institutions. For purposes of §§ 1005.3(b)(2) and (3), 1005.10(b), (d), and (e), and 1005.13, this part applies to any person. The requirements of subpart B apply to remittance transfer providers.

* * * * *

■ 6. Add subpart B to read as follows:

Subpart B—Requirements for Remittance Transfers

Sec.

1005.30 Remittance transfer definitions.
1005.31 Disclosures.
1005.32 Estimates.
1005.33 Procedures for resolving errors.
1005.34 Procedures for cancellation and refund of remittance transfers.
1005.35 Acts of agents.
1005.36 Transfers scheduled in advance.

Subpart B—Requirements for Remittance Transfers

§ 1005.30 Remittance transfer definitions.

For purposes of this subpart, the following definitions apply:

(a) ''Agent'' means an agent, authorized delegate, or person affiliated with a remittance transfer provider, as defined under State or other applicable law, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider.

(b) ''Business day'' means any day on which the offices of a remittance transfer provider are open to the public for carrying on substantially all business functions.

(c) ''Designated recipient'' means any person specified by the sender as the authorized recipient of a remittance transfer to be received at a location in a foreign country.

(d) ''Preauthorized remittance transfer'' means a remittance transfer authorized in advance to recur at substantially regular intervals.

(e) *Remittance transfer*—(1) *General definition.* A ''remittance transfer'' means the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider. The term applies regardless of whether the sender holds an account with the remittance transfer provider, and regardless of whether the transaction is also an electronic fund transfer, as defined in § 1005.3(b).

(2) *Exclusions from coverage.* The term ''remittance transfer'' does not include:

(i) *Small value transactions.* Transfer amounts, as described in § 1005.31(b)(1)(i), of $15 or less.

(ii) *Securities and commodities transfers.* Any transfer that is excluded from the definition of electronic fund transfer under § 1005.3(c)(4).

(f) ''Remittance transfer provider'' or ''provider'' means any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person.

(g) ''Sender'' means a consumer in a State who primarily for personal, family, or household purposes requests a remittance transfer provider to send a remittance transfer to a designated recipient.

§ 1005.31 Disclosures.

(a) *General form of disclosures*—(1) *Clear and conspicuous.* Disclosures required by this subpart must be clear and conspicuous. Disclosures required by this subpart may contain commonly accepted or readily understandable abbreviations or symbols.

(2) *Written and electronic disclosures.* Disclosures required by this subpart generally must be provided to the sender in writing. Disclosures required by paragraph (b)(1) of this section may be provided electronically, if the sender electronically requests the remittance transfer provider to send the remittance transfer. Written and electronic disclosures required by this subpart generally must be made in a retainable form. Disclosures provided via mobile application or text message, to the extent permitted by paragraph (a)(5) of this section, need not be retainable.

(3) *Disclosures for oral telephone transactions.* The information required by paragraph (b)(1) of this section may be disclosed orally if:

(i) The transaction is conducted orally and entirely by telephone;

(ii) The remittance transfer provider complies with the requirements of paragraph (g)(2) of this section; and

(iii) The provider discloses orally a statement about the rights of the sender regarding cancellation required by paragraph (b)(2)(iv) of this section pursuant to the timing requirements in paragraph (e)(1) of this section.

(4) *Oral disclosures for certain error resolution notices.* The information required by § 1005.33(c)(1) may be disclosed orally if:

(i) The remittance transfer provider determines that an error occurred as described by the sender; and

(ii) The remittance transfer provider complies with the requirements of paragraph (g)(2) of this section.

(5) *Disclosures for mobile application or text message transactions.* The information required by paragraph (b)(1) of this section may be disclosed orally or via mobile application or text message if:

(i) The transaction is conducted entirely by telephone via mobile application or text message;

(ii) The remittance transfer provider complies with the requirements of paragraph (g)(2) of this section; and

(iii) The provider discloses orally or via mobile application or text message a statement about the rights of the sender regarding cancellation required by paragraph (b)(2)(iv) of this section pursuant to the timing requirements in paragraph (e)(1) of this section.

(b) *Disclosure requirements*—(1) *Prepayment disclosure.* A remittance transfer provider must disclose to a sender, as applicable:

(i) The amount that will be transferred to the designated recipient, in the currency in which the remittance transfer is funded, using the term ''Transfer Amount'' or a substantially similar term;

(ii) Any fees and taxes imposed on the remittance transfer by the provider, in the currency in which the remittance transfer is funded, using the terms ''Transfer Fees'' for fees and ''Transfer Taxes'' for taxes, or substantially similar terms;

(iii) The total amount of the transaction, which is the sum of paragraphs (b)(1)(i) and (ii) of this section, in the currency in which the remittance transfer is funded, using the term ''Total'' or a substantially similar term;

(iv) The exchange rate used by the provider for the remittance transfer, rounded consistently for each currency to no fewer than two decimal places and no more than four decimal places, using the term ''Exchange Rate'' or a substantially similar term;

(v) The amount in paragraph (b)(1)(i) of this section, in the currency in which the funds will be received by the designated recipient, but only if fees or taxes are imposed under paragraph (b)(1)(vi) of this section, using the term ''Transfer Amount'' or a substantially similar term. The exchange rate used to calculate this amount is the exchange rate in paragraph (b)(1)(iv) of this section, including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate;

(vi) Any fees and taxes imposed on the remittance transfer by a person other than the provider, in the currency in which the funds will be received by the designated recipient, using the terms ''Other Fees'' for fees and ''Other Taxes'' for taxes, or substantially similar terms. The exchange rate used to calculate these fees and taxes is the exchange rate in paragraph (b)(1)(iv) of this section, including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate; and

(vii) The amount that will be received by the designated recipient, in the currency in which the funds will be received, using the term ''Total to Recipient'' or a substantially similar term. The exchange rate used to calculate this amount is the exchange rate in paragraph (b)(1)(iv) of this section, including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate.

(2) *Receipt.* A remittance transfer provider must disclose to a sender, as applicable:

(i) The disclosures described in paragraphs (b)(1)(i) through (vii) of this section;

(ii) The date in the foreign country on which funds will be available to the designated recipient, using the term ''Date Available'' or a substantially similar term. A provider may provide a statement that funds may be available to the designated recipient earlier than the date disclosed, using the term ''may be available sooner'' or a substantially similar term;

(iii) The name and, if provided by the sender, the telephone number and/or address of the designated recipient, using the term ''Recipient'' or a substantially similar term;

(iv) A statement about the rights of the sender regarding the resolution of errors and cancellation, using language set forth in Model Form A–37 of Appendix A to this part or substantially similar language. For any remittance transfer scheduled by the sender at least three business days before the date of the transfer, the statement about the rights of the sender regarding cancellation must instead reflect the requirements of § 1005.36(c);

(v) The name, telephone number(s), and Web site of the remittance transfer provider; and

(vi) A statement that the sender can contact the State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer and the Consumer Financial Protection Bureau for questions or complaints about the remittance transfer provider, using language set forth in Model Form A–37 of Appendix A to this part or substantially similar language. The disclosure must provide the name, telephone number(s), and Web site of the State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer and the name, toll-free telephone number(s), and Web site of the Consumer Financial Protection Bureau.

(3) *Combined disclosure.* As an alternative to providing the disclosures described in paragraphs (b)(1) and (2) of this section, a remittance transfer provider may provide the disclosures described in paragraph (b)(2) of this section, as applicable, in a single disclosure pursuant to the timing requirements in paragraph (e)(1) of this section. If the remittance transfer provider provides the combined disclosure and the sender completes the transfer, the remittance transfer provider must provide the sender with proof of payment when payment is made for the

remittance transfer. The proof of payment must be clear and conspicuous, provided in writing or electronically, and provided in a retainable form.

(4) *Long form error resolution and cancellation notice.* Upon the sender's request, a remittance transfer provider must promptly provide to the sender a notice describing the sender's error resolution and cancellation rights, using language set forth in Model Form A–36 of Appendix A to this part or substantially similar language. For any remittance transfer scheduled by the sender at least three business days before the date of the transfer, the description of the rights of the sender regarding cancellation must instead reflect the requirements of § 1005.36(c).

(c) *Specific format requirements*—(1) *Grouping.* The information required by paragraphs (b)(1)(i), (ii), and (iii) of this section generally must be grouped together. The information required by paragraphs (b)(1)(v), (vi), and (vii) of this section generally must be grouped together. Disclosures provided via mobile application or text message, to the extent permitted by paragraph (a)(5) of this section, need not be grouped together.

(2) *Proximity.* The information required by paragraph (b)(1)(iv) of this section generally must be disclosed in close proximity to the other information required by paragraph (b)(1) of this section. The information required by paragraph (b)(2)(iv) of this section generally must be disclosed in close proximity to the other information required by paragraph (b)(2) of this section. Disclosures provided via mobile application or text message, to the extent permitted by paragraph (a)(5) of this section, need not comply with the proximity requirements of this paragraph.

(3) *Prominence and size.* Written disclosures required by this subpart must be provided on the front of the page on which the disclosure is printed. Disclosures required by this subpart that are provided in writing or electronically must be in a minimum eight-point font, except for disclosures provided via mobile application or text message, to the extent permitted by paragraph (a)(5) of this section. Disclosures required by paragraph (b) of this section that are provided in writing or electronically must be in equal prominence to each other.

(4) *Segregation.* Except for disclosures provided via mobile application or text message, to the extent permitted by paragraph (a)(5) of this section, disclosures required by this subpart that are provided in writing or electronically must be segregated from everything else and must contain only information that is directly related to the disclosures required under this subpart.

(d) *Estimates.* Estimated disclosures may be provided to the extent permitted by § 1005.32. Estimated disclosures must be described using the term ''Estimated'' or a substantially similar term in close proximity to the estimated term or terms.

(e) *Timing.* (1) Except as provided in § 1005.36(a), a pre-payment disclosure required by paragraph (b)(1) of this section or a combined disclosure required by paragraph (b)(3) of this section must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the transfer.

(2) Except as provided in § 1005.36(a), a receipt required by paragraph (b)(2) of this section generally must be provided to the sender when payment is made for the remittance transfer. If a transaction is conducted entirely by telephone, a receipt required by paragraph (b)(2) of this section may be mailed or delivered to the sender no later than one business day after the date on which payment is made for the remittance transfer. If a transaction is conducted entirely by telephone and involves the transfer of funds from the sender's account held by the provider, the receipt required by paragraph (b)(2) of this section may be provided on or with the next regularly scheduled periodic statement for that account or within 30 days after payment is made for the remittance transfer if a periodic statement is not provided. The statement about the rights of the sender regarding cancellation required by paragraph (b)(2)(iv) of this section may, but need not, be disclosed pursuant to the timing requirements of this paragraph if a provider discloses this information pursuant to paragraphs (a)(3)(iii) or (a)(5)(iii) of this section.

(f) *Accurate when payment is made.* Except as provided in § 1005.36(b), disclosures required by this section must be accurate when a sender makes payment for the remittance transfer, except to the extent estimates are permitted by § 1005.32.

(g) *Foreign language disclosures*—(1) *General.* Except as provided in paragraph (g)(2) of this section, disclosures required by this subpart must be made in English and, if applicable, either in:

(i) Each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at the office in which a sender conducts a transaction or asserts an error; or

(ii) The foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction (or for written or electronic disclosures made pursuant to § 1005.33, in the foreign language primarily used by the sender with the remittance transfer provider to assert the error), provided that such foreign language is principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at the office in which a sender conducts a transaction or asserts an error, respectively.

(2) *Oral, mobile application, or text message disclosures.* Disclosures provided orally for transactions conducted orally and entirely by telephone under paragraph (a)(3) of this section or orally or via mobile application or text message for transactions conducted via mobile application or text message under paragraph (a)(5) of this section shall be made in the language primarily used by the sender with the remittance transfer provider to conduct the transaction. Disclosures provided orally under paragraph (a)(4) of this section for error resolution purposes shall be made in the language primarily used by the sender with the remittance transfer provider to assert the error.

§ 1005.32 Estimates.

(a) *Temporary exception for insured institutions*—(1) *General.* For disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2), estimates may be provided in accordance with paragraph (c) of this section for the amounts required to be disclosed under § 1005.31(b)(1)(iv) through (vii), if:

(i) A remittance transfer provider cannot determine the exact amounts for reasons beyond its control;

(ii) A remittance transfer provider is an insured institution; and

(iii) The remittance transfer is sent from the sender's account with the institution.

(2) *Sunset date.* Paragraph (a)(1) of this section expires on July 21, 2015.

(3) *Insured institution.* For purposes of this section, the term ''insured institution'' means insured depository institutions (which includes uninsured U.S. branches and agencies of foreign depository institutions) as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), and insured credit unions as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

(b) *Permanent exception for transfers to certain countries*—(1) *General.* For disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2), estimates may be provided for transfers to certain countries in accordance with paragraph (c) of this section for the amounts required to be disclosed under § 1005.31(b)(1)(iv) through (vii), if a remittance transfer provider cannot determine the exact amounts at the time the disclosure is required because:

(i) The laws of the recipient country do not permit such a determination, or

(ii) The method by which transactions are made in the recipient country does not permit such determination.

(2) *Safe harbor.* A remittance transfer provider may rely on the list of countries published by the Bureau to determine whether estimates may be provided under paragraph (b)(1) of this section, unless the provider has information that a country's laws or the method by which transactions are conducted in that country permits a determination of the exact disclosure amount.

(c) *Bases for estimates.* Estimates provided pursuant to the exceptions in paragraph (a) or (b) of this section must be based on the below-listed approach or approaches, except as otherwise permitted by this paragraph. If a remittance transfer provider bases an estimate on an approach that is not listed in this paragraph, the provider is deemed to be in compliance with this paragraph so long as the designated recipient receives the same, or greater, amount of funds than the remittance transfer provider disclosed under § 1005.31(b)(1)(vii).

(1) *Exchange rate.* In disclosing the exchange rate as required under § 1005.31(b)(1)(iv), an estimate must be based on one of the following:

(i) For remittance transfers sent via international ACH that qualify for the exception in paragraph (b)(1)(ii) of this section, the most recent exchange rate set by the recipient country's central bank or other governmental authority and reported by a Federal Reserve Bank;

(ii) The most recent publicly available wholesale exchange rate and, if applicable, any spread that the remittance transfer provider or its correspondent typically applies to such a wholesale rate for remittance transfers for that currency; or

(iii) The most recent exchange rate offered or used by the person making funds available directly to the designated recipient or by the person setting the exchange rate.

(2) *Transfer amount in the currency in which the funds will be received by the designated recipient.* In disclosing the transfer amount in the currency in which the funds will be received by the designated recipient, as required under § 1005.31(b)(1)(v), an estimate must be based on the estimated exchange rate provided in accordance with paragraph (c)(1) of this section, prior to any rounding of the estimated exchange rate.

(3) *Other fees.* (i) *Imposed as percentage of amount transferred.* In disclosing other fees as required under § 1005.31(b)(1)(vi) that are a percentage of the amount transferred to the designated recipient, an estimate must be based on the estimated exchange rate provided in accordance with paragraph (c)(1) of this section, prior to any rounding of the estimated exchange rate.

(ii) *Imposed by intermediary or final institution.* In disclosing § 1005.31(b)(1)(vi) fees imposed by institutions that act as intermediaries or by the designated recipient's institution in connection with a remittance transfer, an estimate must be based on one of the following:

(A) The remittance transfer provider's most recent remittance transfer to the designated recipient's institution, or

(B) A representative transmittal route identified by the remittance transfer provider.

(4) *Other taxes imposed in the recipient country.* In disclosing taxes imposed in the recipient country as required under § 1005.31(b)(1)(vi) that are a percentage of the amount transferred to the designated recipient, an estimate must be based on the estimated exchange rate provided in accordance with paragraph (c)(1) of this section, prior to any rounding of the estimated exchange rate, and the estimated fees provided in accordance with paragraph (c)(3) of this section.

(5) *Amount of currency that will be received by the designated recipient.* In disclosing the amount of currency that will be received by the designated recipient as required under § 1005.31(b)(1)(vii), an estimate must be based on the information provided in accordance with paragraphs (c)(1) through (4) of this section, as applicable.

§ 1005.33 Procedures for resolving errors.

(a) *Definition of error.* (1) *Types of transfers or inquiries covered.* For purposes of this section, the term *error* means:

(i) An incorrect amount paid by a sender in connection with a remittance transfer;

(ii) A computational or bookkeeping error made by the remittance transfer provider relating to a remittance transfer;

(iii) The failure to make available to a designated recipient the amount of currency stated in the disclosure provided to the sender under § 1005.31(b)(2) or (3) for the remittance transfer, unless:

(A) The disclosure stated an estimate of the amount to be received in accordance with § 1005.32 and the difference results from application of the actual exchange rate, fees, and taxes, rather than any estimated amounts; or

(B) The failure resulted from extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated;

(iv) The failure to make funds available to a designated recipient by the date of availability stated in the disclosure provided to the sender under § 1005.31(b)(2) or (3) for the remittance transfer, unless the failure to make the funds available resulted from:

(A) Extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated;

(B) Delays related to the remittance transfer provider's fraud screening procedures or in accordance with the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.,* Office of Foreign Assets Control requirements, or similar laws or requirements; or

(C) The remittance transfer being made with fraudulent intent by the sender or any person acting in concert with the sender; or

(v) The sender's request for documentation required by § 1005.31 or for additional information or clarification concerning a remittance transfer, including a request a sender makes to determine whether an error exists under paragraphs (a)(1)(i) through (iv) of this section.

(2) *Types of transfers or inquiries not covered.* The term *error* does not include:

(i) An inquiry about the status of a remittance transfer, except where the funds from the transfer were not made available to a designated recipient by the disclosed date of availability as described in paragraph (a)(1)(iv) of this section;

(ii) A request for information for tax or other recordkeeping purposes;

(iii) A change requested by the designated recipient; or

(iv) A change in the amount or type of currency received by the designated recipient from the amount or type of currency stated in the disclosure provided to the sender under § 1005.31(b)(2) or (3) if the remittance transfer provider relied on information provided by the sender as permitted

under § 1005.31 in making such disclosure.

(b) *Notice of error from sender.* (1) *Timing; contents.* A remittance transfer provider shall comply with the requirements of this section with respect to any oral or written notice of error from a sender that:

(i) Is received by the remittance transfer provider no later than 180 days after the disclosed date of availability of the remittance transfer;

(ii) Enables the provider to identify:

(A) The sender's name and telephone number or address;

(B) The recipient's name, and if known, the telephone number or address of the recipient; and

(C) The remittance transfer to which the notice of error applies; and

(iii) Indicates why the sender believes an error exists and includes to the extent possible the type, date, and amount of the error, except for requests for documentation, additional information, or clarification described in paragraph (a)(1)(v) of this section.

(2) *Request for documentation or clarification.* When a notice of error is based on documentation, additional information, or clarification that the sender previously requested under paragraph (a)(1)(v) of this section, the sender's notice of error is timely if received by the remittance transfer provider the later of 180 days after the disclosed date of availability of the remittance transfer or 60 days after the provider sent the documentation, information, or clarification that had been requested.

(c) *Time limits and extent of investigation.* (1) *Time limits for investigation and report to consumer of error.* A remittance transfer provider shall investigate promptly and determine whether an error occurred within 90 days of receiving a notice of error. The remittance transfer provider shall report the results to the sender, including notice of any remedies available for correcting any error that the provider determines has occurred, within three business days after completing its investigation.

(2) *Remedies.* If, following an assertion of an error by a sender, the remittance transfer provider determines an error occurred, the provider shall, within one business day of, or as soon as reasonably practicable after, receiving the sender's instructions regarding the appropriate remedy, correct the error as designated by the sender by:

(i) In the case of any error under paragraphs (a)(1)(i) through (iii) of this section, as applicable, either:

(A) Refunding to the sender the amount of funds provided by the sender in connection with a remittance transfer which was not properly transmitted, or the amount appropriate to resolve the error; or

(B) Making available to the designated recipient, without additional cost to the sender or to the designated recipient, the amount appropriate to resolve the error;

(ii) In the case of an error under paragraph (a)(1)(iv) of this section:

(A) As applicable, either:

(*1*) Refunding to the sender the amount of funds provided by the sender in connection with a remittance transfer which was not properly transmitted, or the amount appropriate to resolve the error; or

(*2*) Making available to the designated recipient the amount appropriate to resolve the error. Such amount must be made available to the designated recipient without additional cost to the sender or to the designated recipient unless the sender provided incorrect or insufficient information to the remittance transfer provider in connection with the remittance transfer, in which case, third party fees may be imposed for resending the remittance transfer with the corrected or additional information; and

(B) Refunding to the sender any fees and, to the extent not prohibited by law, taxes imposed for the remittance transfer, unless the sender provided incorrect or insufficient information to the remittance transfer provider in connection with the remittance transfer; and

(iii) In the case of a request under paragraph (a)(1)(v) of this section, providing the requested documentation, information, or clarification.

(d) *Procedures if remittance transfer provider determines no error or different error occurred.* In addition to following the procedures specified in paragraph (c) of this section, the remittance transfer provider shall follow the procedures set forth in this paragraph (d) if it determines that no error occurred or that an error occurred in a manner or amount different from that described by the sender.

(1) *Explanation of results of investigation.* The remittance transfer provider's report of the results of the investigation shall include a written explanation of the provider's findings and shall note the sender's right to request the documents on which the provider relied in making its determination. The explanation shall also address the specific complaint of the sender.

(2) *Copies of documentation.* Upon the sender's request, the remittance transfer provider shall promptly provide copies of the documents on which the provider relied in making its error determination.

(e) *Reassertion of error.* A remittance transfer provider that has fully complied with the error resolution requirements of this section has no further responsibilities under this section should the sender later reassert the same error, except in the case of an error asserted by the sender following receipt of information provided under paragraph (a)(1)(v) of this section.

(f) *Relation to other laws*—(1) *Relation to Regulation E § 1005.11 for incorrect EFTs from a sender's account.* If an alleged error involves an incorrect electronic fund transfer from a sender's account in connection with a remittance transfer, and the sender provides a notice of error to the account-holding institution, the account-holding institution shall comply with the requirements of § 1005.11 governing error resolution rather than the requirements of this section, provided that the account-holding institution is not also the remittance transfer provider. If the remittance transfer provider is also the financial institution that holds the consumer's account, then the error-resolution provisions of this section apply when the sender provides such notice of error.

(2) *Relation to Truth in Lending Act and Regulation Z.* If an alleged error involves an incorrect extension of credit in connection with a remittance transfer, an incorrect amount received by the designated recipient under paragraph (a)(1)(iii) of this section that is an extension of credit for property or services not delivered as agreed, or the failure to make funds available by the disclosed date of availability under paragraph (a)(1)(iv) of this section that is an extension of credit for property or services not delivered as agreed, and the sender provides a notice of error to the creditor extending the credit, the provisions of Regulation Z, 12 CFR 1026.13, governing error resolution apply to the creditor, rather than the requirements of this section, even if the creditor is the remittance transfer provider. However, if the creditor is the remittance transfer provider, paragraph (b) of this section will apply instead of 12 CFR 1026.13(b). If the sender instead provides a notice of error to the remittance transfer provider that is not also the creditor, then the error-resolution provisions of this section apply to the remittance transfer provider.

(3) *Unauthorized remittance transfers.* If an alleged error involves an unauthorized electronic fund transfer for payment in connection with a

remittance transfer, §§ 1005.6 and 1005.11 apply with respect to the account-holding institution. If an alleged error involves an unauthorized use of a credit account for payment in connection with a remittance transfer, the provisions of Regulation Z, 12 CFR 1026.12(b), if applicable, and § 1026.13, apply with respect to the creditor.

(g) *Error resolution standards and recordkeeping requirements*—(1) *Compliance program.* A remittance transfer provider shall develop and maintain written policies and procedures that are designed to ensure compliance with the error resolution requirements applicable to remittance transfers under this section.

(2) *Retention of error-related documentation.* The remittance transfer provider's policies and procedures required under paragraph (g)(1) of this section shall include policies and procedures regarding the retention of documentation related to error investigations. Such policies and procedures must ensure, at a minimum, the retention of any notices of error submitted by a sender, documentation provided by the sender to the provider with respect to the alleged error, and the findings of the remittance transfer provider regarding the investigation of the alleged error. Remittance transfer providers are subject to the record retention requirements under § 1005.13.

§ 1005.34 Procedures for cancellation and refund of remittance transfers.

(a) *Sender right of cancellation and refund.* Except as provided in § 1005.36(c), a remittance transfer provider shall comply with the requirements of this section with respect to any oral or written request to cancel a remittance transfer from the sender that is received by the provider no later than 30 minutes after the sender makes payment in connection with the remittance transfer if:

(1) The request to cancel enables the provider to identify the sender's name and address or telephone number and the particular transfer to be cancelled; and

(2) The transferred funds have not been picked up by the designated recipient or deposited into an account of the designated recipient.

(b) *Time limits and refund requirements.* A remittance transfer provider shall refund, at no additional cost to the sender, the total amount of funds provided by the sender in connection with a remittance transfer, including any fees and, to the extent not prohibited by law, taxes imposed in connection with the remittance transfer, within three business days of receiving a sender's request to cancel the remittance transfer.

§ 1005.35 Acts of agents.

A remittance transfer provider is liable for any violation of this subpart by an agent when such agent acts for the provider.

§ 1005.36 Transfers scheduled in advance.

(a) *Timing.* For preauthorized remittance transfers, the remittance transfer provider must:

(1) For the first scheduled transfer, provide the pre-payment disclosure described in § 1005.31(b)(1) and the receipt described in § 1005.31(b)(2), in accordance with § 1005.31(e).

(2) For subsequent scheduled transfers:

(i) Provide a pre-payment disclosure as described in § 1005.31(b)(1) to the sender for each subsequent transfer. The pre-payment disclosure must be mailed or delivered within a reasonable time prior to the scheduled date of the subsequent transfer.

(ii) Provide a receipt as described in § 1005.31(b)(2) to the sender for each subsequent transfer. The receipt must be mailed or delivered to the sender no later than one business day after the date on which the transfer is made. However, if the transfer involves the transfer of funds from the sender's account held by the provider, the receipt may be provided on or with the next regularly scheduled periodic statement for that account or within 30 days after payment is made for the remittance transfer if a periodic statement is not provided.

(b) *Accuracy.* For preauthorized remittance transfers:

(1) For the first scheduled transfer, the disclosures described in paragraph (a)(1) of this section must comply with § 1005.31(f).

(2) For subsequent scheduled transfers, the disclosures described in paragraph (a)(2) of this section must be accurate when the transfer is made, except to the extent permitted by § 1005.32.

(c) *Cancellation.* For any remittance transfer scheduled by the sender at least three business days before the date of the transfer, a remittance transfer provider shall comply with any oral or written request to cancel the remittance transfer from the sender if the request to cancel:

(1) Enables the provider to identify the sender's name and address or telephone number and the particular transfer to be cancelled; and

(2) Is received by the provider at least three business days before the scheduled date of the remittance transfer.

■ 6. Amend Appendix A to part 1005 as follows:

■ a. Add Titles A–30 through A–41, and add reserved A–10 through A–29 to the Table of Contents.

■ b. Add Model Forms A–30 through A–41.

The additions and revisions read as follows:

Appendix A to Part 1005—Model Disclosure Clauses and Forms

* * * * *

A–10 through A–29 [Reserved]
A–30—Model Form for Pre-Payment Disclosures for Remittance Transfers Exchanged into Local Currency (§ 1005.31(b)(1))
A–31—Model Form for Receipts for Remittance Transfers Exchanged into Local Currency (§ 1005.31(b)(2))
A–32—Model Form for Combined Disclosures for Remittance Transfers Exchanged into Local Currency (§ 1005.31(b)(3))
A–33—Model Form for Pre-Payment Disclosures for Dollar-to-Dollar Remittance Transfers (§ 1005.31(b)(1))
A–34—Model Form for Receipts for Dollar-to-Dollar Remittance Transfers (§ 1005.31(b)(2))
A–35—Model Form for Combined Disclosures for Dollar-to-Dollar Remittance Transfers (§ 1005.31(b)(3))
A–36—Model Form for Error Resolution and Cancellation Disclosures (Long) (§ 1005.31(b)(4))
A–37—Model Form for Error Resolution and Cancellation Disclosures (Short) (§ 1005.31(b)(2)(iv) and (b)(2)(vi))
A–38—Model Form for Pre-Payment Disclosures for Remittance Transfers Exchanged into Local Currency—Spanish (§ 1005.31(b)(1))
A–39—Model Form for Receipts for Remittance Transfers Exchanged into Local Currency—Spanish (§ 1005.31(b)(2))
A–40—Model Form for Combined Disclosures for Remittance Transfers Exchanged into Local Currency—Spanish (§ 1005.31(b)(3))
A–41—Model Form for Error Resolution and Cancellation Disclosures (Long)—Spanish (§ 1005.31(b)(4))

* * * * *

A–30—Model Form for Pre-Payment Disclosures for Remittance Transfers Exchanged Into Local Currency (§ 1005.31(b)(1))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345
Today's Date: March 3, 2013

NOT A RECEIPT

Transfer Amount	$100.00
Transfer Fees	+$7.00
Transfer Taxes	+$3.00
Total	$110.00

Exchange Rate: US$1.00 = 12.27 MXN

Transfer Amount	1,227.00 MXN
Other Fees	−30.00 MXN
Other Taxes	−10.00 MXN
Total to Recipient	1,187.00 MXN

A–31—Model Form for Receipts for Remittance Transfers Exchanged Into Local Currency (§ 1005.31(b)(2))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: March 3, 2013

RECEIPT

SENDER:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
222–555–1212
RECIPIENT:
Carlos Gomez
123 Calle XXX
Mexico City, Mexico
PICK-UP LOCATION:
ABC Company
65 Avenida YYY
Mexico City, Mexico

Confirmation Code: ABC 123 DEF 456
Date Available: March 4, 2013

Transfer Amount	$100.00
Transfer Fees	+$7.00
Transfer Taxes	+$3.00
Total	$110.00

Exchange Rate: US$1.00 = 12.27 MXN

Transfer Amount	1,227.00 MXN
Other Fees	−30.00 MXN
Other Taxes	−10.00 MXN
Total to Recipient	1,187.00 MXN

You have a right to dispute errors in your transaction. If you think there is an error, contact us within 180 days at 800–123–4567 or *www.abccompany.com.* You can also contact us for a written explanation of your rights.

You can cancel for a full refund within 30 minutes of payment, unless the funds have been picked up or deposited.

For questions or complaints about ABC Company, contact:

State Regulatory Agency
800–111–2222
www.stateregulatoryagency.gov
Consumer Financial Protection Bureau
855–411–2372
855–729–2372 (TTY/TDD)
www.consumerfinance.gov

A–32—Model Form for Combined Disclosures for Remittance Transfers Exchanged Into Local Currency (§ 1005.31(b)(3))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: March 3, 2013
SENDER:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
222–555–1212
RECIPIENT:
Carlos Gomez
123 Calle XXX
Mexico City
Mexico
PICK-UP LOCATION:
ABC Company
65 Avenida YYY
Mexico City
Mexico

Confirmation Code: ABC 123 DEF 456
Date Available: March 4, 2013

Transfer Amount	$100.00
Transfer Fees	+$7.00
Transfer Taxes	+$3.00
Total	$110.00

Exchange Rate: US$1.00 = 12.27 MXN

Transfer Amount	1,227.00 MXN
Other Fees	−30.00 MXN
Other Taxes	−10.00 MXN
Total to Recipient	1,187.00 MXN

You have a right to dispute errors in your transaction. If you think there is an error, contact us within 180 days at 800–123–4567 or *www.abccompany.com.* You can also contact us for a written explanation of your rights.

You can cancel for a full refund within 30 minutes of payment, unless the funds have been picked up or deposited.

For questions or complaints about ABC Company, contact:

State Regulatory Agency
800–111–2222
www.stateregulatoryagency.gov
Consumer Financial Protection Bureau
855–411–2372
855–729–2372 (TTY/TDD)
www.consumerfinance.gov

A–33—Model form for Pre-Payment Disclosures for Dollar-to-Dollar Remittance Transfers (§ 1005.31(b)(1))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: March 3, 2013

NOT A RECEIPT

Transfer Amount	$100.00
Transfer Fees	+$7.00
Transfer Taxes	+$3.00
Total	$110.00
Transfer Amount	$100.00
Other Fees	−$4.00
Other Taxes	−$1.00
Total to Recipient	$95.00

A–34—Model Form for Receipts for Dollar-to-Dollar Remittance Transfers (§ 1005.31(b)(2))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: March 3, 2013

RECEIPT

SENDER:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
301–555–1212
RECIPIENT:
Carlos Gomez
106 Calle XXX
Mexico City
Mexico
PICK–UP LOCATION:
ABC Company
65 Avenida YYY
Mexico City
Mexico

Confirmation Code: ABC 123 DEF 456
Date Available: March 4, 2013

Transfer Amount	$100.00
Transfer Fees	+$7.00
Transfer Taxes	+$3.00
Total	$110.00
Transfer Amount	$100.00
Other Fees	−$4.00
Other Taxes	−$1.00
Total to Recipient:	$95.00

You have a right to dispute errors in your transaction. If you think there is an error, contact us within 180 days at 800–123–4567 or *www.abccompany.com.* You can also contact us for a written explanation of your rights.

You can cancel for a full refund within 30 minutes of payment, unless the funds have been picked up or deposited.

For questions or complaints about ABC Company, contact:

State Regulatory Agency
800–111–2222
www.stateregulatoryagency.gov
Consumer Financial Protection Bureau
855–411–2372
855–729–2372 (TTY/TDD)
www.consumerfinance.gov

A–35—Model Form for Combined Disclosures for Dollar-to-Dollar Remittance Transfers (§ 1005.31(b)(3))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: March 3, 2013
SENDER:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
301–555–1212
RECIPIENT:
Carlos Gomez
106 Calle XXX
Mexico City
Mexico
PICK-UP LOCATION:
ABC Company
65 Avenida YYY
Mexico City
Mexico

Confirmation Code: ABC 123 DEF 456
Date Available: March 4, 2013

Transfer Amount	$100.00
Transfer Fees	+$7.00
Transfer Taxes	+$3.00
Total	$110.00
Transfer Amount	$100.00
Other Fees	−$4.00
Other Taxes	−$1.00
Total to Recipient	$95.00

You have a right to dispute errors in your transaction. If you think there is an error, contact us within 180 days at 800–123–4567 or *www.abccompany.com.* You can also contact us for a written explanation of your rights.

You can cancel for a full refund within 30 minutes of payment, unless the funds have been picked up or deposited.

For questions or complaints about ABC Company, contact:

State Regulatory Agency
800–111–2222
www.stateregulatoryagency.gov
Consumer Financial Protection Bureau
855–411–2372
855–729–2372 (TTY/TDD)
www.consumerfinance.gov

A–36—Model Form for Error Resolution and Cancellation Disclosures (Long) (§ 1005.31(b)(4))

What to do if you think there has been an error or problem:

If you think there has been an error or problem with your remittance transfer:

- Call us at [insert telephone number][; or]
- Write us at [insert address][; or]
- [Email us at [insert electronic mail address]].

You must contact us within 180 days of the date we promised to you that funds would be made available to the recipient. When you do, please tell us:

(1) Your name and address [or telephone number];

(2) The error or problem with the transfer, and why you believe it is an error or problem;

(3) The name of the person receiving the funds, and if you know it, his or her telephone number or address; [and]

(4) The dollar amount of the transfer; [and

(5) The confirmation code or number of the transaction.]

We will determine whether an error occurred within 90 days after you contact us and we will correct any error promptly. We will tell you the results within three business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of any documents we used in our investigation.

What to do if you want to cancel a remittance transfer:

You have the right to cancel a remittance transfer and obtain a refund of all funds paid to us, including any fees. In order to cancel, you must contact us at the [phone number or email address] above within 30 minutes of payment for the transfer.

When you contact us, you must provide us with information to help us identify the transfer you wish to cancel, including the amount and location where the funds were sent. We will refund your money within three business days of your request to cancel a transfer as long as the funds have not already been picked up or deposited into a recipient's account.

A–37—Model Form for Error Resolution and Cancellation Disclosures (Short) (§ 1005.31(b)(2)(iv) and (vi))

You have a right to dispute errors in your transaction. If you think there is an error, contact us within 180 days at [insert telephone number] or [insert Web site]. You can also contact us for a written explanation of your rights.

You can cancel for a full refund within 30 minutes of payment, unless the funds have been picked up or deposited.

For questions or complaints about [insert name of remittance transfer provider], contact:

BILLING CODE 4810–AM–P

A-38 – Model Form for Pre-Payment Disclosures for Remittance Transfers Exchanged into Local Currency – Spanish (§ 1005.31(b)(1))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Fecha: 3 de marzo de 2013

ESTE NO ES UN RECIBO

Cantidad de Envío:	$100.00
Cargos por Envío:	+$7.00
Impuestos de Envío:	+$3.00
Total:	$110.00

Tasa de Cambio: US$1.00 = 12.27 MXN

Cantidad de Envío:	1,227.00 MXN
Otros Cargos por Envío:	-30.00 MXN
Otros Impuestos de Envío:	-10.00 MXN
Total al Destinatario:	1,187.00 MXN

A-39 – Model Form for Receipts for Remittance Transfers Exchanged into Local Currency – Spanish (§ 1005.31(b)(2))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Fecha: 3 de marzo de 2013

RECIBO

REMITENTE:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
222-555-1212

DESTINATARIO:
Carlos Gomez
123 Calle XXX
Ciudad de México, D.F.
Mexico

México PUNTO DE PAGO:
ABC Company
65 Avenida YYY
Ciudad de México, D.F.
México

Código de Confirmación: ABC 123 DEF 456

Fecha Disponible: 4 de marzo de 2013

Cantidad de Envío:	$100.00
Cargos por Envío:	+$7.00
Impuestos de Envío:	+$3.00
Total:	$110.00

Tasa de Cambio: US$1.00 = 12.27 MXN

Cantidad de Envío:	1,227.00 MXN
Otros Cargos por Envío:	-30.00 MXN
Otros Impuestos de Envío:	-10.00 MXN
Total al Destinatario:	1,187.00 MXN

Usted tiene el derecho de discutir errores en su transaccion. Si cree que hay un error, contáctenos dentro de 180 días al 800-123-4567 o www.abccompany.com. También puede contactarnos para obtener una explicación escrita de sus derechos.

Puede cancelar el envío y recibir un reembolso total dentro de 30 minutos de haber realizado el pago, a no ser que los fondos hayan sido recogidos o depositados.

Para preguntas o presentar una queja
sobre ABC Company, contacte a:

State Regulatory Agency
800-111-2222
www.stateregulatoryagency.gov

Consumer Financial Protection Bureau
855-411-2372
855-729-2372 (TTY/TDD)
www.consumerfinance.gov

A-40 – Model Form for Combined Disclosures for Remittance Transfers Exchanged into Local Currency – Spanish (§ 1005.31(b)(3))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Fecha: 3 de marzo de 2013

REMITENTE:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
222-555-1212

DESTINATARIO:
Carlos Gomez
123 Calle XXX
Ciudad de México, D.F.
México

México PUNTO DE PAGO:
ABC Company
65 Avenida YYY
Ciudad de México, D.F.
México

Código de Confirmación: ABC 123 DEF 456

Fecha Disponible: 4 de marzo de 2013

Cantidad de Envío:	$100.00
Cargos por Envío:	+$7.00
Impuestos de Envío:	+$3.00
Total:	$110.00

Tipo de Cambio: US$1.00 = 12.27 MXN

Cantidad de Envío:	1,227.00 MXN
Otros Cargos por Envío:	-30.00 MXN
Otros Impuestos de Envío:	-10.00 MXN
Total al Destinatario:	1,187.00 MXN

Usted tiene el derecho de discutir errores en su transaccion. Si cree que hay un error, contáctenos dentro de 180 días al 800-123-4567 o www.abccompany.com. También puede contactarnos para obtener una explicación escrita de sus derechos.

Puede cancelar el envío y recibir un reembolso total dentro de 30 minutos de haber realizado el pago, a no ser que los fondos hayan sido recogidos o depositados.

Para preguntas o presentar una queja
sobre ABC Company, contacte a:

State Regulatory Agency
800-111-2222
www.stateregulatoryagency.gov

Consumer Financial Protection Bureau
855-411-2372
855-729-2372 (TTY/TDD)
www.consumerfinance.gov

A-41 – Model Form for Error Resolution and Cancellation Disclosures (Long) – Spanish (§ 1005.31(b)(4))

Lo que usted debe hacer si cree que hay un error o problema:

Si cree que hay un error o problema con su envío de dinero:

- Llámenos a [inserte número de teléfono][; o]
- Escríbanos a [inserte dirección][; o]
- [Envíenos un correo electrónico a [inserte dirección de correo electrónico].

Debe contactarnos dentro de 180 días a partir de la fecha en que se le prometió que los fondos estarían disponibles al destinatario. Cuando se comunique con nosotros, por favor provea la siguiente información:

(1) Su nombre y dirección [o número de teléfono];

(2) El error o problema con su envío de dinero, y por qué cree que hay un error o problema;

(3) El nombre del destinatario, y si lo sabe, su número de teléfono o dirección; [y]

(4) El monto del envío en dólares; [y

(5) El código de confirmación o el número de la transacción.]

Nosotros determinaremos si ocurrió un error dentro de 90 días después de que usted nos contacte y lo corregiremos rápidamente. Le diremos los resultados dentro de tres días hábiles después de terminar nuestra investigación. Si decidimos que no hubo un error, le enviaremos a usted una explicación escrita. Usted puede pedir copias de los documentos que usamos en nuestra investigación.

Lo que usted debe hacer si quiere cancelar un envío de dinero:

Tiene el derecho de cancelar un envío de dinero y obtener un reembolso de todo el dinero, incluyendo tarifas o gastos que usted nos pagó. Para cancelar debe contactarnos al [número de teléfono o dirección de correo electrónico] que se encuentra arriba dentro de 30 minutos de haber realizado el pago para el envío de dinero.

Cuando nos contacte, debe proveernos información que nos ayudará a identificar el envío de dinero que quiere cancelar, incluyendo la cantidad del envío y el lugar adonde fue enviado. Le reembolsaremos su dinero dentro de tres días hábiles de su petición de cancelar, a no ser que los fondos hayan sido recogidos o depositados en la cuenta del destinatario.

BILLING CODE 4810–AM–C

■ 7. In Supplement I to part 1005:

■ a. Add new Commentary for §§ 1005.30, 1005.31, 1005.32, 1005.33, 1005.34, 1005.35, and 1005.36.

■ b. Under Subheading Appendix A, paragraph (2) *Use of forms* is revised and paragraph (4) is added.

The revisions and additions read as follows:

Supplement I to Part 1005—Official Interpretations

* * * * *

Section 1005.30—Remittance Transfer Definitions

1. *Applicability of definitions in subpart A.* Except as modified or limited by subpart B (which modifications or limitations apply only to subpart B), the definitions in § 1005.2 apply to all of Regulation E, including subpart B.

30(b) Business Day

1. *General.* A business day, as defined in § 1005.30(b), includes the entire 24-hour period ending at midnight, and a notice given pursuant to any section of subpart B is effective even if given outside of normal business hours. A remittance transfer provider is not required under subpart B to make telephone lines available on a 24-hour basis.

2. *Substantially all business functions.* ''Substantially all business functions'' include both the public and the back-office operations of the provider. For example, if the offices of a provider are open on Saturdays for customers to request remittance transfers, but not for performing internal functions (such as investigating errors), then Saturday is not a business day for that provider. In this case, Saturday does not count toward the business-day standard set by subpart B for resolving errors, processing refunds, etc.

3. *Short hours.* A provider may determine, at its election, whether an abbreviated day is a business day. For example, if a provider engages in substantially all business functions until noon on Saturdays instead of its usual 3 p.m. closing, it may consider Saturday a business day.

4. *Telephone line.* If a provider makes a telephone line available on Sundays for cancelling the transfer, but performs no other business functions, Sunday is not a business day under the ''substantially all business functions'' standard.

30(c) Designated Recipient

1. *Person.* A designated recipient can be either a natural person or an organization, such as a corporation. *See* § 1005.2(j) (definition of person).

2. *Location in a foreign country.* i. A remittance transfer is received at a location in a foreign country if funds are to be received at a location physically outside of any State, as defined in § 1005.2(l). A specific pick-up location need not be designated for funds to be received at a location in a foreign country. If it is specified that the funds will be transferred to a foreign country to be picked up by the designated recipient, the transfer will be received at a location in a foreign country, even though a specific pick-up location within that country has not been designated.

ii. For transfers to a designated recipient's account, whether funds are to be received at a location physically outside of any State depends on where the recipient's account is located. If the account is located in a State, the funds will not be received at a location in a foreign country.

iii. Where the sender does not specify information about a designated recipient's account, but instead provides information about the recipient, a remittance transfer provider may make the determination of whether the funds will be received at a location in a foreign country on information that is provided by the sender, and other information the provider may have, at the time the transfer is requested. For example, if a consumer in a State gives a provider the recipient's email address, and the provider has no other information about whether the funds will be received by the recipient at a location in a foreign country, then the provider may determine that funds are not to be received at a location in a foreign country. However, if the provider at the time the transfer is requested has additional information indicating that funds are to be received in a foreign country, such as if the recipient's email address is already registered with the provider and associated with a foreign account, then the provider has sufficient information to conclude that the remittance transfer will be received at a location in a foreign country. Similarly, if a consumer in a State purchases a prepaid card, and the provider mails or delivers the card directly to the consumer, the provider may conclude that funds are not to be received in a foreign country, because the provider does not know whether the consumer will subsequently send the prepaid card to a recipient in a foreign country. In contrast, the provider has sufficient information to conclude that the funds are to be received in a foreign country if the remittance transfer provider sends a prepaid card to a specified recipient in a foreign country, even if a person located in a State, including the sender, retains the ability to access funds on the prepaid card.

3. *Sender as designated recipient.* A ''sender,'' as defined in § 1005.30(g), may also be a designated recipient if the sender meets the definition of ''designated recipient'' in § 1005.30(c). For example, a sender may request that a provider send an electronic transfer of funds from the sender's checking account in a State to the sender's checking account located in a foreign country. In this case, the sender would also be a designated recipient.

30(d) Preauthorized Remittance Transfer

1. *Advance authorization.* A preauthorized remittance transfer is a remittance transfer authorized in advance of a transfer that will take place on a recurring basis, at substantially regular intervals, and will require no further action by the consumer to initiate the transfer. In a bill-payment system, for example, if the consumer authorizes a remittance transfer provider to make monthly payments to a payee by means of a remittance transfer, and the payments take place without further action by the consumer, the payments are preauthorized remittance transfers. In contrast, if the consumer must take action each month to initiate a transfer (such as by entering instructions on a telephone or home computer), the payments are not preauthorized remittance transfers.

30(e) Remittance Transfer

1. *Electronic transfer of funds.* The definition of ''remittance transfer'' requires an electronic transfer of funds. The term electronic has the meaning given in section 106(2) of the Electronic Signatures in Global and National Commerce Act. There may be an electronic transfer of funds if a provider makes an electronic book entry between different settlement accounts to effectuate the transfer. However, where a sender mails funds directly to a recipient, or provides funds to a courier for delivery to a foreign country, there is not an electronic transfer of funds. Similarly, generally, where a provider issues a check, draft, or other paper instrument to be mailed to a person abroad, there is not an electronic transfer of funds. Nonetheless, an electronic transfer of funds occurs for a payment made by a provider under a bill-payment service available to a consumer via computer or other electronic means, unless the terms of the bill-payment service explicitly state that all payments, or all payments to a particular payee or payees, will be solely by check, draft, or similar paper instrument drawn on the consumer's account to be mailed abroad, and the payee or payees that will be paid in this manner are identified to the consumer. With respect to such a bill-payment service, if a provider provides a check, draft or similar paper instrument drawn on a consumer's account to be mailed abroad for a payee that is not identified to the consumer as described above, this payment by check, draft or similar payment instrument will be an electronic transfer of funds.

2. *Sent by a remittance transfer provider.* i. The definition of ''remittance transfer'' requires that a transfer be ''sent by a remittance transfer provider.'' This means that there must be an intermediary that is directly engaged with the sender to send an electronic transfer of funds on behalf of the sender to a designated recipient.

ii. A payment card network or other third party payment service that is functionally similar to a payment card network does not send a remittance transfer when a consumer provides a debit, credit or prepaid card directly to a foreign merchant as payment for goods or services. In such a case, the payment card network or third party payment service is not directly engaged with the sender to send a transfer of funds to a person in a foreign country; rather, the network or third party payment service is merely providing contemporaneous third-party payment processing and settlement services on behalf of the merchant or the card issuer, rather than on behalf of the sender. In such a case, the card issuer also is not directly engaged with the sender to send an electronic transfer of funds to the foreign merchant when the card issuer provides payment to the merchant. Similarly, where a consumer provides a checking or other account number, or a debit, credit or prepaid card, directly to a foreign merchant as payment for goods or services, the merchant is not acting as an intermediary that sends a transfer of funds on behalf of the sender when it submits the payment information for processing.

iii. However, a card issuer or a payment network may offer a service to a sender where the card issuer or a payment network is an intermediary that is directly engaged with the sender to obtain funds using the

sender's debit, prepaid or credit card and to send those funds to a recipient's checking account located in a foreign country. In this case, the card issuer or the payment network is an intermediary that is directly engaged with the sender to send an electronic transfer of funds on behalf of the sender, and this transfer of funds is a remittance transfer because it is made to a designated recipient. *See* comment 30(c)–2.ii.

3. *Examples of remittance transfers.*

i. Examples of remittance transfers include:

A. Transfers where the sender provides cash or another method of payment to a money transmitter or financial institution and requests that funds be sent to a specified location or account in a foreign country.

B. Consumer wire transfers, where a financial institution executes a payment order upon a sender's request to wire money from the sender's account to a designated recipient.

C. An addition of funds to a prepaid card by a participant in a prepaid card program, such as a prepaid card issuer or its agent, that is directly engaged with the sender to add these funds, where the prepaid card is sent or was previously sent by a participant in the prepaid card program to a person in a foreign country, even if a person located in a State (including a sender) retains the ability to withdraw such funds.

D. International ACH transactions sent by the sender's financial institution at the sender's request.

E. Online bill payments and other electronic transfers that a sender schedules in advance, including preauthorized remittance transfers, made by the sender's financial institution at the sender's request to a designated recipient.

ii. The term remittance transfer does not include, for example:

A. A consumer's provision of a debit, credit or prepaid card, directly to a foreign merchant as payment for goods or services because the issuer is not directly engaged with the sender to send an electronic transfer of funds to the foreign merchant when the issuer provides payment to the merchant. *See* comment 30(e)–2.

B. A consumer's deposit of funds to a checking or savings account located in a State, because there has not been a transfer of funds to a designated recipient. *See* comment 30(c)–2.ii.

C. Online bill payments and other electronic transfers that senders can schedule in advance, including preauthorized transfers, made through the Web site of a merchant located in a foreign country and via direct provision of a checking account, credit card, debit card or prepaid card number to the merchant, because the financial institution is not directly engaged with the sender to send an electronic transfer of funds to the foreign merchant when the institution provides payment to the merchant. *See* comment 30(e)–2.

30(f) Remittance Transfer Provider

1. *Agents.* A person is not deemed to be acting as a remittance transfer provider when it performs activities as an agent on behalf of a remittance transfer provider.

2. *Normal course of business.* Whether a person provides remittance transfers in the normal course of business depends on the facts and circumstances, including the total number and frequency of remittance transfers sent by the provider. For example, if a financial institution generally does not make international consumer wire transfers available to customers, but sends a couple of international consumer wire transfers in a given year as an accommodation for a customer, the institution does not provide remittance transfers in the normal course of business. In contrast, if a financial institution makes international consumer wire transfers generally available to customers (whether described in the institution's deposit account agreement, or in practice) and makes transfers multiple times per month, the institution provides remittance transfers in the normal course of business.

3. *Multiple remittance transfer providers.* If the remittance transfer involves more than one remittance transfer provider, only one set of disclosures must be given, and the remittance transfer providers must agree among themselves which provider must take the actions necessary to comply with the requirements that subpart B imposes on any or all of them. Even though the providers must designate one provider to take the actions necessary to comply with the requirements that subpart B imposes on any or all of them, all remittance transfer providers involved in the remittance transfer remain responsible for compliance with the applicable provisions of the EFTA and Regulation E.

30(g) Sender

1. *Determining whether a consumer is located in a State.* Under § 1005.30(g), the definition of ''sender'' means a consumer in a State who, primarily for personal, family, or household purposes, requests a remittance transfer provider to send a remittance transfer to a designated recipient. For transfers from a consumer's account, whether a consumer is located in a State depends on where the consumer's account is located. If the account is located in a State, the consumer will be located in a State for purposes of the definition of ''sender'' in § 1005.30(g), notwithstanding comment 3(a)–3. Where a transfer is requested electronically or by telephone and the transfer is not from an account, the provider may make the determination of whether a consumer is located in a State based on information that is provided by the consumer and on any records associated with the consumer that the provider may have, such as an address provided by the consumer.

Section 1005.31—Disclosures

31(a) General Form of Disclosures

31(a)(1) Clear and Conspicuous

1. *Clear and conspicuous standard.* Disclosures are clear and conspicuous for purposes of subpart B if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to senders. Oral disclosures as permitted by § 1005.31(a)(3), (4), and (5) are clear and conspicuous when they are given at a volume and speed sufficient for a sender to hear and comprehend them.

2. *Abbreviations and symbols.* Disclosures may contain commonly accepted or readily understandable abbreviations or symbols, such as ''USD'' to indicate currency in U.S. dollars or ''MXN'' to indicate currency in Mexican pesos.

31(a)(2) Written and Electronic Disclosures

1. *E–Sign Act requirements.* If a sender electronically requests the remittance transfer provider to send a remittance transfer, the disclosures required by § 1005.31(b)(1) may be provided to the sender in electronic form without regard to the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E–Sign Act) (15 U.S.C. 7001 *et seq.*). If a sender electronically requests the provider to send a remittance transfer, the disclosures required by § 1005.31(b)(2) may be provided to the sender in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E–Sign Act. *See* § 1005.4(a)(1).

2. *Paper size.* Written disclosures may be provided on any size paper, as long as the disclosures are clear and conspicuous. For example, disclosures may be provided on a register receipt or on an 8.5 inch by 11 inch sheet of paper.

3. *Retainable electronic disclosures.* A remittance transfer provider may satisfy the requirement to provide electronic disclosures in a retainable form if it provides an online disclosure in a format that is capable of being printed. Electronic disclosures may not be provided through a hyperlink or in another manner by which the sender can bypass the disclosure. A provider is not required to confirm that the sender has read the electronic disclosures.

4. *Pre-payment disclosures to a mobile telephone.* Disclosures provided via mobile application or text message, to the extent permitted by § 1005.31(a)(5), need not be retainable. However, disclosures provided electronically to a mobile telephone that are not provided via mobile application or text message must be retainable. For example, disclosures provided via email must be retainable, even if a sender accesses them by mobile telephone.

31(a)(3) Disclosures for Oral Telephone Transactions

1. *Transactions conducted partially by telephone.* For transactions conducted partially by telephone, providing the information required by § 1005.31(b)(1) to a sender orally does not fulfill the requirement to provide the disclosures required by § 1005.31(b)(1). For example, a sender may begin a remittance transfer at a remittance transfer provider's dedicated telephone in a retail store, and then provide payment in person to a store clerk to complete the transaction. In such cases, all disclosures must be provided in writing. A provider complies with this requirement, for example, by providing the written pre-payment disclosure in person prior to the sender's payment for the transaction, and the written receipt when the sender pays for the transaction.

2. *Oral Telephone Transactions.* Section 1005.31(a)(3) applies to transactions

conducted orally and entirely by telephone, such as transactions conducted orally on a landline or mobile telephone.

31(a)(5) Disclosures for Mobile Application or Text Message Transactions

1. *Mobile application and text message transactions.* A remittance transfer provider may provide the required pre-payment disclosures orally or via mobile application or text message if the transaction is conducted entirely by telephone via mobile application or text message, the remittance transfer provider complies with the requirements of § 1005.31(g)(2), and the provider discloses orally or via mobile application or text message a statement about the rights of the sender regarding cancellation required by § 1005.31(b)(2)(iv) pursuant to the timing requirements in § 1005.31(e)(1). For example, if a sender conducts a transaction via text message on a mobile telephone, the remittance transfer provider may call the sender and orally provide the required pre-payment disclosures. Alternatively, the provider may provide the required pre-payment disclosures via text message. Section 1005.31(a)(5) applies only to transactions conducted entirely by mobile telephone via mobile application or text message.

31(b) Disclosure Requirements

1. *Disclosures provided as applicable.* Disclosures required by § 1005.31(b) need only be provided to the extent applicable. A remittance transfer provider may choose to omit an item of information required by § 1005.31(b) if it is inapplicable to a particular transaction. Alternatively, a provider may disclose a term and state that an amount or item is ''not applicable,'' ''N/A,'' or ''None.'' For example, if fees or taxes are not imposed in connection with a particular transaction, the provider need not provide the disclosures about fees and taxes generally required by § 1005.31(b)(1)(ii) and (vi). Similarly, a web site need not be disclosed if the provider does not maintain a web site. A provider need not provide the exchange rate disclosure required by § 1005.31(b)(1)(iv) if a recipient receives funds in the currency in which the remittance transfer is funded, or if funds are delivered into an account denominated in the currency in which the remittance transfer is funded. For example, if a sender in the United States sends funds from an account denominated in Euros to an account in France denominated in Euros, no exchange rate would need to be provided. Similarly, if a sender funds a remittance transfer in U.S. dollars and requests that a remittance transfer be delivered to the recipient in U.S. dollars, a provider need not disclose an exchange rate.

2. *Substantially similar terms, language, and notices.* Certain disclosures required by § 1005.31(b) must be described using the terms set forth in § 1005.31(b) or substantially similar terms. Terms may be more specific than those provided. For example, a remittance transfer provider sending funds to Colombia may describe a tax under § 1005.31(b)(1)(vi) as a ''Colombian Tax'' in lieu of describing it as ''Other Taxes.'' Foreign language disclosures required under § 1005.31(g) must contain accurate translations of the terms, language, and notices required by § 1005.31(b).

31(b)(1) Pre-Payment Disclosures

1. *Fees and taxes.* i. Taxes imposed on the remittance transfer by the remittance transfer provider include taxes imposed on the remittance transfer by a State or other governmental body. A provider need only disclose fees or taxes imposed on the remittance transfer by the provider in § 1005.31(b)(1)(ii) and imposed on the remittance transfer by a person other than the provider in § 1005.31(b)(1)(vi), as applicable. For example, if no transfer taxes are imposed on a remittance transfer, a provider would only disclose applicable transfer fees. *See* comment 31(b)–1. If both fees and taxes are imposed, the fees and taxes must be disclosed as separate, itemized disclosures. For example, a provider would disclose all transfer fees using the term ''Transfer Fees'' or a substantially similar term and would separately disclose all transfer taxes as ''Transfer Taxes'' or a substantially similar term.

ii. The fees and taxes required to be disclosed by § 1005.31(b)(1)(ii) include all fees and taxes imposed on the remittance transfer by the provider. For example, a provider must disclose a service fee and any State taxes imposed on the remittance transfer. In contrast, the fees and taxes required to be disclosed by § 1005.31(b)(1)(vi) include fees and taxes imposed on the remittance transfer by a person other than the provider. Fees and taxes imposed on the remittance transfer include only those fees and taxes that are charged to the sender or designated recipient and are specifically related to the remittance transfer. For example, a provider must disclose fees imposed on a remittance transfer by the receiving institution or agent at pick-up for receiving the transfer, fees imposed on a remittance transfer by intermediary institutions in connection with an international wire transfer, and taxes imposed on a remittance transfer by a foreign government. However, a provider need not disclose, for example, overdraft fees that are imposed by a recipient's bank or funds that are garnished from the proceeds of a remittance transfer to satisfy an unrelated debt, because these charges are not specifically related to the remittance transfer. Similarly, fees that banks charge one another for handling a remittance transfer or other fees that do not affect the total amount of the transaction or the amount that will be received by the designated recipient are not charged to the sender or designated recipient. For example, an interchange fee that is charged to a provider when a sender uses a credit or debit card to pay for a remittance transfer need not be disclosed. The terms used to describe the fees and taxes imposed on the remittance transfer by the provider in § 1005.31(b)(1)(ii) and imposed on the remittance transfer by a person other than the provider in § 1005.31(b)(1)(vi) must differentiate between such fees and taxes. For example, the terms used to describe fees disclosed under § 1005.31(b)(1)(ii) and (vi) may not both be described solely as ''Fees.''

2. *Transfer amount.* Section 1005.31(b)(1)(i) and (v) require two transfer amount disclosures. First, under § 1005.31(b)(1)(i), a provider must disclose the transfer amount in the currency in which the remittance transfer is funded to show the calculation of the total amount of the transaction. Typically, the remittance transfer is funded in U.S. dollars, so the transfer amount would be expressed in U.S. dollars. However, if the remittance transfer is funded, for example, from a Euro-denominated account, the transfer amount would be expressed in Euros. Second, under § 1005.31(b)(1)(v), a provider must disclose the transfer amount in the currency in which the funds will be made available to the designated recipient. For example, if the funds will be picked up by the designated recipient in Japanese yen, the transfer amount would be expressed in Japanese yen. However, this second transfer amount need not be disclosed if fees and taxes are not imposed on the remittance transfer under § 1005.31(b)(1)(vi). The terms used to describe each transfer amount should be the same.

3. *Exchange rate for calculation.* The exchange rate used to calculate the transfer amount in § 1005.31(b)(1)(v), the fees and taxes imposed on the remittance transfer by a person other than the provider in § 1005.31(b)(1)(vi), and the amount received in § 1005.31(b)(1)(vii) is the exchange rate in § 1005.31(b)(1)(iv), including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate. For example, if one U.S. dollar exchanges for 11.9483779 Mexican pesos, a provider must calculate these disclosures using this rate, even though the provider may disclose pursuant to § 1005.31(b)(1)(iv) that the U.S. dollar exchanges for 11.9484 Mexican pesos. Similarly, if a provider estimates pursuant to § 1005.32 that one U.S. dollar exchanges for 11.9483 Mexican pesos, a provider must calculate these disclosures using this rate, even though the provider may disclose pursuant to § 1005.31(b)(1)(iv) that the U.S. dollar exchanges for 11.95 Mexican pesos (Estimated). If an exchange rate need not be rounded, a provider must use that exchange rate to calculate these disclosures. For example, if one U.S. dollar exchanges for exactly 11.9 Mexican pesos, a provider must calculate these disclosures using this exchange rate.

31(b)(1)(iv) Exchange Rate

1. *Applicable exchange rate.* If the designated recipient will receive funds in a currency other than the currency in which the remittance transfer is funded, a remittance transfer provider must disclose the exchange rate to be used by the provider for the remittance transfer. An exchange rate that is estimated must be disclosed pursuant to the requirements of § 1005.32. A remittance transfer provider may not disclose, for example, that an exchange rate is ''unknown,'' ''floating,'' or ''to be determined.'' If a provider does not have specific knowledge regarding the currency in which the funds will be received, the provider may rely on a sender's representation as to the currency in which

funds will be received for purposes of determining whether an exchange rate is applied to the transfer. For example, if a sender requests that a remittance transfer be deposited into an account in U.S. dollars, the provider need not disclose an exchange rate, even if the account is actually denominated in Mexican pesos and the funds are converted prior to deposit into the account. If a sender does not know the currency in which funds will be received, the provider may assume that the currency in which funds will be received is the currency in which the remittance transfer is funded.

2. *Rounding.* The exchange rate disclosed by the provider for the remittance transfer is required to be rounded. The provider may round to two, three, or four decimal places, at its option. For example, if one U.S. dollar exchanges for 11.9483779 Mexican pesos, a provider may disclose that the U.S. dollar exchanges for 11.9484 Mexican pesos. The provider may alternatively disclose, for example, that the U.S. dollar exchanges for 11.948 pesos or 11.95 pesos. On the other hand, if one U.S. dollar exchanges for exactly 11.9 Mexican pesos, the provider may disclose that ''US$1 = 11.9 MXN'' in lieu of, for example, ''US$1 = 11.90 MXN.'' The exchange rate disclosed for the remittance transfer must be rounded consistently for each currency. For example, a provider may not round to two decimal places for some transactions exchanged into Euros and round to four decimal places for other transactions exchanged into Euros.

3. *Exchange rate used.* The exchange rate used by the provider for the remittance transfer need not be set by that provider. For example, an exchange rate set by an intermediary institution and applied to the remittance transfer would be the exchange rate used for the remittance transfer and must be disclosed by the provider.

31(b)(1)(vi) Fees and Taxes Imposed by a Person Other Than the Provider

1. *Fees and taxes disclosed in the currency in which the funds will be received.* Section 1005.31(b)(1)(vi) requires the disclosure of fees and taxes in the currency in which the funds will be received by the designated recipient. A fee or tax described in § 1005.31(b)(1)(vi) may be imposed in one currency, but the funds may be received by the designated recipient in another currency. In such cases, the remittance transfer provider must calculate the fee or tax to be disclosed using the exchange rate in § 1005.31(b)(1)(iv), including an estimated exchange rate to the extent permitted by § 1005.32, prior to any rounding of the exchange rate. For example, an intermediary institution in an international wire transfer may impose a fee in U.S. dollars, but funds are ultimately deposited in the recipient's account in Euros. In this case, the provider would disclose the fee to the sender expressed in Euros, calculated using the exchange rate used by the provider for the remittance transfer. For purposes of § 1005.31(b)(1)(v), (vi), and (vii), if a provider does not have specific knowledge regarding the currency in which the funds will be received, the provider may rely on a sender's representation as to the currency in which funds will be received. For example, if a sender requests that a remittance transfer be deposited into an account in U.S. dollars, the provider may provide the disclosures required in § 1005.31(b)(1)(v), (vi), and (vii) in U.S. dollars, even if the account is actually denominated in Mexican pesos and the funds are subsequently converted prior to deposit into the account. If a sender does not know the currency in which funds will be received, the provider may assume that the currency in which funds will be received is the currency in which the remittance transfer is funded.

2. *Determining taxes.* The amount of taxes imposed by a person other than the provider may depend on the tax status of the sender or recipient, the type of accounts or financial institutions involved in the transfer, or other variables. For example, the amount of tax may depend on whether the receiver is a resident of the country in which the funds are received or the type of account to which the funds are delivered. If a provider does not have specific knowledge regarding variables that affect the amount of taxes imposed by a person other than the provider for purposes of determining these taxes, the provider may rely on a sender's representations regarding these variables. If a sender does not know the information relating to the variables that affect the amount of taxes imposed by a person other than the provider, the provider may disclose the highest possible tax that could be imposed for the remittance transfer with respect to any unknown variable.

31(b)(1)(vii) Amount Received

1. *Amount received.* The remittance transfer provider is required to disclose the amount that will be received by the designated recipient in the currency in which the funds will be received. The amount received must reflect all charges imposed on the remittance transfer that affect the amount received, including the exchange rate and all fees and taxes imposed on the remittance transfer by the remittance transfer provider, the receiving institution, or any other party in the transmittal route of a remittance transfer. The disclosed amount received must be reduced by the amount of any fee or tax that is imposed on the remittance transfer by any person, even if that amount is imposed or itemized separately from the transaction amount.

31(b)(2) Receipt

1. *Date funds will be available.* A remittance transfer provider does not comply with the requirements of § 1005.31(b)(2)(ii) if it provides a range of dates that the remittance transfer may be available or an estimate of the date on which funds will be available. If a provider does not know the exact date on which funds will be available, the provider may disclose the latest date on which the funds will be available. For example, if funds may be available on January 3, but are not certain to be available until January 10, then a provider complies with § 1005.31(b)(2)(ii) if it discloses January 10 as the date funds will be available. However, a remittance transfer provider may also disclose that funds ''may be available sooner'' or use a substantially similar term to inform senders that funds may be available to the designated recipient on a date earlier than the date disclosed. For example, a provider may disclose ''January 10 (may be available sooner).''

2. *Agencies required to be disclosed.* A remittance transfer provider must only disclose information about a State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer as applicable. For example, if a financial institution is solely regulated by a Federal agency, and not licensed or chartered by a State agency, then the institution need not disclose information about a State agency. A remittance transfer provider must disclose information about the Consumer Financial Protection Bureau, whether or not the Consumer Financial Protection Bureau is the provider's primary Federal regulator.

3. *State agency that licenses or charters a provider.* A remittance transfer provider must only disclose information about one State agency that licenses or charters the remittance transfer provider with respect to the remittance transfer, even if other State agencies also regulate the remittance transfer provider. For example, a provider may disclose information about the State agency which granted its license. If a provider is licensed in multiple States, and the State agency that licenses the provider with respect to the remittance transfer is determined by a sender's location, a provider may make the determination as to the State in which the sender is located based on information that is provided by the sender and on any records associated with the sender. For example, if the State agency that licenses the provider with respect to an online remittance transfer is determined by a sender's location, a provider could rely on the sender's statement regarding the State in which the sender is located and disclose the State agency that licenses the provider in that State. A State-chartered bank must disclose information about the State agency that granted its charter, regardless of the location of the sender.

31(b)(3) Combined Disclosure

1. *Proof of payment.* If a sender initiating a remittance transfer receives a combined disclosure provided under § 1005.31(b)(3) and then completes the transaction, the remittance transfer provider must provide the sender with proof of payment. The proof of payment must be clear and conspicuous, provided in writing or electronically, and provided in a retainable form. The combined disclosure must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the transfer, pursuant to § 1005.31(e)(1), and the proof of payment must be provided when payment is made for the remittance transfer. The proof of payment for the transaction may be provided on the same piece of paper as the combined disclosure or on a separate piece of paper. For example, a provider may feed a combined disclosure through a computer printer when payment is made to add the date and time of the transaction, a confirmation code, and an indication that the transfer was paid in full. A provider may also provide this additional information to a

sender on a separate piece of paper when payment is made. A remittance transfer provider does not comply with the requirements of § 1005.31(b)(3) by providing a combined disclosure with no further indication that payment has been received.

31(c) Specific Format Requirements

31(c)(1) Grouping

1. *Grouping.* Information is grouped together for purposes of subpart B if multiple disclosures are in close proximity to one another and a sender can reasonably calculate the total amount of the transaction and the amount that will be received by the designated recipient. Model Forms A–30 through A–35 in Appendix A illustrate how information may be grouped to comply with the rule, but a remittance transfer provider may group the information in another manner. For example, a provider could provide the grouped information as a horizontal, rather than a vertical, calculation.

31(c)(4) Segregation

1. *Segregation.* Disclosures may be segregated from other information in a variety of ways. For example, the disclosures may appear on a separate sheet of paper or may appear on the front of a page where other information appears on the back of that page. The disclosures may be set off from other information on a notice by outlining them in a box or series of boxes, with bold print dividing lines or a different color background, or by using other means.

2. *Directly related.* For purposes of § 1005.31(c)(4), the following is directly related information:

i. The date and time of the transaction;

ii. The sender's name and contact information;

iii. The location at which the designated recipient may pick up the funds;

iv. The confirmation or other identification code;

v. A company name and logo;

vi. An indication that a disclosure is or is not a receipt or other indicia of proof of payment;

vii. A designated area for signatures or initials;

viii. A statement that funds may be available sooner, as permitted by § 1005.31(b)(2)(ii);

ix. Instructions regarding the retrieval of funds, such as the number of days the funds will be available to the recipient before they are returned to the sender; and

x. A statement that the provider makes money from foreign currency exchange.

31(d) Estimates

1. *Terms.* A remittance transfer provider may provide estimates of the amounts required by § 1005.31(b), to the extent permitted by § 1005.32. An estimate must be described using the term ''Estimated'' or a substantially similar term in close proximity to the term or terms described. For example, a remittance transfer provider could describe an estimated disclosure as ''Estimated Transfer Amount,'' ''Other Estimated Fees and Taxes,'' or ''Total to Recipient (Est.).''

31(e) Timing

1. *Request to send a remittance transfer.* Except as provided in § 1005.36(a), pre-payment and combined disclosures are required to be provided to the sender when the sender requests the remittance transfer, but prior to payment for the transfer. Whether a consumer has requested a remittance transfer depends on the facts and circumstances. A sender that asks a provider to send a remittance transfer, and provides transaction-specific information to the provider in order to send funds to a designated recipient, has requested a remittance transfer. For example, a sender who asks the provider to send money to a recipient in Mexico and provides the sender and recipient information to the provider has requested a remittance transfer. A consumer who solely inquires about that day's rates and fees to send to Mexico, however, has not requested the provider to send a remittance transfer.

2. *When payment is made.* Except as provided in § 1005.36(a), a receipt required by § 1005.31(b)(2) must be provided to the sender when payment is made for the remittance transfer. For example, a remittance transfer provider could give the sender the disclosures after the sender pays for the remittance transfer, but before the sender leaves the counter. A provider could also give the sender the disclosures immediately before the sender pays for the transaction. For purposes of subpart B, payment is made, for example, when a sender provides cash to the remittance transfer provider or when payment is authorized.

3. *Telephone transfer from an account.* A sender may transfer funds from his or her account, as defined by § 1005.2(b), that is held by the remittance transfer provider. For example, a financial institution may send an international wire transfer for a sender using funds from the sender's account with the institution. Except as provided in § 1005.36(a), if the sender conducts such a transfer entirely by telephone, the institution may provide a receipt required by § 1005.31(b)(2) on or with the sender's next regularly scheduled periodic statement for that account or within 30 days after payment is made for the remittance transfer if a periodic statement is not provided.

4. *Mobile application and text message transactions.* If a transaction is conducted entirely by telephone via mobile application or text message, a receipt required by § 1005.31(b)(2) may be mailed or delivered to the sender pursuant to the timing requirements in § 1005.31(e)(2). For example, if a sender conducts a transfer entirely by telephone via mobile application, a remittance transfer provider may mail or deliver the disclosures to a sender pursuant to the timing requirements in § 1005.31(e)(2).

5. *Statement about cancellation rights.* The statement about the rights of the sender regarding cancellation required by § 1005.31(b)(2)(iv) may, but need not, be disclosed pursuant to the timing requirements of § 1005.31(e)(2) if a provider discloses this information pursuant to § 1005.31(a)(3)(iii) or (a)(5)(iii). The statement about the rights of the sender regarding error resolution required by § 1005.31(b)(2)(iv), however, must be disclosed pursuant to the timing requirements of § 1005.31(e)(2).

31(f) Accurate When Payment Is Made

1. *No guarantee of disclosures provided before payment.* Except as provided in § 1005.36(b), disclosures required by § 1005.31(b) must be accurate when a sender makes payment for the remittance transfer. A remittance transfer provider is not required to guarantee the terms of the remittance transfer in the disclosures required by § 1005.31(b) for any specific period of time. However, if any of the disclosures required by § 1005.31(b) are not accurate when a sender makes payment for the remittance transfer, a provider must give new disclosures before accepting payment.

31(g) Foreign Language Disclosures

1. *Number of foreign languages used in written disclosure.* Section 1005.31(g)(1) does not limit the number of languages that may be used on a single document, but such disclosures must be clear and conspicuous pursuant to § 1005.31(a)(1). Under § 1005.31(g)(1), a remittance transfer provider may, but need not, provide the sender with a written or electronic disclosure that is in English and, if applicable, in each foreign language that the remittance transfer provider principally uses to advertise, solicit, or market either orally, in writing, or electronically, at the office in which a sender conducts a transaction or asserts an error, respectively. Alternatively, the remittance transfer provider may provide the disclosure solely in English and, if applicable, the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction or assert an error, provided such language is principally used by the remittance transfer provider to advertise, solicit, or market either orally, in writing, or electronically, at the office in which the sender conducts the transaction or asserts the error, respectively. If the remittance transfer provider chooses the alternative method, it may provide disclosures in a single document with both languages or in two separate documents with one document in English and the other document in the applicable foreign language. The following examples illustrate this concept.

i. A remittance transfer provider principally uses only Spanish and Vietnamese to advertise, solicit, or market remittance transfer services at a particular office. The remittance transfer provider may provide all senders with disclosures in English, Spanish, and Vietnamese, regardless of the language the sender uses with the remittance transfer provider to conduct the transaction or assert an error.

ii. Same facts as i. If a sender primarily uses Spanish with the remittance transfer provider to conduct a transaction or assert an error, the remittance transfer provider may provide a written or electronic disclosure in English and Spanish, whether in a single document or two separate documents. If the sender primarily uses English with the remittance transfer provider to conduct the transaction or assert an error, the remittance

transfer provider may provide a written or electronic disclosure solely in English. If the sender primarily uses a foreign language with the remittance transfer provider to conduct the transaction or assert an error that the remittance transfer provider does not use to advertise, solicit, or market either orally, in writing, or electronically, at the office in which the sender conducts the transaction or asserts the error, respectively, the remittance transfer provider may provide a written or electronic disclosure solely in English.

2. *Primarily used.* The language primarily used by the sender with the remittance transfer provider to conduct the transaction is the primary language used by the sender with the remittance transfer provider to convey the information necessary to complete the transaction. Similarly, the language primarily used by the sender with the remittance transfer provider to assert the error is the primary language used by the sender with the remittance transfer provider to provide the information required by § 1005.33(b) to assert an error. For example:

i. A sender initiates a conversation with a remittance transfer provider with a greeting in English and expresses interest in sending a remittance transfer to Mexico in English. If the remittance transfer provider thereafter communicates with the sender in Spanish and the sender conveys the other information needed to complete the transaction, including the designated recipient's information and the amount and funding source of the transfer, in Spanish, then Spanish is the language primarily used by the sender with the remittance transfer provider to conduct the transaction.

ii. A sender initiates a conversation with the remittance transfer provider with a greeting in English and states in English that there was a problem with a prior remittance transfer to Vietnam. If the remittance transfer provider thereafter communicates with the sender in Vietnamese and the sender uses Vietnamese to convey the information required by § 1005.33(b) to assert an error, then Vietnamese is the language primarily used by the sender with the remittance transfer provider to assert the error.

iii. A sender accesses the Web site of a remittance transfer provider that may be used by senders to conduct remittance transfers or assert errors. The Web site is offered in English and French. If the sender uses the French version of the Web site to conduct the remittance transfer, then French is the language primarily used by the sender with the remittance transfer provider to conduct the transaction.

31(g)(1) General

1. *Principally used.* i. All relevant facts and circumstances determine whether a foreign language is principally used by the remittance transfer provider to advertise, solicit, or market under § 1005.31(g)(1). Generally, whether a foreign language is considered to be principally used by the remittance transfer provider to advertise, solicit, or market is based on:

A. The frequency with which the foreign language is used in advertising, soliciting, or marketing of remittance transfer services at that office;

B. The prominence of the advertising, soliciting, or marketing of remittance transfer services in that foreign language at that office; and

C. The specific foreign language terms used in the advertising soliciting, or marketing of remittance transfer service at that office.

ii. For example, if a remittance transfer provider posts several prominent advertisements in a foreign language for remittance transfer services, including rate and fee information, on a consistent basis in an office, the provider is creating an expectation that a consumer could receive information on remittance transfer services in the foreign language used in the advertisements. The foreign language used in such advertisements would be considered to be principally used at that office based on the frequency and prominence of the advertising. In contrast, an advertisement for remittance transfer services, including rate and fee information, that is featured prominently at an office and is entirely in English, except for a greeting in a foreign language, does not create an expectation that a consumer could receive information on remittance transfer services in the foreign language used for such greeting. The foreign language used in such an advertisement is not considered to be principally used at that office based on the incidental specific foreign language term used.

2. *Advertise, solicit, or market.* i. Any commercial message in a foreign language, appearing in any medium, that promotes directly or indirectly the availability of remittance transfer services constitutes advertising, soliciting, or marketing in such foreign language for purposes of § 1005.31(g)(1). Examples illustrating when a foreign language is used to advertise, solicit, or market include:

A. Messages in a foreign language in a leaflet or promotional flyer at an office.

B. Announcements in a foreign language on a public address system at an office.

C. On-line messages in a foreign language, such as on the internet.

D. Printed material in a foreign language on any exterior or interior sign at an office.

E. Point-of-sale displays in a foreign language at an office.

F. Telephone solicitations in a foreign language.

ii. Examples illustrating use of a foreign language for purposes other than to advertise, solicit, or market include:

A. Communicating in a foreign language (whether by telephone, electronically, or otherwise) about remittance transfer services in response to a consumer-initiated inquiry.

B. Making disclosures in a foreign language that are required by Federal or other applicable law.

3. *Office.* An office includes any physical location, telephone number, or Web site of a remittance transfer provider where a sender may conduct a remittance transfer or assert an error for a remittance transfer. The location need not exclusively offer remittance transfer services. For example, if an agent of a remittance transfer provider is located in a grocery store, the grocery store is considered an office for purposes of § 1005.31(g)(1). Because a consumer must be located in a State in order to be considered a ''sender'' under § 1005.30(g), a Web site is not an office for purposes of § 1005.31(g)(1), even if the Web site can be accessed by consumers that are located in the United States, unless a sender may conduct a remittance transfer on the Web site or may assert an error for a remittance transfer on the Web site.

4. *At the office.* Any advertisement, solicitation, or marketing is considered to be made at the office in which a sender conducts a transaction or asserts an error if such advertisement, solicitation, or marketing is posted, provided, or made: at a physical office of a remittance transfer provider; on a Web site of a remittance transfer provider that may be used by senders to conduct remittance transfers or assert errors; during a telephone call with a remittance transfer provider that may be used by senders to conduct remittance transfers or assert errors; or via mobile application or text message by a remittance transfer provider if the mobile application or text message may be used by senders to conduct remittance transfers or assert errors. An advertisement, solicitation, or marketing that is considered to be made at an office does not include general advertisements, solicitations, or marketing that are not intended to be made at a particular office. For example, if an advertisement for remittance transfers in Chinese appears in a Chinese newspaper that is being distributed at a grocery store in which the agent of a remittance transfer provider is located, such advertisement would not be considered to be made at that office. For disclosures provided pursuant to § 1005.31, the relevant office is the office in which the sender conducts the transaction. For disclosures provided pursuant to § 1005.33 for error resolution purposes, the relevant office is the office in which the sender first asserts the error, not the office where the transaction was conducted.

Section 1005.32—Estimates

1. *Disclosures where estimates can be used.* Section 1005.32(a) and (b) permit estimates to be used in certain circumstances for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2). To the extent permitted in § 1005.32(a) and (b), estimates may be used in the pre-payment disclosure described in § 1005.31(b)(1), the receipt disclosure described in § 1005.31(b)(2), the combined disclosure described in § 1005.31(b)(3), and the pre-payment disclosures and receipt disclosures for both first and subsequent preauthorized remittance transfers described in § 1005.36(a)(1) and (2).

32(a) Temporary Exception for Insured Institutions

32(a)(1) General

1. *Control.* For purposes of this section, an insured institution cannot determine exact amounts ''for reasons beyond its control'' when a person other than the insured institution or with which the insured institution has no correspondent relationship sets the exchange rate required to be disclosed under § 1005.31(b)(1)(iv) or imposes a fee required to be disclosed under

§ 1005.31(b)(1)(vi). For example, if an insured institution has a correspondent relationship with a financial institution in another country and that correspondent institution sets the exchange rate or imposes a fee for remittance transfers sent from the insured institution to the correspondent institution, then the insured institution must determine exact amounts for the disclosures required under § 1005.31(b)(1)(iv) or (vi) because the determination of those amounts are not beyond the insured institution's control.

2. *Examples of scenarios that qualify for the temporary exception.* The following examples illustrate when an insured institution cannot determine an exact amount ''for reasons beyond its control'' and thus would qualify for the temporary exception.

i. *Exchange rate.* An insured institution cannot determine the exact exchange rate to disclose under § 1005.31(b)(1)(iv) for an international wire transfer if the insured institution does not set the exchange rate, and the rate is set when the funds are deposited into the recipient's account by the designated recipient's institution with which the insured institution does not have a correspondent relationship. The insured institution will not know the exchange rate that the recipient institution will apply when the funds are deposited into the recipient's account.

ii. *Other fees.* An insured institution cannot determine the exact fees to disclose under § 1005.31(b)(1)(vi) if an intermediary institution or the designated recipient's institution, with which the insured institution does not have a correspondent relationship, imposes a transfer or conversion fee.

iii. *Other taxes.* An insured institution cannot determine the exact taxes to disclose under § 1005.31(b)(1)(vi) if the insured institution cannot determine the applicable exchange rate or fees as described in paragraphs i. and ii. above, and the recipient country imposes a tax that is a percentage of the amount transferred to the designated recipient, less any other fees.

3. *Examples of scenarios that do not qualify for the temporary exception.* The following examples illustrate when an insured institution can determine exact amounts and thus would not qualify for the temporary exception.

i. *Exchange rate.* An insured institution can determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) if it converts the funds into the local currency to be received by the designated recipient using an exchange rate that it sets. The determination of the exchange rate is in the insured institution's control even if there is no correspondent relationship with an intermediary institution in the transmittal route or the designated recipient's institution.

ii. *Other fees.* An insured institution can determine the exact fees required to be disclosed under § 1005.31(b)(1)(vi) if it has agreed upon the specific fees with a correspondent institution, and this correspondent institution is the only institution in the transmittal route to the designated recipient's institution, which itself does not impose fees.

iii. *Other taxes.* An insured institution can determine the exact taxes required to be disclosed under § 1005.31(b)(1)(vi) if:

A. The recipient country imposes a tax that is a percentage of the amount transferred to the designated recipient, less any other fees, and the insured institution can determine the exact amount of the applicable exchange rate and other fees; or

B. The recipient country imposes a specific sum tax that is not tied to the amount transferred.

32(b) Permanent Exception for Transfers to Certain Countries

1. *Laws of the recipient country.* The laws of the recipient country do not permit a remittance transfer provider to determine exact amounts required to be disclosed when a law or regulation of the recipient country requires the person making funds directly available to the designated recipient to apply an exchange rate that is:

i. Set by the government of the recipient country after the remittance transfer provider sends the remittance transfer, or

ii. Set when the designated recipient receives the funds.

2. *Example illustrating when exact amounts can and cannot be determined because of the laws of the recipient country.*

i. The laws of the recipient country do not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) when, for example, the government of the recipient country, on a daily basis, sets the exchange rate that must, by law, apply to funds received and the funds are made available to the designated recipient in the local currency the day after the remittance transfer provider sends the remittance transfer.

ii. In contrast, the laws of the recipient country permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) when, for example, the government of the recipient country ties the value of its currency to the U.S. dollar.

3. *Method by which transactions are made in the recipient country.* The method by which transactions are made in the recipient country does not permit a remittance transfer provider to determine exact amounts required to be disclosed when transactions are sent via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is a rate set by the recipient country's central bank or other governmental authority after the provider sends the remittance transfer.

4. *Example illustrating when exact amounts can and cannot be determined because of the method by which transactions are made in the recipient country.*

i. The method by which transactions are made in the recipient country does not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) when the provider sends a remittance transfer via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is a rate set by the recipient country's central bank on the business day after the provider has sent the remittance transfer.

ii. In contrast, a remittance transfer provider would not qualify for the § 1005.32(b)(1)(ii) methods exception if it sends a remittance transfer via international ACH on terms negotiated between the United States government and a private-sector entity or entities in the recipient country, under which the exchange rate is set by the institution acting as the entry point to the recipient country's payments system on the next business day. However, a remittance transfer provider sending a remittance transfer using such a method may qualify for the § 1005.32(a) temporary exception.

iii. A remittance transfer provider would not qualify for the § 1005.32(b)(1)(ii) methods exception if, for example, it sends a remittance transfer via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank or other governmental authority before the sender requests a transfer.

5. *Safe harbor list.* If a country is included on a safe harbor list published by the Bureau under § 1005.32(b)(2), a remittance transfer provider may provide estimates of the amounts to be disclosed under § 1005.31(b)(1)(iv) through (vii). If a country does not appear on the Bureau's list, a remittance transfer provider may provide estimates under § 1005.32(b)(1) if the provider determines that the recipient country does not legally permit or method by which transactions are conducted in that country does not permit the provider to determine exact disclosure amounts.

6. *Reliance on Bureau list of countries.* A remittance transfer provider may rely on the list of countries published by the Bureau to determine whether the laws of a recipient country do not permit the remittance transfer provider to determine exact amounts required to be disclosed under § 1005.31(b)(1)(iv) through (vii). Thus, if a country is on the Bureau's list, the provider may give estimates under this section, unless a remittance transfer provider has information that a country on the Bureau's list legally permits the provider to determine exact disclosure amounts.

7. *Change in laws of recipient country.* i. If the laws of a recipient country change such that a remittance transfer provider can determine exact amounts, the remittance transfer provider must begin providing exact amounts for the required disclosures as soon as reasonably practicable if the provider has information that the country legally permits the provider to determine exact disclosure amounts.

ii. If the laws of a recipient country change such that a remittance transfer provider cannot determine exact disclosure amounts, the remittance transfer provider may provide estimates under § 1005.32(b)(1), even if that country does not appear on the list published by the Bureau.

32(c) Bases for Estimates

32(c)(1) Exchange Rate

1. *Most recent exchange rate for qualifying international ACH transfers.* If the exchange

rate for a remittance transfer sent via international ACH that qualifies for the § 1005.32(b)(1)(ii) exception is set the following business day, the most recent exchange rate available for a transfer is the exchange rate set for the day that the disclosure is provided, *i.e.* the current business day's exchange rate.

2. *Publicly available.* Examples of publicly available sources of information containing the most recent wholesale exchange rate for a currency include U.S. news services, such as Bloomberg, the Wall Street Journal, and the New York Times; a recipient country's national news services, and a recipient country's central bank or other government agency.

3. *Spread.* An estimate for disclosing the exchange rate based on the most recent publicly available wholesale exchange rate must also reflect any spread the remittance transfer provider typically applies to the wholesale exchange rate for remittance transfers for a particular currency.

4. *Most recent.* For the purposes of § 1005.32(c)(1)(ii) and (iii), if the exchange rate with respect to a particular currency is published or provided multiple times throughout the day because the exchange rate fluctuates throughout the day, a remittance transfer provider may use any exchange rate available on that day to determine the most recent exchange rate.

32(c)(3) Other Fees

1. *Potential transmittal routes.* A remittance transfer from the sender's account at an insured institution to the designated recipient's institution may take several routes, depending on the correspondent relationships each institution in the transmittal route has with other institutions. In providing an estimate of the fees required to be disclosed under § 1005.31(b)(1)(vi) pursuant to the § 1005.32(a) temporary exception, an insured institution may rely upon the representations of the designated recipient's institution and the institutions that act as intermediaries in any one of the potential transmittal routes that it reasonably believes a requested remittance transfer may travel.

32(c)(4) Other Taxes Imposed in the Recipient Country

1. *Other taxes imposed in a recipient country that are a percentage.* Section 1005.32(c)(4) sets forth the basis for providing an estimate of only those taxes imposed in a recipient country that are a percentage of the amount transferred to the designated recipient because a remittance transfer provider can determine the exact amount of other taxes, such as a tax of a specific amount imposed without regard to the amount of the funds transferred or received. However, a remittance transfer provider can determine the exact amount of other taxes that are a percentage of the amount transferred if the provider can determine the exchange rate and the exact amount of other fees imposed on the remittance transfer.

Section 1005.33—Procedures for Resolving Errors

33(a) Definition of Error

1. *Incorrect amount of currency paid by sender.* Section 1005.33(a)(1)(i) covers circumstances in which a sender pays an amount that differs from the total amount of the transaction, including fees imposed in connection with the transfer, stated in the receipt or combined disclosure provided under § 1005.31(b)(2) or (3). Such error may be asserted by a sender regardless of the form or method of payment provided, including when a debit, credit, or prepaid card is used to fund the transfer and an excess amount is paid. For example, if a remittance transfer provider incorrectly charged a sender's credit card account for US$150, and US$120 was sent, plus a transfer fee of US$10, the sender could assert an error with the remittance transfer provider for the incorrect charge under § 1005.33(a)(1)(i).

2. *Incorrect amount of currency received—coverage.* Section 1005.33(a)(1)(iii) covers circumstances in which the designated recipient receives an amount of currency that differs from the amount of currency identified on the disclosures provided to the sender, except where the disclosure stated an estimate of the amount of currency to be received in accordance with § 1005.32 and the difference results from application of the actual exchange rate, fees, and taxes, rather than any estimated amounts, or the failure was caused by circumstances outside the remittance transfer provider's control. A designated recipient may receive an amount of currency that differs from the amount of currency disclosed, for example, if an exchange rate other than the disclosed rate is applied to the remittance transfer, or if the provider fails to account for fees or taxes that may be imposed by the provider or a third party before the transfer is picked up by the designated recipient or deposited into the recipient's account in the foreign country. However, if the provider rounds the exchange rate used to calculate the amount received consistent with § 1005.31(b)(1)(iv) and comment 31(b)(1)(iv)–2 for the disclosed rate, there is no error if the designated recipient receives an amount of currency that results from applying the exchange rate used, prior to any rounding of the exchange rate, to calculate fees, taxes, or the amount received rather than the disclosed rate. Section 1005.33(a)(1)(iii) also covers circumstances in which the remittance transfer provider transmits an amount that differs from the amount requested by the sender.

3. *Incorrect amount of currency received—examples.* For purposes of the following examples illustrating the error for an incorrect amount of currency received under § 1005.33(a)(1)(iii), assume that none of the circumstances permitting an estimate under § 1005.32 apply (unless otherwise stated).

i. A consumer requests to send funds to a relative in Mexico to be received in local currency. Upon receiving the sender's payment, the remittance transfer provider provides a receipt indicating that the amount of currency that will be received by the designated recipient will be 1180 Mexican pesos, after fees and taxes are applied. However, when the relative picks up the transfer in Mexico a day later, he only receives 1150 Mexican pesos because the exchange rate applied by the recipient agent in Mexico was lower than the exchange rate used by the provider, prior to any rounding of the exchange rate, to disclose the amount of currency to be received by the designated recipient on the receipt. Because the designated recipient has received less than the amount of currency disclosed on the receipt, an error has occurred.

ii. A consumer requests to send funds to a relative in Colombia to be received in local currency. The remittance transfer provider provides the sender a receipt stating an amount of currency that will be received by the designated recipient, which does not reflect additional foreign taxes that will be imposed in Colombia on the transfer. Because the designated recipient will receive less than the amount of currency disclosed on the receipt due to the additional foreign taxes, an error has occurred.

iii. Same facts as in ii., except that the receipt provided by the remittance transfer provider does not reflect additional fees that are imposed by the receiving agent in Colombia on the transfer. Because the designated recipient will receive less than the amount of currency disclosed on the receipt due to the additional fees, an error has occurred.

iv. A consumer requests to send US$250 to a relative in India to a U.S. dollar-denominated account held by the relative at an Indian bank. Instead of the US$250 disclosed on the receipt as the amount to be sent, the remittance transfer provider sends US$200, resulting in a smaller deposit to the designated recipient's account than was disclosed as the amount to be received after fees and taxes. Because the designated recipient received less than the amount of currency that was disclosed, an error has occurred.

v. A consumer requests to send US$100 to a relative in a foreign country to be received in local currency. The remittance transfer provider provides the sender a receipt that discloses an estimated exchange rate, other taxes, and amount of currency that will be received due to the law in the foreign country requiring that the exchange rate be set by the foreign country's central bank. When the relative picks up the remittance transfer, the relative receives less currency than the estimated amount disclosed to the sender on the receipt due to application of the actual exchange rate, fees, and taxes, rather than any estimated amounts. Because § 1005.32(b) permits the remittance transfer provider to disclose an estimate of the amount of currency to be received, no error has occurred unless the estimate was not based on an approach set forth under § 1005.32(c).

4. *Incorrect amount of currency received—extraordinary circumstances.* Under § 1005.33(a)(1)(iv)(B), a remittance transfer provider's failure to deliver or transmit a remittance transfer by the disclosed date of availability is not an error if such failure was caused by extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably

anticipated. Examples of extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated under § 1005.33(a)(1)(iv)(B) include circumstances such as war or civil unrest, natural disaster, garnishment or attachment of some of the funds after the transfer is sent, and government actions or restrictions that could not have been reasonably anticipated by the remittance transfer provider, such as the imposition of foreign currency controls or foreign taxes unknown at the time the receipt or combined disclosure is provided under § 1005.31(b)(2) or (3).

5. *Failure to make funds available by disclosed date of availability—coverage.* Section 1005.33(a)(1)(iv) generally covers disputes about the failure to make funds available in connection with a remittance transfer to a designated recipient by the disclosed date of availability. If only a portion of the funds were made available by the disclosed date of availability, then § 1005.33(a)(1)(iv) does not apply, but § 1005.33(a)(1)(iii) may apply instead. The following are examples of errors for failure to make funds available by the disclosed date of availability (assuming that none of the exceptions in § 1005.33(a)(1)(iv)(A), (B), or (C) apply).

i. Late or non-delivery of a remittance transfer;

ii. Delivery of funds to the wrong account;

iii. The fraudulent pick-up of a remittance transfer in a foreign country by a person other than the designated recipient;

iv. The recipient agent or institution's retention of the remittance transfer, instead of making the funds available to the designated recipient.

6. *Failure to make funds available by disclosed date of availability—extraordinary circumstances.* Under § 1005.33(a)(1)(iv)(A), a remittance transfer provider's failure to deliver or transmit a remittance transfer by the disclosed date of availability is not an error if such failure was caused by extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated. Examples of extraordinary circumstances outside the remittance transfer provider's control that could not have been reasonably anticipated under § 1005.33(a)(1)(iv)(A) include circumstances such as war or civil unrest, natural disaster, garnishment or attachment of funds after the transfer is sent, and government actions or restrictions that could not have been reasonably anticipated by the remittance transfer provider, such as the imposition of foreign currency controls.

7. *Recipient-requested changes.* Under § 1005.33(a)(2)(iii), a change requested by the designated recipient that the remittance transfer provider or others involved in the remittance transfer decide to accommodate is not considered an error. The exception under § 1005.33(a)(2)(iii) is available only if the change is made solely because the designated recipient requested the change. For example, if a sender requests to send US$100 to a designated recipient at a designated location, but the designated recipient requests the amount in a different currency (either at the sender-designated location or another location requested by the recipient) and the remittance transfer provider accommodates the recipient's request, the change does not constitute an error.

8. *Change from disclosure made in reliance on sender information.* Under the commentary accompanying § 1005.31, the remittance transfer provider may rely on the sender's representations in making certain disclosures. *See, e.g.* comments 31(b)(1)(iv)–1, 31(b)(1)(vi)–1, and 31(b)(1)(vi)–2. For example, suppose a sender requests U.S. dollars to be deposited into an account of the designated recipient and represents that the account is U.S. dollar-denominated. If the designated recipient's account is actually denominated in local currency and the recipient account-holding institution must convert the remittance transfer into local currency in order to deposit the funds and complete the transfer, the change in currency does not constitute an error pursuant to § 1005.33(a)(2)(iv). Similarly, if the remittance transfer provider relies on the sender's representations regarding variables that affect the amount of taxes imposed by a person other than the provider for purposes of determining these taxes, the change in the amount of currency the designated recipient actually receives due to the taxes actually imposed does not constitute an error pursuant to § 1005.33(a)(2)(iv).

33(b) Notice of Error From Sender

1. *Person asserting or discovering error.* The error resolution procedures of this section apply only when a notice of error is received from the sender, and not when a notice of error is received from the designated recipient or when the remittance transfer provider itself discovers and corrects an error.

2. *Content of error notice.* The notice of error is effective so long as the remittance transfer provider is able to identify the elements in § 1005.33(b)(1)(ii). For example, the sender could provide the confirmation number or code that would be used by the designated recipient to pick up the transfer, or other identification number or code supplied by the remittance transfer provider in connection with the transfer, if such number or code is sufficient for the remittance transfer provider to identify the sender (and contact information), designated recipient, and the transfer in question. For an account-based remittance transfer, the notice of error is effective even if it does not contain the sender's account number, so long as the remittance transfer provider is able to identify the account and the transfer in question.

3. *Address on notice of error.* A remittance transfer provider may request, or a sender may provide, the sender's or designated recipient's email address, as applicable, instead of a physical address, on a notice of error.

4. *Effect of late notice.* A remittance transfer provider is not required to comply with the requirements of this section for any notice of error from a sender that is received by the provider more than 180 days from the disclosed date of availability of the remittance transfer to which the notice of error applies or, if applicable, more than 60 days after a provider sent documentation, additional information, or clarification requested by the sender, provided such date is later than 180 days after the disclosed date of availability.

5. *Notice of error provided to agent.* A notice of error provided by a sender to an agent of the remittance transfer provider is deemed to be received by the provider under § 1005.33(b)(1)(i) when received by the agent.

6. *Consumer notice of error resolution rights.* Section 1005.31 requires a remittance transfer provider to include an abbreviated notice of the consumer's error resolution rights on the receipt or combined notice provided under § 1005.31(b)(2) or (3). In addition, the remittance transfer provider must make available to a sender upon request, a notice providing a full description of the sender's error resolution rights, using language set forth in Appendix A of this part (Model Form A–36) or substantially similar language.

33(c) Time Limits and Extent of Investigation

1. *Notice to sender of finding of error.* If the remittance transfer provider determines during its investigation that an error occurred as described by the sender, the remittance provider may inform the sender of its findings either orally or in writing. However, if the provider determines that no error or a different error occurred, the provider must provide a written explanation of its findings under § 1005.33(d)(1).

2. *Incorrect or insufficient information provided for transfer.* Under § 1005.33(c)(2)(ii)(A)(*2*), if a remittance transfer provider's failure to make funds in connection with a remittance transfer available to a designated recipient by the disclosed date of availability occurred because the sender provided incorrect or insufficient information in connection with the transfer, such as by erroneously identifying the designated recipient or the recipient's account number or by providing insufficient information to enable the entity distributing the funds to identify the correct designated recipient, the sender may choose to have the provider make funds available to the designated recipient and third party fees may be imposed for resending the remittance transfer with the corrected or additional information. The remittance transfer provider may not require the sender to provide the principal transfer amount again. Third party fees that were not incurred during the first unsuccessful remittance transfer attempt may not be imposed again for resending the remittance transfer. A request to resend is a request for a remittance transfer. Therefore, a provider must provide the disclosures required by § 1005.31 for a resend of a remittance transfer, and the provider must use the exchange rate it is using for such transfers on the date of the resend if funds were not already exchanged in the first unsuccessful remittance transfer attempt. A sender providing incorrect or insufficient information does not include a provider's miscommunication of information necessary for the designated recipient to pick up the transfer. For example, a sender is not considered to have provided incorrect or insufficient information if the provider

discloses the incorrect location where the transfer may be picked up or gives the wrong confirmation number/code for the transfer. The following examples illustrate these concepts.

i. A sender instructs a remittance transfer provider to send US$100 to a designated recipient in local currency, for which the remittance transfer provider charges a transfer fee of US$10, and the sender provided incorrect or insufficient information that resulted in non-delivery of the remittance transfer as requested. If the sender chooses the remedy to have the remittance transfer provider make the funds available to the designated recipient pursuant to § 1005.33(c)(2)(ii)(A)(*2*) and provides the corrected or additional information, the remittance transfer provider may not require the sender to provide another US$100 to send to the designated recipient or charge the sender the US$10 transfer fee to resend the remittance transfer with the corrected or additional information. If the funds were not already exchanged into the local currency during the first unsuccessful remittance transfer attempt, the provider must use the exchange rate it is using for such transfers on the date of the resend.

ii. A sender instructs a remittance transfer provider to send US$100 to a designated recipient in a foreign country, for which a remittance transfer provider charges a transfer fee of US$10 and an intermediary institution charges a lifting fee of US$5, such that the designated recipient is expected to receive only US$95, as indicated in the receipt. If the sender provided incorrect or insufficient information that resulted in non-delivery of the remittance transfer as requested, an error has occurred. If the sender chooses the remedy to have the remittance transfer provider make the funds available to the designated recipient pursuant to § 1005.33(c)(2)(ii)(A)(*2*) and provides the corrected or additional information, the remittance transfer provider may not charge another transfer fee of US$10 to send the remittance transfer again with the corrected or additional information necessary to complete the transfer. If the intermediary institution charged a lifting fee of US$5 in the first unsuccessful remittance transfer attempt, the sender may choose to provide an additional amount to offset the US$5 lifting fee deducted in the first unsuccessful remittance transfer attempt and ensure that the designated recipient receives US$95 or may choose to resend the US$95 amount with the understanding that another US$5 fee will be deducted by the intermediary institution, as indicated in the receipt. Otherwise, if the intermediary institution did not charge a US$5 lifting fee in the first unsuccessful remittance transfer attempt, the provider must resend the original $100 transfer amount, and a US$5 lifting fee may be imposed by the intermediary institution, as indicated in the receipt.

3. *Designation of requested remedy.* Under § 1005.33(c)(2), the sender may choose to obtain a refund of the amount of funds that was not properly transmitted or delivered to the designated recipient or request redelivery of the amount appropriate to correct the error at no additional cost. Upon receiving the sender's request, the remittance transfer provider shall correct the error within one business day, or as soon as reasonably practicable, applying the same exchange rate, fees, and taxes stated in the disclosure provided under § 1005.31(b)(2) or (3), if the sender requests delivery of the amount appropriate to correct the error. The remittance transfer provider may also request that the sender indicate the preferred remedy at the time the sender provides notice of the error. However, if the sender does not indicate the desired remedy at the time of providing notice of error, the remittance transfer provider must notify the sender of any available remedies in the report provided under § 1005.33(c)(1) if the provider determines an error occurred.

4. *Default remedy.* The provider may set a default remedy that the remittance transfer provider will provide if the sender does not designate a remedy within a reasonable time after the sender receives the report provided under § 1005.33(c)(1). A provider that permits a sender to designate a remedy within 10 days after the provider has sent the report provided under § 1005.33(c)(1) before imposing the default remedy is deemed to have provided the sender with a reasonable time to designate a remedy. In the case a default remedy is provided, the remittance transfer provider must correct the error within one business day, or as soon as reasonably practicable, after the reasonable time for the sender to designate the remedy has passed, consistent with § 1005.33(c)(2).

5. *Amount appropriate to resolve the error.* For purposes of the remedies set forth in § 1005.33(c)(2)(i)(A), (c)(2)(i)(B), (c)(2)(ii)(A)(*1*), and (c)(2)(i)(A)(*2*) the amount appropriate to resolve the error is the specific amount of transferred funds that should have been received if the remittance transfer had been effected without error. The amount appropriate to resolve the error does not include consequential damages.

6. *Form of refund.* For a refund provided under § 1005.33(c)(2)(i)(A), (c)(2)(ii)(A)(*1*), or (c)(2)(ii)(B), a remittance transfer provider may generally, at its discretion, issue a refund either in cash or in the same form of payment that was initially provided by the sender for the remittance transfer. For example, if the sender originally provided a credit card as payment for the transfer, the remittance transfer provider may issue a credit to the sender's credit card account in the appropriate amount. However, if a sender initially provided cash for the remittance transfer, a provider may issue a refund by check. For example, if the sender originally provided cash as payment for the transfer, the provider may mail a check to the sender in the amount of the payment.

7. *Remedies for incorrect amount paid.* If an error under § 1005.33(a)(1)(i) occurred, the sender may request the remittance transfer provider refund the amount necessary to resolve the error under § 1005.33(c)(2)(i)(A) or that the remittance transfer provider make the amount necessary to resolve the error available to the designated recipient at no additional cost under § 1005.33(c)(2)(i)(B).

8. *Correction of an error if funds not available by disclosed date.* If the remittance transfer provider determines an error of failure to make funds available by the disclosed date occurred under § 1005.33(a)(1)(iv), it must correct the error in accordance with § 1005.33(c)(2)(ii)(A), as applicable, and refund any fees imposed for the transfer (unless the sender provided incorrect or insufficient information to the remittance transfer provider in connection with the remittance transfer), whether the fee was imposed by the provider or a third party involved in sending the transfer, such as an intermediary bank involved in sending a wire transfer or the institution from which the funds are picked up in accordance with § 1005.33(c)(2)(ii)(B).

9. *Charges for error resolution.* If an error occurred, whether as alleged or in a different amount or manner, the remittance transfer provider may not impose a charge related to any aspect of the error resolution process (including charges for documentation or investigation).

10. *Correction without investigation.* A remittance transfer provider may correct an error, without investigation, in the amount or manner alleged by the sender, or otherwise determined, to be in error, but must comply with all other applicable requirements of § 1005.33.

33(d) Procedures if Remittance Transfer Provider Determines No Error or Different Error Occurred

1. *Error different from that alleged.* When a remittance transfer provider determines that an error occurred in a manner or amount different from that described by the sender, it must comply with the requirements of both § 1005.33(c) and (d), as applicable. The provider may give the notice of correction and the explanation separately or in a combined form.

33(e) Reassertion of Error

1. *Withdrawal of error; right to reassert.* The remittance transfer provider has no further error resolution responsibilities if the sender voluntarily withdraws the notice alleging an error. A sender who has withdrawn an allegation of error has the right to reassert the allegation unless the remittance transfer provider had already complied with all of the error resolution requirements before the allegation was withdrawn. The sender must do so, however, within the original 180-day period from the disclosed date of availability or, if applicable, the 60-day period for a notice of error asserted pursuant to § 1005.33(b)(2).

33(f) Relation to Other Laws

1. *Concurrent error obligations.* A financial institution that is also the remittance transfer provider may have error obligations under both §§ 1005.11 and 1005.33. For example, if a sender asserts an error under § 1005.11 with a remittance transfer provider that holds the sender's account, and the error is not also an error under § 1005.33 (such as the omission of an EFT on a periodic statement), then the error-resolution provisions of § 1005.11 exclusively apply to the error. However, if a sender asserts an error under § 1005.33 with a remittance transfer provider that holds the sender's account, and the error is also an error under § 1005.11 (such as when the amount the sender requested to be

deducted from the sender's account and sent for the remittance transfer differs from the amount that was actually deducted from the account and sent), then the error-resolution provisions of § 1005.33 exclusively apply to the error.

2. *Holder in due course.* Nothing in this section limits a sender's rights to assert claims and defenses against a card issuer concerning property or services purchased with a credit card under Regulation Z, 12 CFR 1026.12(c)(1), as applicable.

3. *Assertion of same error with multiple parties.* If a sender receives credit to correct an error of an incorrect amount paid in connection with a remittance transfer from either the remittance transfer provider or account-holding institution (or creditor), and subsequently asserts the same error with another party, that party has no further responsibilities to investigate the error if the error has been corrected. For example, assume that a sender initially asserts an error with a remittance transfer provider with respect to a remittance transfer alleging that US$130 was debited from his checking account, but the sender only requested a remittance transfer for US$100, plus a US$10 transfer fee. If the remittance transfer provider refunds US$20 to the sender to correct the error, and the sender subsequently asserts the same error with his account-holding institution, the account-holding institution has no error resolution responsibilities under Regulation E because the error has been fully corrected. In addition, nothing in this section prevents an account-holding institution or creditor from reversing amounts it has previously credited to correct an error if a sender receives more than one credit to correct the same error. For example, assume that a sender concurrently asserts an error with his or her account-holding institution and remittance transfer provider for the same error, and the sender receives credit from the account-holding institution for the error within 45 days of the notice of error. If the remittance transfer provider subsequently provides a credit of the same amount to the sender for the same error, the account-holding institution may reverse the amounts it had previously credited to the consumer's account, even after the 45-day error resolution period under § 1005.11.

33(g) Error Resolution Standards and Recordkeeping Requirements

1. *Record retention requirements.* As noted in § 1005.31(g)(2), remittance transfer providers are subject to the record retention requirements under § 1005.13. Therefore, remittance transfer providers must retain documentation, including documentation related to error investigations, for a period of not less than two years from the date a notice of error was submitted to the provider or action was required to be taken by the provider. A remittance transfer provider need not maintain records of individual disclosures that it has provided to each sender; it need only retain evidence demonstrating that its procedures reasonably ensure the sender's receipt of required disclosures and documentation.

Section 1005.34—Procedures for Cancellation and Refund of Remittance Transfers

34(a) Sender Right of Cancellation and Refund

1. *Content of cancellation request.* A request to cancel a remittance transfer is valid so long as the remittance transfer provider is able to identify the remittance transfer in question. For example, the sender could provide the confirmation number or code that would be used by the designated recipient to pick up the transfer or other identification number or code supplied by the remittance transfer provider in connection with the transfer, if such number or code is sufficient for the remittance transfer provider to identify the transfer. A remittance transfer provider may also request, or the sender may provide, the sender's email address instead of a physical address, so long as the remittance transfer provider is able to identify the transfer to which the request to cancel applies.

2. *Notice of cancellation right.* Section 1005.31 requires a remittance transfer provider to include an abbreviated notice of the sender's right to cancel a remittance transfer on the receipt or combined disclosure given under § 1005.31(b)(2) or (3). In addition, the remittance transfer provider must make available to a sender upon request, a notice providing a full description of the right to cancel a remittance transfer using language that is set forth in Model Form A–36 of Appendix A to this part or substantially similar language.

3. *Thirty-minute cancellation right.* A remittance transfer provider must comply with the cancellation and refund requirements of § 1005.34 if the cancellation request is received by the provider no later than 30 minutes after the sender makes payment. The provider may, at its option, provide a longer time period for cancellation. A provider must provide the 30-minute cancellation right regardless of the provider's normal business hours. For example, if an agent closes less than 30 minutes after the sender makes payment, the provider could opt to take cancellation requests through the telephone number disclosed on the receipt. The provider could also set a cutoff time after which the provider will not accept requests to send a remittance transfer. For example, a financial institution that closes at 5:00 p.m. could stop accepting payment for remittance transfers after 4:30 p.m.

4. *Cancellation request provided to agent.* A cancellation request provided by a sender to an agent of the remittance transfer provider is deemed to be received by the provider under § 1005.34(a) when received by the agent.

5. *Payment made.* For purposes of subpart B, payment is made, for example, when a sender provides cash to the remittance transfer provider or when payment is authorized.

34(b) Time Limits and Refund Requirements

1. *Form of refund.* At its discretion, a remittance transfer provider generally may issue a refund either in cash or in the same form of payment that was initially provided by the sender for the remittance transfer. For example, if the sender originally provided a credit card as payment for the transfer, the remittance transfer provider may issue a credit to the sender's credit card account in the amount of the payment. However, if a sender initially provided cash for the remittance transfer, a provider may issue a refund by check. For example, if the sender originally provided cash as payment for the transfer, the provider may mail a check to the sender in the amount of the payment.

2. *Fees and taxes refunded.* If a sender provides a timely request to cancel a remittance transfer, a remittance transfer provider must refund all funds provided by the sender in connection with the remittance transfer, including any fees and, to the extent not prohibited by law, taxes that have been imposed for the transfer, whether the fee or tax was assessed by the provider or a third party, such as an intermediary institution, the agent or bank in the recipient country, or a State or other governmental body.

Section 1005.35—Acts of Agents

1. *General.* Remittance transfer providers must comply with the requirements of subpart B, including, but not limited to, providing the disclosures set forth in § 1005.31 and providing any remedies as set forth in § 1005.33, even if an agent or other person performs functions for the remittance transfer provider, and regardless of whether the provider has an agreement with a third party that transfers or otherwise makes funds available to a designated recipient.

Section 1005.36—Transfers Scheduled in Advance

1. *Applicability of subpart B.* The requirements set forth in subpart B apply to remittance transfers subject to § 1005.36, to the extent that § 1005.36 does not modify those requirements. For example, the foreign language disclosure requirements in § 1005.31(g) and related commentary continue to apply to disclosures provided in accordance with § 1005.36(a)(2).

36(c) Cancellation

1. *Scheduled remittance transfer.* Section 1005.36(c) applies when a remittance transfer is scheduled by the sender at least three business days before the date of the transfer, whether the sender schedules a preauthorized remittance transfer or a one-time transfer. A remittance transfer is scheduled if it will require no further action by the sender to send the transfer after the sender requests the transfer. For example, a remittance transfer is scheduled at least three business days before the date of the transfer, and § 1005.36(c) applies, where a sender on March 1 requests a remittance transfer provider to send a wire transfer to pay a bill in a foreign country on March 15, if it will require no further action by the sender to send the transfer after the sender requests the transfer. A remittance transfer is not scheduled, and § 1005.36(c) does not apply, where a transfer occurs more than three days after the date the sender requests the transfer solely due to the provider's processing time. The following are examples of when a sender has not scheduled a remittance transfer at least three business days before the date of

the remittance transfer, such that the cancellation rule in § 1005.34 applies.

i. A sender on March 1 requests a remittance transfer provider to send a wire transfer to pay a bill in a foreign country on March 3.

ii. A sender on March 1 requests that a remittance transfer provider send a remittance transfer on March 15, but the provider requires the sender to confirm the request on March 14 in order to send the transfer.

iii. A sender on March 1 requests that a remittance transfer provider send an ACH transfer, and that transfer is sent on March 2, but due to the time required for processing, funds will not be deducted from the sender's account until March 5.

2. *Cancelled preauthorized remittance transfers.* For preauthorized remittance transfers, the provider must assume the request to cancel applies to all future preauthorized remittance transfers, unless the sender specifically indicates that it should apply only to the next scheduled remittance transfer.

3. *Concurrent cancellation obligations.* A financial institution that is also a remittance transfer provider may have both stop payment obligations under § 1005.10 and cancellation obligations under § 1005.36. If a sender cancels a remittance transfer under § 1005.36 with a remittance transfer provider that holds the sender's account, and the transfer is a preauthorized transfer under § 1005.10, then the cancellation provisions of § 1005.36 exclusively apply.

Appendix A—Model Disclosure Clauses and Forms

* * * * *

2. *Use of forms.* The appendix contains model disclosure clauses for optional use by financial institutions and remittance transfer providers to facilitate compliance with the disclosure requirements of sections §§ 1005.5(b)(2) and (3), 1005.6(a), 1005.7, 1005.8(b), 1005.14(b)(1)(ii), 1005.15(d)(1) and (2), 1005.18(c)(1) and (2), 1005.31, and 1005.36. The use of appropriate clauses in making disclosures will protect a financial institution and a remittance transfer provider from liability under sections 916 and 917 of the act provided the clauses accurately reflect the institution's EFT services and the provider's remittance transfer services, respectively.

* * * * *

4. *Model forms for remittance transfers.* The Bureau will not review or approve disclosure forms for remittance transfer providers. However, this appendix contains 12 model forms for use in connection with remittance transfers. These model forms are intended to demonstrate several formats a remittance transfer provider may use to comply with the requirements of § 1005.31(b). Model Forms A–30 through A–32 demonstrate how a provider could provide the required disclosures for a remittance transfer exchanged into local currency. Model Forms A–33 through A–35 demonstrate how a provider could provide the required disclosures for dollar-to-dollar remittance transfers. These forms also demonstrate disclosure of the required content, in accordance with the grouping and proximity requirements of § 1005.31(c)(1) and (2), in both a register receipt format and an 8.5 inch by 11 inch format. Model Form A–36 provides long form model error resolution and cancellation disclosures required by § 1005.31(b)(4), and Model Form A–37 provides short form model error resolution and cancellation disclosures required by § 1005.31(b)(2)(iv) and (vi). Model Forms A–38 through A–41 provide language for Spanish language disclosures.

i. The model forms contain information that is not required by subpart B, such as a confirmation code and the sender's name and contact information. Additional information not required by subpart B may be presented on the model forms as permitted by § 1005.31(c)(4). Any additional information must be presented consistent with a remittance transfer provider's obligation to provide required disclosures in a clear and conspicuous manner.

ii. Use of the model forms is optional. A remittance transfer provider may change the forms by rearranging the format or by making modifications to the language of the forms, in each case without modifying the substance of the disclosures. Any rearrangement or modification of the format of the model forms must be consistent with the form, grouping, proximity, and other requirements of § 1005.31(a) and (c). Providers making revisions that do not comply with this section will lose the benefit of the safe harbor for appropriate use of Model Forms A–30 to A–41.

iii. Permissible changes to the language and format of the model forms include, for example:

A. Substituting the information contained in the model forms that is intended to demonstrate how to complete the information in the model forms—such as names, addresses, and Web sites; dates; numbers; and State-specific contact information—with information applicable to the remittance transfer.

B. Eliminating disclosures that are not applicable to the transfer, as permitted under § 1005.31(b).

C. Correcting or updating telephone numbers, mailing addresses, or Web site addresses that may change over time.

D. Providing the disclosures on a paper size that is different from a register receipt and 8.5 inch by 11 inch formats.

E. Adding a term substantially similar to ''estimated'' in close proximity to the specified terms in § 1005.31(b)(1) and (2), as required under § 1005.31(d).

F. Providing the disclosures in a foreign language, or multiple foreign languages, subject to the requirements of § 1005.31(g).

G. Substituting cancellation language to reflect the right to a cancellation made pursuant to the requirements of § 1005.36(c).

iv. Changes to the model forms that are not permissible include, for example, adding information that is not segregated from the required disclosures, other than as permitted by § 1005.31(c)(4).

Dated: January 23, 2012.

Richard Cordray,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2012–1728 Filed 1–30–12; 11:15 am]

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

[Docket No. CFPB–2011–0009]

RIN 3170–AA15

Electronic Fund Transfers (Regulation E)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is proposing to amend Regulation E, which implements the Electronic Fund Transfer Act, and the official interpretation to the regulation, which interprets the requirements of Regulation E. The proposal is related to a final rule, published elsewhere in today's **Federal Register**, that implements section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding remittance transfers. The proposal requests comment on whether a safe harbor should be adopted with respect to the phrase ''normal course of business'' in the definition of ''remittance transfer provider.'' This definition determines whether a person is covered by the rule. The proposal also requests comment on several aspects of the final rule regarding remittance transfers that are scheduled in advance, including preauthorized remittance transfers. In developing the final rule, the Bureau believes that these issues would benefit from further public comment.

DATES: Comments must be received on or before April 9, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2011–0009 or RIN 3170–AA15, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW., Washington, DC 20006.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW., Washington, DC 20006.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street, NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Mandie Aubrey, Dana Miller, or Stephen Shin, Counsels, or Krista Ayoub and Vivian Wong, Senior Counsels, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street, NW., Washington, DC 20006, at (202) 435–7000.

SUPPLEMENTARY INFORMATION:

I. Overview

Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] mandates a new comprehensive consumer protection regime for remittance transfers sent by consumers in the United States to individuals and businesses in foreign countries. The Bureau of Consumer Financial Protection (Bureau) is publishing a final rule (January 2012 Final Rule) elsewhere in today's **Federal Register** to implement the new regime. The Bureau is publishing this notice of proposed rulemaking to seek comment on whether to provide additional safe harbors and flexibility in applying the final rule to certain transactions and remittance transfer providers.

The Dodd-Frank Act, which was enacted July 21, 2010, amends the Electronic Fund Transfer Act (EFTA) [2] to create a multi-faceted regime governing most electronic transfers of funds sent by consumers in the United States to recipients in other countries. For covered transactions conducted by ''remittance transfer providers'' as defined by the statute, the regime requires: (i) The provision of disclosures concerning the exchange rate and amount to be received by the remittance recipient, prior to and at the time of payment by the consumer for the transfer; (ii) Federal rights regarding transaction cancellation periods; (iii) investigation and remedy of errors by remittance transfer providers; and (iv) standards for the liability of remittance transfer providers for the acts of their agents. Authority to implement the new Dodd-Frank Act provisions transferred from the Board of Governors of the Federal Reserve System (Board) to the Bureau effective July 21, 2011.[3]

This proposal has two parts. First, it seeks comment on addition of a possible safe harbor to the definition of the term ''remittance transfer provider'' to make it easier to determine when certain companies are excluded from the statutory scheme because they do not provide remittance transfers in ''the normal course of business.'' Second, it seeks comment on a possible safe harbor and other refinements to disclosure and cancellation requirements for certain transfers scheduled in advance, including ''preauthorized'' remittance transfers that are scheduled in advance to recur at substantially regular intervals. The Bureau believes that providing additional guidance on these issues may help both to reduce compliance burden for providers and to increase the benefits of the disclosure and cancellation requirements for consumers.

The final rule adopted by the Bureau provides a one-year implementation period. The Bureau expects to complete any further rulemaking on matters raised in this proposal on an expedited basis before the January 2013 effective date for the final rule. As detailed in the **SUPPLEMENTARY INFORMATION** to the January 2012 Final Rule, the Bureau will work actively with consumers, industry, and other regulators in the coming months to facilitate implementation of the new regime.

II. Summary of Final Rule

Elsewhere in today's **Federal Register**, the Bureau is publishing the final rule (January 2012 Final Rule) to implement the remittance transfer provisions in section 1073 of the Dodd-Frank Act. The final rule largely adopts the proposal as published in the May 2011 Proposed Rule, with several amendments and clarifications based on commenters' suggestions. The final rule incorporates the definitions of ''remittance transfer,'' ''sender,'' ''remittance transfer provider,'' and ''designated recipient'' set forth in the statute. With regard to statutory language excluding any person

[1] Public Law 111–203, 124 Stat. 1376, section 1073 (2010).

[2] 15 U.S.C. 1693 *et seq.* EFTA section 919 is codified in 15 U.S.C. 1693o–1.

[3] Because the Dodd-Frank Act requires that regulations to implement certain provisions be issued by January 21, 2012, the Board issued a Notice of Proposed Rulemaking in May 2011 (May 2011 Proposed Rule) with the expectation that the Bureau would complete the rulemaking process. 76 FR 29902 (May 23, 2011).

that does not provide remittance transfers in the ''normal course of its business'' from the definition of ''remittance transfer provider,'' the rule adopts a facts and circumstances test.

The final rule generally requires a remittance transfer provider to provide a written pre-payment disclosure to a sender containing information about the specific transfer requested by the sender, such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. Under the final rule, the remittance transfer provider also is required generally to provide a written receipt when payment is made for the transfer, which is when the payment is authorized. The receipt must include the information provided on the pre-payment disclosure, as well as additional information such as the date of availability, the recipient's contact information, and information regarding the sender's error resolution and cancellation rights. Consistent with the statute, which permits remittance transfer providers to provide estimates only in two narrow circumstances, the final rule generally requires that disclosures provide the actual exchange rate and amount to be received.

The final rule also sets forth special requirements for the timing and accuracy of disclosures with respect to ''preauthorized remittance transfers,'' which are defined as remittance transfers authorized in advance to recur at substantially regular intervals. As explained in the **SUPPLEMENTARY INFORMATION** to the January 2012 Final Rule, the Bureau recognizes that the market for preauthorized remittance transfers is still developing. The Bureau is concerned that if providers were required to provide accurate disclosures for subsequent preauthorized remittance transfers at the time those transfers are authorized, in many cases providers would not be able to offer preauthorized remittance transfer products, which could limit consumer access to a potentially valuable product.

The final rule treats the first transaction in a series of preauthorized remittance transfers the same as all other remittances transfers. Accordingly, the provider must issue a pre-payment disclosure at the time the sender requests the transfer and a receipt at the time when payment for the transfer is authorized, and the disclosures must be accurate when payment for the transfer is authorized, unless the statutory exceptions apply.

But in recognition of the potential risks associated with setting exchange rates and the potential difficulty of determining the amount to be provided to a designated recipient weeks or months in advance of subsequent transfers, the final rule does not require that disclosures for the entire series of preauthorized transfers be provided at the time of the consumer's initial request and payment authorization. Instead, providers must issue pre-payment disclosures and receipts for each subsequent transfer at later times. Specifically, under the final rule, the pre-payment disclosure for each subsequent transfer must be provided within a reasonable time prior to the scheduled date of the transfer. The receipt for each subsequent transfer generally must be provided no later than one business day after the date on which the transfer is made. However, if the transfer involves the transfer of funds from the sender's ''account'' (as defined by Regulation E) held by the provider, the receipt may be provided on or with the next regularly scheduled periodic statement for that account or within 30 days after payment is made for the remittance transfer if a periodic statement is not required. The pre-payment disclosure and receipt for each subsequent transfer must be accurate when the respective transfer is made, unless the statutory exceptions apply.

The final rule also provides senders specified cancellation and refund rights. Under the final rule, a sender generally has 30 minutes after payment for the transfer is made to cancel the transfer. The final rule, however, contains special cancellation procedures for any remittance transfer scheduled by the sender at least three business days before the date of the transfer, including preauthorized remittance transfers. In that case, the sender must notify the provider at least three business days before the scheduled date of the transfer to cancel the transfer.

III. Summary of the Proposed Rule

The proposal relates to two provisions in the January 2012 Final Rule. First, the proposal solicits comment on a possible safe harbor to define when a person does not provide transfers in the ''normal course of business'' for purposes of the definition of ''remittance transfer provider.'' Second, the proposal solicits comment on possible changes to the rules applicable to remittance transfers that are scheduled in advance, including preauthorized remittance transfers. In developing the January 2012 Final Rule, the Bureau recognized that additional safe harbors and flexibility for providers in complying with certain requirements related to these provisions may be needed to facilitate compliance with the final rule, and to minimize compliance burden. In addition, the Bureau wants to ensure that the disclosures required under the final rule for preauthorized remittance transfers are beneficial to senders, and are provided at a time that is most useful to senders in understanding the terms of the transfers. Moreover, the Bureau wants to ensure that the special cancellation procedures for remittance transfers scheduled in advance as set forth in the final rule provide appropriate protections for senders and do not impose undue burden on providers. The Bureau also wants to ensure that senders are informed properly of the right to cancel a transfer and the deadline to cancel, without undue burden on providers in providing these disclosures. The Bureau believes that these issues would benefit from further public comment, as summarized below.

Definition of ''Remittance Transfer Provider''

Consistent with the statute, the January 2012 Final Rule provides that a ''remittance transfer provider'' means any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person. A ''remittance transfer provider,'' as defined in the final rule, is required to comply with the disclosure and substantive protections set forth in subpart B of Regulation E relating to remittance transfers. The final rule provides guidance in the commentary regarding the phrase ''normal course of business'' using a facts and circumstances test, but does not give a numerical threshold.

The proposal solicits comment on whether the Bureau should adopt a safe harbor for determining whether a person is providing remittance transfers in the ''normal course of its business,'' and thus is a ''remittance transfer provider.'' Under the proposed safe harbor, if a person makes no more than 25 remittance transfers in the previous calendar year, the person does not provide remittance transfers in the normal course of business for the current year if it provides no more than 25 remittance transfers in the current year. If that person, however, makes a 26th remittance transfer in the current calendar year, the person would be evaluated under the facts and circumstances test to determine whether that person is a remittance transfer provider for that transfer and any additional transfers provided through the rest of the year. The Bureau requests comment on the proposed safe harbor generally, and, if such a safe harbor is appropriate, whether the maximum

number of transfers per calendar year to qualify for the safe harbor should be higher or lower than 25 transfers, such as 10 or 50 transfers, or some other number.

Disclosure Rules For Advance Remittance Transfers

The January 2012 Final Rule sets forth special requirements for the timing and accuracy of disclosures relating to preauthorized remittance transfers, which are remittance transfers authorized in advance to recur at substantially regular intervals. This proposal seeks comment both on a relatively narrow question regarding whether to provide a safe harbor regarding certain timing requirements under the final rule and more broadly on whether to make further adjustments in the disclosure rules for preauthorized remittance transfers and certain other remittance transfers requested in advance of the transfer date (advance transfers). The options presented explore whether there are ways to better balance consumer benefits and potential industry compliance burdens in light of the potential costs of setting exchange rates and the potential difficulty of determining the amount to be received by designated recipients far in advance of a particular transfer.

The proposal first addresses whether the Bureau should modify the final rule for a transfer scheduled more than a certain number of days (*e.g.,* 10 days) in advance of the consumer's requested transfer date, whether that transfer is a standalone transaction or the first in a series of preauthorized remittance transfers. The proposal also solicits comments on modifications of the final rule as applied to the first transfer in a series of preauthorized remittance transfers where the amount of the transfers can vary, and the provider does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. The proposal then seeks comment on whether the Bureau should modify the disclosure rules for subsequent transfers in a preauthorized series.

Initial Advance Transfers

The January 2012 Final Rule treats the first transaction in a series of preauthorized remittance transfers the same as all other remittances transfers by requiring disclosure of the actual exchange rate and amount to be provided to the designated recipient unless one of the statutory exceptions permitting use of estimates applies. As the final rule recognizes with regard to subsequent transfers in the same preauthorized series, however, setting exchange rates and determining the amount to be received far in advance may pose risks and remittance transfer providers may choose not to offer advance scheduling rather than developing new risk management strategies or finding partners that are willing to do so. The Bureau lacks data on how frequently consumers request transfers many days in advance, and seeks comment on whether further adjustment of the disclosure regime is warranted to address such situations.

The proposal therefore solicits comment on two potential changes to the disclosure requirements: (i) Whether a provider should be permitted additional flexibility to provide estimates for certain information in the pre-payment disclosure and receipt; and (ii) if additional estimates are permitted, whether a provider that uses this additional flexibility to provide estimates in the disclosures given at the time the transfer is requested and authorized should be required to provide a second receipt with accurate information closer to the time the transfer is scheduled to occur. The Bureau also solicits comment on whether in lieu of providing an estimate of the exchange rate on the disclosures for an advance transfer, the Bureau should allow a provider to disclose a formula that will be used to calculate the exchange rate that will apply to a transfer, and that is based on information that is publicly available prior to the time of transfer. The Bureau is contemplating these changes to minimize compliance burden on providers and to ensure that senders receive accurate information about transfers at a time that is most useful to them.

Specifically, the proposal solicits comment on whether use of estimates should be permitted in the following two circumstances: (i) A consumer schedules a one-time transfer or the first in a series of preauthorized transfers to occur more than 10 days after the transfer is authorized; or (ii) a consumer enters into an agreement for preauthorized remittance transfers where the amount of the transfers can vary and the provider does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. For the first proposed use of estimates, the Bureau has structured the proposed 10-day threshold to mesh with the safe harbor proposed below regarding provision of disclosures relating to subsequent preauthorized transfers within a ''reasonable time'' prior to the individual transfer. The Bureau requests comment on whether this linkage is appropriate and whether 10 days is the appropriate cut off for both purposes.

The Bureau also requests comment on whether a provider that uses estimates in the pre-payment disclosure and receipt given at the time the transfer is requested and authorized in the two situations described above should be required to provide a second receipt with accurate information within a reasonable time prior to the scheduled date of the transfer. The Bureau requests comment on any tradeoffs between compliance burdens to providers of allowing an estimate-and-redisclosure option and the benefit to senders of receiving a second, more accurate disclosure. The Bureau also solicits comment on whether providing multiple disclosures (one pre-payment disclosure and two receipts) for each transfer described above would create information overload for consumers.

Subsequent Advance Transfers

Under the January 2012 Final Rule, a provider must provide a pre-payment disclosure and receipt for each subsequent transfer in a series of preauthorized remittance transfers. The pre-payment disclosure for each subsequent transfer must be provided within a reasonable time prior to the scheduled date of the transfer. The receipt for each subsequent transfer generally must be provided no later than one business day after the date on which the transfer is made. The proposal solicits comment on two alternative approaches to possible changes to the disclosures rules for subsequent transfers: (i) whether the Bureau should retain the requirement that a provider give a pre-payment disclosure for each subsequent transfer, and should provide a safe harbor interpreting the ''within a reasonable time'' standard for providing this disclosure; or (ii) whether the Bureau instead should eliminate the requirement to provide a pre-payment disclosure for each subsequent transfer.

With respect to the first alternative approach, the Bureau would retain the requirement that a provider mail or deliver a pre-payment disclosure within a reasonable time prior to the scheduled date of the transfer. The Bureau solicits comment on whether it should provide a safe harbor interpreting the ''within a reasonable time'' standard for providing this disclosure. The proposal specifically solicits comment on a safe harbor under which a provider would be deemed to have provided the pre-payment disclosure within a reasonable time prior to the scheduled date of a subsequent transfer, if the provider mails or delivers the pre-payment

disclosure not later than 10 days before the scheduled date of the respective subsequent transfer. The Bureau believes that this proposed safe harbor would facilitate compliance with the final rule with respect to the timing of the disclosures required for subsequent preauthorized remittance transfers. The Bureau requests comment on whether the length of time for the safe harbor should be longer or shorter than 10 days, and whether different safe harbors should be provided based on whether the disclosures are mailed or provided electronically.

With respect to the second alternative approach, the Bureau solicits comment on whether the Bureau instead should eliminate the requirement that a provider mail or deliver a pre-payment disclosure for each subsequent transfer. Specifically, the Bureau solicits comment on whether the benefit to senders of receiving a pre-payment disclosure for each subsequent transfer justifies the cost to providers of providing this disclosure for each subsequent transfer. The Bureau solicits comment on whether senders will find the pre-payment disclosures useful, for example, (i) to ensure that their deposit or other accounts have sufficient funds to cover the upcoming transfers; or (ii) to evaluate whether to cancel the subsequent transfers and discontinue the preauthorized remittance transfer arrangement. The Bureau also requests comment on the relative trade off in compliance burdens to providers in providing pre-payment disclosures for each subsequent transfer.

Cancellation Requirements Applicable to Certain Remittance Transfers Scheduled in Advance, Including Preauthorized Remittance Transfers

The January 2012 Final Rule provides senders specified cancellation and refund rights. Under the final rule, a sender generally has 30 minutes after payment for the transfer is made to cancel the transfer. The final rule, however, contains special cancellation procedures for any remittance transfer scheduled by the sender at least three business days before the date of the transfer, including preauthorized remittance transfers. In that case, the sender must notify the provider at least three business days before the scheduled date of the transfer to cancel the transfer. In the final rule, the Bureau adopted special cancellation provisions for these transfers scheduled in advance (in lieu of the general 30 minute cancellation rule) because the Bureau believes it is appropriate to provide senders with additional time to change their minds about sending a transfer if, for example, circumstances change between when the transfer is authorized and when the transfer is to be made. At the same time, the Bureau believes that it is necessary to give providers sufficient time to process any cancellation requests before a transfer is made.

The Bureau wants to ensure that the special cancellation procedures for remittance transfers scheduled in advance as set forth in the final rule provide appropriate protections for senders and do not impose undue burden on providers. As a result, the Bureau solicits comment on whether the three-business-day deadline to cancel accomplishes these goals, or whether the deadline to cancel these transfers should be more or less than three business days before the scheduled date of the transfer.

Notice of Deadline to Cancel

The Bureau also wants to ensure that senders are informed properly of the right to cancel a transfer and the deadline to cancel, without undue burden on providers in providing these disclosures. The January 2012 Final Rule requires that a provider disclose the deadline to cancel in the receipt. Under the final rule, a provider must only disclose in the receipt for a transfer the deadline to cancel that is applicable to that transfer. Thus, for any remittance transfer scheduled by the sender at least three business days before the date of the transfer, a provider may solely disclose in the receipt information about the three-business-day deadline to cancel the transfer. For other transfers, the receipt may solely disclose the 30 minute deadline to cancel. In addition, in disclosing the three-business-day deadline to cancel, under the final rule, the provider is *not* required to disclose a specific date on which the right to cancel will expire, such as disclosing: ''You can cancel for a full refund no later than [insert calendar date].'' Thus, under the final rule, a provider could use a generic disclosure, such as disclosing: ''You can cancel for a full refund no later than three business days prior to the scheduled date of the transfer.'' The Bureau solicits comment on three issues related to the disclosure of the deadline to cancel as set forth in the final rule: (i) Whether the three-business-day deadline to cancel transfers scheduled in advance should be disclosed in a different manner to consumers, such as by requiring a provider to disclose in the receipt the specific date on which the right to cancel will expire; (ii) whether a provider should be allowed on a receipt to describe both the three-business-day and 30 minute deadline-to-cancel time frames and either describe to which transfers each deadline to cancel is applicable, or alternatively, use a check box or other method to indicate which deadline is applicable to the transfer; and (iii) whether a provider should be required to disclose the deadline to cancel in the pre-payment disclosure for each subsequent transfer, rather than in the receipt given for each subsequent transfer.

IV. Legal Authority

Section 1073 of the Dodd-Frank Act creates a new section 919 of the EFTA and requires remittance transfer providers to provide disclosures to senders of remittance transfers, pursuant to rules prescribed by the Bureau. In particular, providers must give senders a written pre-payment disclosure containing specified information applicable to the sender's remittance transfer. The remittance transfer provider must also provide a written receipt that includes the information provided on the pre-payment disclosure, as well as additional specified information. EFTA section 919(a).

In addition, EFTA section 919 provides for specific error resolution procedures. The Act directs the Bureau to promulgate error resolution standards and rules regarding appropriate cancellation and refund policies. EFTA section 919(d). Finally, EFTA section 919 requires the Bureau to establish standards of liability for remittance transfer providers, including those that act through agents. EFTA section 919(f). Except as described below, the proposed changes are proposed under the authority provided to the Bureau in EFTA section 919, and as more specifically described in this **SUPPLEMENTARY INFORMATION**.

In addition to the statutory mandates set forth in the Dodd-Frank Act, EFTA section 904(a) authorizes the Bureau to prescribe regulations necessary to carry out the purposes of the title. The express purposes of the EFTA, as amended by the Dodd-Frank Act, are to establish ''the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems'' and to provide ''individual consumer rights.'' EFTA section 902(b). EFTA section 904(c) further provides that regulations prescribed by the Bureau may contain any classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of electronic fund transfers or remittance transfers that the Bureau deems necessary or proper to effectuate the purposes of the

title, to prevent circumvention or evasion, or to facilitate compliance.

As described in more detail in the **SUPPLEMENTARY INFORMATION**, the provisions proposed in part or in whole pursuant to the Bureau's authority in EFTA sections 904(a) and 904(c) include: [4] § 1005.32(b)(2).[5] The Bureau also solicits comments on various regulatory provisions some of which would require use of EFTA sections 904(a) and (c) authority but for which proposed regulatory text is not provided.

VI. Section-by-Section Analysis

Section 1005.30 Remittance Transfer Definitions

30(f) Remittance Transfer Provider

As adopted in the January 2012 Final Rule, § 1005.30(f) and the accompanying interpretations implement the definition of ''remittance transfer provider'' in EFTA section 919(g)(3). Section 1005.30(f) states that a ''remittance transfer provider'' means any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person. A ''remittance transfer provider,'' as defined in § 1005.30(f), is required to comply with disclosure and substantive protections set forth in subpart B of Regulation E relating to remittance transfers.

Comment 30(f)–2 provides guidance interpreting the phrase ''normal course of business'' for purposes of the definition of ''remittance transfer provider'' in § 1005.30(f). Specifically, comment 30(f)–2 states that whether a person provides remittance transfers in the normal course of business depends on the facts and circumstances, including the total number and frequency of remittance transfers sent by the provider. For example, if a financial institution generally does not make international consumer wire transfers available to customers, but sends a couple of international consumer wire transfers in a given year as an accommodation for a customer, the institution does not provide remittance transfers in the normal course of business. In contrast, if a financial institution makes international consumer wire transfers generally available to customers (whether described in the institution's deposit account agreement, or in practice) and makes transfers multiple times each month, the institution provides remittance transfers in the normal course of business.

Under the final rule, comment 30(f)–2 does not provide any *de minimis* numerical threshold under which a person would be deemed not to be providing remittance transfers in the normal course of business, and thus would not be a ''remittance transfer provider'' for purposes of § 1005.30(f). However, the Bureau recognizes that a bright-line safe harbor may minimize compliance burden. Thus, the Bureau proposes to revise comment 30(f)–2 to provide that if a person provided no more than 25 remittance transfers in the previous calendar year, the person does not provide remittance transfers in the normal course of business for the current calendar year if it provides no more than 25 remittance transfers in the current calendar year. If that person, however, makes a 26th remittance transfer in the current calendar year, the person would be evaluated under the facts and circumstances test to determine whether the person is a remittance transfer provider for that transfer and any other transfer provided through the rest of the year.

The proposed comment provides several examples to demonstrate how this proposed safe harbor would apply. For instance assume that in calendar year 2012, a person provided 20 remittance transfers. This person is not providing remittance transfers in the normal course of business for calendar year 2013 if it provides no more than 25 remittance transfers in calendar year 2013. Assume further that the person makes 15 transfers in calendar year 2013. Because this person limited its remittance transfers to no more than 25 in 2013, it would not be required to comply with the rules in subpart B for any of its transfers in 2013. However, if the person provides a 26th transfer in calendar year 2013, then the person will be evaluated under the facts and circumstances test for determining whether the person is a remittance transfer provider for that and any other transfer provided through the rest of the calendar year. In addition, if the person provides a 26th transfer for calendar year 2013, this person would not qualify for the safe harbor in 2014 because the person did not make 25 or fewer remittance transfers in 2013. In this case, in 2014, the person would be evaluated under the facts and circumstances test in determining whether the person is a remittance transfer provider for all transfers made in 2014. Under the proposed safe harbor, a person would not be subject to the definition of ''remittance transfer provider'' and thus, would not be required to comply with the disclosure and substantive protections set forth in subpart B of Regulation E relating to remittance transfers if it made no more than 25 remittance transfers for each calendar year.

The proposed threshold number of no more than 25 transfers per calendar year for the safe harbor is consistent with the general threshold for coverage under the Bureau's Regulation Z, which relates to credit transactions. Under Regulation Z, 12 CFR part 1026, a ''creditor'' as defined by the regulation, must comply with certain disclosure requirements and substantive protections related to credit transactions contained in Regulation Z. Under Regulation Z, a creditor is an entity that regularly extends consumer credit under specified circumstances. Generally, under Regulation Z, a person regularly extends consumer credit in the current calendar year when it either extended consumer credit more than 25 times in the preceding calendar year or more than 25 times in the current calendar year.[6] *See* § 1026.2(a)(17) and comment 2(a)(17)(i)–4.[7] However, the Bureau solicits comment on whether a threshold safe harbor is appropriate in this context, and if so, whether other threshold numbers for the safe harbor, such as 10 or 50 transfers, may be appropriate as the threshold number to carve out persons that provide remittance transfers on a limited basis, primarily as an accommodation to the customers of its regular business.

Without a safe harbor, persons who currently provide remittance transfers, or are contemplating doing so, may face

[4] Throughout the **SUPPLEMENTARY INFORMATION**, the Bureau is citing its authority under both EFTA section 904(a) and EFTA section 904(c) for purposes of simplicity. The Bureau notes, however, that with respect to some of the provisions referenced in the text, use of only one of the authorities may be sufficient.

[5] The consultation and economic impact analysis requirement previously contained in EFTA sections 904(a)(1)–(4) were not amended to apply to the Bureau. Nevertheless, the Bureau consulted with the appropriate prudential regulators and other Federal agencies and considered the potential benefits, costs, and impacts of the rule to consumers and covered persons as required under section 1022 of the Dodd-Frank Act, and through these processes would have satisfied the requirements of these EFTA provisions if they had been applicable.

[6] Regulation Z in some cases provides additional protections for credit secured by a dwelling and certain high cost mortgages. For example, with respect to whether a person is a creditor, a person regularly extends consumer credit in the current calendar year if it either extended consumer credit for more than five times for transactions secured by a dwelling in the previous calendar year or more than five times in the current calendar year. In addition, a person regularly extends consumer credit if it extends consumer credit for just one high-cost mortgage in a 12 month period. *See* 12 CFR 1026.2(a)(17).

[7] The Bureau notes that it has issued a separate notice of request for information on whether it should revise these threshold numbers in Regulation Z. *See* 76 FR 75825 (Dec. 5, 2011).

uncertainty and litigation risk as to whether they meet the definition of ''remittance transfer provider'' when they provide a small number of transfers in a given year. These persons may decide to discontinue providing these transfers, or choose not to start making these transfers, to the detriment of their customers, rather than taking on the burden of complying with the remittance transfer rules for only a small number of transfers per year. The Bureau believes that the safe harbor may be particularly useful to relatively small financial services providers that provide remittance transfers on an infrequent basis.

The Bureau recognizes that if a safe harbor is adopted, in some cases, consumers would not receive the disclosures and protections set forth in the remittance transfer rules because the person providing these transfers would not be deemed a ''remittance transfer provider'' for purposes of subpart B of Regulation E. However, Congress itself created this result by providing that the disclosure and other provisions apply only to persons that provide remittance transfers in the normal course of business. The statutory language, by defining ''remittance transfer provider'' as any person that provides remittance transfers for a consumer in the normal course of its business, implies that there will be persons that provide remittance transfers *outside* the normal course of business that are not subject to the statutory disclosure and protection requirements related to remittance transfers. The Bureau believes that the inclusion of the phrase ''normal course of business'' in the statutory definition was meant to exclude persons that provide remittance transfers on a limited basis, such as an accommodation to the customers of its regular business. In addition, as described above, the Bureau is concerned that persons may discontinue providing a small number of transfers per year to accommodate customers of its regular business, or choose not to start making these transfers, to the detriment of their customers, rather than taking on the burden of complying with the remittance transfer rules for only a small number of transfers per year.

The Bureau notes that industry commenters in response to the Board's May 2011 Proposed Rule provided suggestions for a *de minimis* threshold amount that were extremely high. Suggestions ranged from 1,200 or fewer transfers annually to 2,400 transfers annually, per method (*i.e.,* 2,400 wire transfers plus 2,400 international ACH transfers). The commenters did not provide any data on the overall distribution and frequency of remittance transfers across various providers to support treating such high numbers of transactions as being outside the normal course of business. Nor did they suggest other means of determining when remittance transfer providers are engaging in transfers merely as an accommodation to occasional consumer requests rather than part of a business line of payment services. Absent significant additional information, the Bureau is skeptical that Congress intended to exclude companies averaging 100 or more remittance transfers *per month* from the statutory scheme. Based on the data presented by commenters, such a range would appear to exclude the majority of providers of open network transfers, such as international wire transfers and ACH transactions, from the rule. For example, one trade association commenter stated that most respondents to an information request said that they make fewer than 2,400 international transactions per year. As discussed in the **SUPPLEMENTARY INFORMATION** to the January 2012 Final Rule, the Bureau believes that the statute clearly covers open network transfers, such as wire transfers and ACH transactions. Providing an exception based on the ranges suggested by these commenters would allow many financial institutions that arguably regularly and in the normal course of business provide remittance transfers to not be subject to the regulation. The Bureau believes in general that the term ''normal course of business'' covers remittance transfer activities at a level significantly lower than the ranges suggested by these commenters.

The Bureau requests comment on the proposed safe harbor. As discussed above, the Bureau requests comment on whether a threshold safe harbor is appropriate in this context, and whether the maximum number of transfers per calendar year to qualify for the safe harbor should be higher or lower than 25 transfers, and if so, what the maximum number should be and why. The Bureau also specifically seeks information regarding how many persons would likely qualify for any such a safe harbor; whether such a safe harbor would be more or less likely to apply to particular types of businesses, as compared to others; the potential benefits for consumers if a higher or lower number were chosen; and any specific costs that would be implicated by a higher or lower figure. The Bureau would benefit from comments both from companies or other persons that send far more than 25 transfers per year and from companies or other persons that send around 25 transfers per year.

Section 1005.31 Disclosures

Section 1005.31 generally sets forth the disclosure requirements for remittance transfers, except for disclosures provisions for preauthorized remittance transfers which are set forth in § 1005.36. Under § 1005.31, remittance providers are required to provide two sets of disclosures to a sender in connection with a remittance transfer: (i) a pre-payment disclosure when a sender requests a transfer; and (ii) a written receipt to the sender when payment is made, which is when the payment is authorized. The pre-payment disclosure provides information about the transfer, such as the exchange rate, fees, and the amount to be received by the designated recipient. The receipt includes the information provided on the pre-payment disclosure, as well as additional information, such as the promised date of delivery, contact information for the designated recipient, and information regarding the sender's error resolution rights. Consistent with the statute, which permits remittance transfer providers to provide estimates only in two narrow circumstances as set forth in § 1005.32, the final rule generally requires that disclosures provide the actual exchange rate and amount to be received.

For the reasons discussed in the section-by-section analysis to § 1005.36, the Bureau solicits comment on whether a provider should be permitted to use estimates for certain information in the pre-payment disclosures and receipts where a consumer schedules a one-time transfer or the first in a series of preauthorized transfers to occur more than 10 days after the transfer is authorized. *See* proposed § 1005.32(b)(2). Also, as discussed in more detail in the section-by-section analysis to § 1005.36, the Bureau also solicits comment on whether a provider that uses estimates in the situation described above should be required to provide a second receipt with accurate information within a reasonable time prior to the scheduled date of the transfer.

Section 1005.32 Estimates

Generally, remittance transfer providers are not permitted to use estimates for the information provided in the pre-payment disclosures and receipts. The January 2012 Final Rule implements the two statutory exceptions that permit a remittance transfer provider to disclose an estimate of the amount of currency to be

received, as well as other information such as the exchange rate that is used to calculate the amount of currency. Section 1005.32(a) contains the first exception, which applies to depository institutions that cannot determine certain disclosed amounts for reasons beyond their control. Section 1005.32(b) contains the second exception, which applies when the provider cannot determine certain amounts to be disclosed because of: (i) the laws of a recipient country; or (ii) the method by which transactions are made in the recipient country.

To effectuate the purposes of the EFTA and facilitate compliance, the Bureau proposes to use its EFTA section 904(a) and (c) authority to add a third exception in a new § 1005.32(b)(2) that would provide additional flexibility for providers to use estimates in pre-payment disclosures and receipts where a consumer schedules a one-time transfer or the first in a series of preauthorized transfers to occur more than 10 days after the transfer is authorized. This exception is discussed in more detail in the section-by-section analysis to § 1005.36 below. The current exception relating to transfers to certain countries that is contained in § 1005.32(b) would be moved to § 1005.32(b)(1), and conforming changes would be made to interpretation provisions that reference this exception.

Section 1005.36 Transfers Scheduled in Advance

The January 2012 Final Rule sets forth special requirements for the timing and accuracy of disclosures relating to preauthorized remittance transfers, which are remittance transfers authorized in advance to recur at substantially regular intervals. This proposal seeks comment both on a relatively narrow question regarding whether to provide a safe harbor regarding certain timing requirements under the final rule and more broadly on whether to make further adjustments in the disclosure rules for preauthorized remittance transfers and other remittance transfers requested more than a certain number of days (*e.g.,* 10 days) in advance of the transfer date (advance transfers). The options presented explore whether there are ways to better balance consumer benefits and potential industry compliance burdens in light of the potential risks associated with setting exchange rates and the potential difficulty of determining the amount to be received by designated recipients far in advance of a particular transfer. The proposal first considers modification of the final rule as applied to a transfer scheduled more than a certain number of days (*e.g.,* 10 days) in advance of the consumer's requested transfer date, whether that transfer is a standalone transaction or the first in a series of preauthorized remittance transfers. The proposal also solicits comment on modifications of the final rule for the first transfer in a series of preauthorized remittance transfers where the amount of the preauthorized remittance transfers can vary, and the provider does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. The proposal then also requests comment on whether the Bureau should modify the disclosure rules for subsequent transfers in a preauthorized series.

The Bureau recognizes that the market for preauthorized remittance transfers is still developing. The Bureau is concerned that without specific rules and flexibility for providers in complying with certain disclosure requirements, providers may either discontinue providing preauthorized remittance transfer products, or may not begin to offer those products in the future, to the detriment of senders who may enjoy the convenience that these products provide. The final rule provides remittance transfer providers some relief by allowing them to shift their obligation to provide pre-payment disclosures for subsequent transfers to a ''reasonable time'' prior to the particular transfer; this provision should reduce the potential costs associated with setting exchange rates far in advance of a transfer. However, the Bureau recognizes that similar issues may arise in situations in which a consumer schedules the first in a series of preauthorized transfers or a single standalone transfer significantly in advance of the transfer date.

The Bureau also solicits comment on possible changes to the cancellation requirements for certain remittance transfers scheduled in advance. The Bureau wants to ensure that the three-business-day deadline to cancel remittance transfers scheduled in advance as set forth in the final rule provides appropriate protections for senders and does not impose undue burden on providers, and that senders are informed properly of the right to cancel a transfer.

Timing and Accuracy Requirements for Disclosures About Initial Advance Transfers

The January 2012 Final Rule treats the first transaction in a series of preauthorized remittance transfers the same as all other remittances transfers by requiring disclosure of the actual exchange rate and amount to be provided to the designated recipient unless one of the statutory exceptions permitting use of estimates applies. The final rule recognizes for subsequent transfers in the same preauthorized series, however, that setting exchange rates far in advance may require more sophisticated risk management strategies and remittance transfer providers may choose not to offer advance scheduling rather than developing such strategies (or finding partners that are willing to do so). The Bureau lacks data on how frequently consumers request transfers many days in advance, and seeks comment on whether further adjustment of the disclosure regime is warranted to address such situations.

As discussed in more detail below, the proposal solicits comment on whether use of estimates should be permitted in the following two circumstances: (i) A consumer schedules a one-time transfer or the first in a series of preauthorized transfers to occur more than 10 days after the transfer is authorized; or (ii) a consumer enters into an agreement for preauthorized remittance transfers where the amount of the transfers can vary, and the provider does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. The Bureau also solicits comment on whether a provider that uses estimates in the two situations described above should be required to provide a second receipt with accurate information within a reasonable time prior to the schedule date of the transfer.

Estimates Where the Transfer Is Scheduled To Occur More Than 10 Days After the Transfer Is Authorized

The Bureau proposes to add an exception in § 1005.32 that would provide additional flexibility for providers to use estimates in disclosures for certain transfers scheduled in advance. Under proposed § 1005.32(b)(2)(i), a provider would be permitted to use estimates for certain information in the pre-payment disclosure and receipt for a one-time transfer or the first in a series of preauthorized transfers to occur more than 10 days after the transfer is authorized. Specifically, under proposed § 1005.32(b)(1)(i), a provider generally would be allowed to provide estimates in accordance with § 1005.32(c) for the following information contained in the pre-payment disclosure and receipt, as applicable: (i) The exchange rate used by the provider for the remittance

transfer; (ii) the amount that will be transferred to the designated recipient, in the currency in which the funds will be received by the designated recipient, if required to be disclosed under § 1005.31(b)(1)(v); (iii) any fees and taxes imposed on the remittance transfer by a person other than the provider, in the currency in which the funds will be received by the designated recipient; and (iv) the amount that will be received by the designated recipient, in the currency in which the funds will be received. *See* §§ 1005.36(b)(1), 1005.31(b)(1)(iv) through (vii), 1005.31(b)(2) and 1005.31(f); *see also* proposed comment 32–1.

Under proposed § 1005.32(b)(2)(ii), a provider would be permitted to estimate taxes imposed on the remittance transfer by a person other than the provider, in the currency in which the funds will be received by the designated recipient, for transfers scheduled more than 10 days in advance only if those taxes are a percentage of the amount transferred to the designated recipient. Thus, a provider would be permitted to estimate taxes imposed in a recipient country only if they are calculated as a percentage of the estimated amount transferred to the designated recipient. The provider does not need additional flexibility to estimate taxes imposed in a recipient country in other cases, because in such instances, the taxes do not depend on an estimate of the amount of the funds transferred to the recipient.

Under proposed § 1005.32(b)(2)(iii), fees imposed on the remittance transfer by a person other than the provider, in the currency in which the funds will be received by the designated recipient, may be estimated in only two circumstances: (i) Where the fees are calculated as a percentage of the estimated amount transferred to the designated recipient, as described in § 1005.31(b)(1)(v); or (2) where an ''insured institution'' as defined in § 1005.32(a)(3) is permitted to estimate fees under the temporary exemption in § 1005.32(a). *See* proposed comment 32(b)(2)-1. Thus, a provider would not be permitted to estimate these fees for transfers scheduled more than 10 days in advance if the fees are a specific sum fee, unless a depository institution is otherwise allowed to estimate that fee under the temporary exemption in § 1005.32(a).

The Bureau believes that a provider might be reluctant to allow a sender to schedule a transfer too far in advance if the provider is required to fix the exchange rate that will apply to the transfer (*i.e.,* the retail rate) at the time that it is scheduled. This reluctance could arise due to the risk associated with participating in foreign exchange markets, and the manners in which providers and their partners manage such risk. Many retail exchange rates are set through reference to wholesale currency markets in which rates can fluctuate frequently.[8] As a result, whenever there are time lags in between the time when the retail rate applied to a transfer is set, the time when the relevant foreign currency is purchased, and the time when funds are delivered, a provider (and/or its business partner) may face losses due to unexpected changes in the value of the relevant foreign currency. Providers (and/or their partners) generally use a variety of pricing, business processes, or hedging techniques to manage or minimize this exchange rate risk. For some, and perhaps many providers (or their partners), the task of managing or minimizing exchange risk may become more complicated or more costly if the amount of time between when the rate is set for a customer and when the transfer is sent increases. Setting the retail rate that applies to a transfer far in advance of when that transfer is sent may require the provider or other parties involved in processing the remittance transfer to use additional or more sophisticated risk management tools.

As a result, the Bureau is concerned that providers—particularly relatively small remittance transfer providers—may choose not to offer remittance transfers scheduled too far in advance, particularly preauthorized remittance transfers that may extend over a series of months. The Bureau believes that the market for preauthorized remittance transfers is still in its nascent stages. Reluctance to further develop and/or offer such products could reduce consumers' access to the convenience of advance transfers. In other cases, providers may pass any additional costs of risk management on to consumers who schedule preauthorized transfers, in the form of less favorable exchange rates or higher fees.

The proposal would give providers an option to schedule advance remittance transfers, while potentially limiting the need for additional exchange rate risk assumption, management, or minimization techniques. Under the proposal, if a transfer is scheduled to occur more than 10 days after the transfer is authorized, a provider could disclose an estimate of the exchange rate, and other information that depends on the exchange rate. The proposal links the time frame for use of estimates to the proposed safe harbor described below for when a provider would be deemed to have provided the pre-payment disclosure for subsequent preauthorized transfers within a ''reasonable time'' prior to the scheduled transfer of the respective subsequent transfer. Accordingly, remittance transfer providers would be able to use estimates under proposed § 1005.32(b)(2) only where a consumer requests a transfer more than 10 days in advance, but would be expected to provide actual exchange rates and the amount to be provided to the recipient if the transfer is scheduled 10 or fewer days in advance. To effectuate the purposes of the EFTA and facilitate compliance, the Bureau proposes to use its authority under EFTA sections 904(a) and (c) to permit this additional flexibility to provide estimates.

The Bureau solicits comment on the proposed changes allowing providers additional flexibility to provide estimates on pre-payment disclosures and receipts when the transfer is scheduled by the sender to be made more than 10 days after it is authorized. Specifically, the Bureau requests comment on whether estimates should be allowed in such cases, and if so, the number of days in each case should be more or less than 10 days and why. The Bureau specifically seeks information and comment regarding the nature of any burden or cost associated with setting exchange rates more than 10 days in advance of a payment, and the potential effect on consumers to doing so. The Bureau has structured the proposed threshold number of days to mesh with the safe harbor proposed below regarding provision of disclosures relating to subsequent preauthorized transfers within a ''reasonable time'' prior to the individual transfer. The Bureau requests comment on whether this linkage is appropriate and whether 10 days is the appropriate cut off for both purposes.

The Bureau also recognizes that compared to disclosure of exact exchange rates, disclosure of estimated exchange rates will likely provide consumers less clear information about the service that they are buying, and whether that service is more or less expensive than the services offered by competitors. The Bureau therefore also solicits comment as described below on whether remittance transfer providers should be required to provide a follow-

[8] Some foreign exchange rates are set by monetary authorities. There are a variety of business models that providers use to purchase currency and fund transfers that are received in foreign currency. The timing of when foreign currency is purchased, the role of the provider in such a purchase, and the role of other intermediaries, partners, agents, and other parties can vary.

up disclosure listing the actual exchange rate and related numbers. Finally, the Bureau solicits comment on whether in lieu of providing an estimate of the exchange rate on the disclosures for an advance transfer, the Bureau should allow a provider to disclose a formula that will be used to calculate the exchange rate that will apply to a transfer, and that is based on information that is publicly available prior to the time of transfer, such that a sender could use that formula to calculate the exchange rate that will apply to the transfer.

Estimates When the Amount of the Preauthorized Remittance Transfers Can Vary

In some cases, a sender may set up a preauthorized remittance transfer arrangement where the amount of the first transfer and the scheduled date of the first transfer are not known at the time the arrangement is established. This may occur where the preauthorized remittance transfer arrangement is established to pay a bill each month (such as a utilities bill) and the amount of the bill and the date the bill is due may vary each month. In this case, the sender may not have received the next bill at the time the sender is establishing the preauthorized remittance transfer arrangement, and thus would not know the amount of the next bill and the date it is due.

The Bureau requests comment on whether a provider should be given flexibility to estimate certain information in the disclosures for the first scheduled transfer where the preauthorized remittance transfers can vary in amount, and the provider does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. Specifically, the Bureau requests comment on whether the Bureau should allow providers in this case to use estimates for the following information included on the pre-payment disclosure and receipt given at the time the first transfer is requested and authorized: (i) The amount of the transfer (in the currency in which the transfer is funded); (ii) fees and taxes if they depend on the amount of the transfer; (iii) the total amount of the transfer and fees; (iv) the date in the foreign country on which the funds will be available, if the provider does not know the exact due date of the next bill; (v) the exchange rate used by the provider for the remittance transfer; (vi) the amount that will be transferred to the designated recipient, in the currency in which the funds will be received by the designated recipient, if required to be disclosed under § 1005.31(b)(1)(v); (vii) any fees and taxes imposed on the remittance transfer by a person other than the provider, in the currency in which the funds will be received by the designated recipient; and (viii) the amount that will be received by the designated recipient, in the currency in which the funds will be received. To effectuate the purposes of the EFTA and facilitate compliance, the Bureau proposes to use its authority under EFTA sections 904(a) and (c) to permit this additional flexibility to provide estimates.

If these estimates are allowed, what should be the basis for the estimates for the transfer amount and the date the funds will be available? Should a provider be allowed to rely on estimates from the consumer of the transfer amount and the date the next bill is due? Section 1005.32(c) sets forth a basis for estimating the other disclosures described above. Where the amount of the preauthorized remittance transfers can vary, will providers need the flexibility to estimate the amount of the first transfer where the transfer is scheduled to occur within 10 days of when the preauthorized remittance transfer was established? Or in this case is it likely that senders at the time of establishing the preauthorized remittance transfer arrangement will have received the next bill to be paid under this arrangement and thus, would know the exact amount of the first transfer and when it is due?

As discussed above, the Bureau solicits comment on whether a provider should be permitted to estimate the date in the foreign country on which the funds will be available, if the amount of the transfers under the preauthorized transfers arrangement varies, and the provider does not know the exact amount of the first transfer and the exact due date of the next bill at the time the disclosures are given for the first transfer. The Bureau solicits specific comment on whether this additional flexibility to estimate the date in the foreign county on which the funds will be available is necessary. The Bureau notes that under the January 2012 Final Rule, a provider must disclose in the receipt the date in the foreign country on which the funds will be available and may provide a statement that funds may be available to the designated recipient earlier than the date disclosed, using the term ''may be available sooner'' or a substantially similar term. *See* § 1005.31(b)(2)(ii). In the case described above, will providers have sufficient information to know the time frame of when the next bill will be due (such that the next bill will be due within the next month), even if the provider does not know the exact date the next bill is due at the time the disclosures are given? If so, the Bureau solicits comment on whether the January 2012 Final Rule already provides providers with sufficient flexibility to handle situations where the provider does not know the exact date the next bill is due when the disclosures are given for the first transfer. Similarly, the Bureau also solicits comments on whether there are preauthorized remittance arrangements where the amount of the transfers will not vary, but the date on which the bills are due each payment period varies. If so, do providers need additional flexibility for the first transfer to estimate the date in the foreign country on which the funds will be available, if the provider does not know the exact due date of the next bill at the time the disclosures for the first transfer are given?

Second Receipt

As discussed above, the proposal solicits comment on whether providers should be allowed additional flexibility to provide estimates for certain information in the pre-payment disclosure and receipt given at the time the transfer is requested and authorized if: (i) The transfer is scheduled to occur more than 10 days after the transfer is authorized; or (ii) the amount of the transfers under the preauthorized remittance transfer arrangement can vary, and the provider does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. The Bureau recognizes that if providers are allowed to provide estimates in these two situations, there is an increased likelihood that the pre-payment disclosure and receipt given at the time the sender requests the transfer will contain estimates.

If estimates are used, the sender will not receive precise information related to the exchange rate, the amount of currency to be received, and other information for that transfer, unless the provider is required to provide another disclosure to the sender with accurate information closer to the time the transfer is scheduled to occur. For example, assume a transfer is scheduled to occur more than 10 days after the transfer is authorized. Under the proposal, a provider would be permitted to use an estimate of the exchange rate and other information that depend on the exchange rate, such as the amount of currency to be received by the designated recipient, in providing the pre-payment disclosure and receipt that are given at the time the transfer is requested and authorized. Under the

final rule, these are the only disclosures that a sender would receive about the transfer, and the sender would not receive precise information about the exchange rate, the amount of currency to be received by the designated recipient, and other information about the transfer. Thus, if the Bureau allows providers additional flexibility to use estimates in the two situations described above in disclosures for the transfer that are given at the time the transfer is requested and authorized, the Bureau requests comment on whether it should also require a provider to provide a second receipt with accurate information within a reasonable time prior to the scheduled date of the transfer.

The Bureau contemplates that this second receipt would be required only if the provider uses estimates because: (i) The transfer is scheduled to occur more than 10 days after the transfer is authorized; or (ii) the amount of the transfers under the preauthorized remittance transfer arrangement can vary, and the provider does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. In other words, this second receipt would be required only for certain transfers that are one-time or the first transactions in series of preauthorized transfers. To effectuate the purposes of the EFTA and facilitate compliance, the Bureau proposes to use its authority under EFTA sections 904(a) and (c) to require this second receipt if a provider uses estimates in the two situations described above. The Bureau does not contemplate that this second receipt would be required if providers are otherwise permitted to use estimates under current §§ 1005.32(a) and (b). *See* discussion of § 1005.32 above.

The timing and accuracy standards for this second receipt would be the same as those that apply to the disclosure of the pre-payment disclosure for subsequent transfers. For example, the Bureau would require that this second receipt must be mailed or delivered within a reasonable time prior to the scheduled date of the transfer. The Bureau would provide a safe harbor for meeting the ''reasonable time'' standard consistent with the one proposed for subsequent transfers. Thus, the safe harbor could provide that a provider meets the ''reasonable time'' standard if the provider mails or delivers the second receipt no later than 10 days before the schedule date of the transfer. The error resolution procedures in § 1005.33 would relate to information disclosed in this second receipt. This second receipt would ensure that senders receive accurate information with respect to the transfer, where estimates are permitted in the two situations above. In this case, for certain transfers that are one-time transfers or the first transaction in a series of preauthorized transfers, the sender would receive three disclosures for a transfer: (i) A pre-payment disclosure given at the time the transfer is requested that contains estimated information about the transfer; (ii) a receipt given at the time the transfer is authorized that contains estimated information about the transfer; and (iii) a second receipt given within a reasonable time prior to the schedule date of the transfer that contains accurate information about the transfer. The Bureau requests comment on the burden to providers of providing this second receipt and the benefit to senders of receiving this additional disclosure. Specifically, the Bureau requests comment on whether providing multiple disclosures (one pre-payment disclosure and two receipts) for each transfer described above would create information overload for consumers.

The Timing and Accuracy Requirements for Disclosures About Subsequent Transfers

For subsequent preauthorized remittance transfers under the January 2012 Final Rule, the remittance transfer provider must provide a pre-payment disclosure as described in § 1005.31(b)(1) to the sender for each subsequent transfer. The pre-payment disclosure must be mailed or delivered within a reasonable time prior to the scheduled date of each subsequent transfer. *See* § 1005.36(a)(2)(i). The remittance transfer provider also must provide a receipt as described in § 1005.31(b)(2) to the sender for each subsequent transfer. The receipt generally must be mailed or delivered to the sender no later than one business day after the date on which the transfer is made. If the transfer involves the transfer of funds from the sender's ''account'' (as defined by Regulation E) held by the provider, the receipt may be provided on or with the next regularly scheduled periodic statement for that account or within 30 days after payment is made for the remittance transfer if a periodic statement is not required. *See* § 1005.36(a)(2)(ii). The pre-payment disclosure and the receipt provided for each subsequent transfer must be accurate when the respective subsequent transfer is made, except to the extent estimates are allowed under § 1005.32. *See* § 1005.36(b)(2).

The proposal solicits comment on two alternative approaches to possible changes to the disclosures rules for subsequent transfers: (i) Whether the Bureau should retain the requirement that a provider give a pre-payment disclosure for each subsequent transfer, and should provide a safe harbor interpreting the ''within a reasonable time'' standard for providing this disclosure; or (ii) whether the Bureau instead should eliminate the requirement to provide a pre-payment disclosure for each subsequent transfer.

First Alternative Approach for Revising the Disclosure Requirements for Subsequent Transfers

As discussed above, § 1005.36(a)(2)(i) provides that the pre-payment disclosure for subsequent transfers must be mailed or delivered within a reasonable time prior to the scheduled date of the respective subsequent transfer. However, the final rule does not provide further guidance on what constitutes a ''reasonable time.'' With respect to the first alternative approach to revising the disclosure requirements for subsequent transfers, the Bureau would retain the requirement that a provider mail or deliver a pre-payment disclosure within a reasonable time prior to the scheduled date of the transfer. The Bureau solicits comment on whether it should provide a safe harbor interpreting the ''within a reasonable time'' standard for providing this disclosure. Specifically, the Bureau proposes to add comment 36(a)–1 to specify that if a provider mails or delivers the pre-payment disclosure not later than 10 days before the scheduled date of the respective subsequent transfer, the provider will be deemed to have provided that disclosure within a reasonable time prior to the scheduled date of the respective subsequent transfer. Without a safe harbor, providers may face uncertainty and litigation risk over whether they are complying with the requirement to provide the pre-payment disclosure within a reasonable time prior to the scheduled date of the respective subsequent transfer.

The Bureau is proposing 10 days for the safe harbor because it believes that this length of time ensures that a sender is provided timely advance notice of the upcoming transfer. The pre-payment disclosure would notify the sender of the amount of the upcoming transfer and other important information about the transfer. Senders may need time to make sure that sufficient funds are in their deposit or other accounts to fund the upcoming transfers. This pre-payment disclosure may be particularly useful in cases where the amount that will be transferred to the designated recipient will vary. The 10-day period

would also facilitate consumers' ability to exercise their cancellation rights as discussed further below.

The Bureau also notes that this 10-day period for the safe harbor is consistent with a 10-day notice provision in § 1005.10(d)(1) that relates to preauthorized EFTs. Specifically, under § 1005.10(d)(1), when a preauthorized EFT from the consumer's account will vary in amount from the previous transfer under the same authorization or from the preauthorized amount, the designated payee or the financial institution must send the consumer written notice of the amount and date of the electronic fund transfer at least 10 days before the scheduled date of the transfer.[9]

The Bureau solicits comment on the proposed safe harbor in comment 36(a)–1. Specifically, the Bureau requests comment on whether the length of time for the safe harbor should be more or less than 10 days and if so, what the length of time for the safe harbor should be and why. In addition, the Bureau solicits comment on whether the safe harbor also should include a limit on how far in advance of the specified transfer the pre-payment disclosure may be given, such as also specifying that under the safe harbor the pre-payment disclosure could be given no earlier than a certain number of days before the scheduled date of the transfer. The Bureau also requests comment on whether two safe harbors should be provided—one applicable to disclosures that are mailed and one applicable to disclosures provided electronically—and if so, what the length of time for each safe harbor should be and why. The Bureau recognizes that a shorter time frame for a safe harbor for electronic disclosures may be appropriate, given that this safe harbor would not need to account for time needed for the disclosures to reach senders through the mail. The Bureau also requests comment on cases where the amount of the preauthorized remittance transfers can vary or the date the bill is due each payment period may vary. How far in advance will providers typically receive the next bill to be paid under preauthorized remittance arrangements? Are there cases where providers will not have received the next bill at least 10 days prior to when the bill must be paid, so that the providers will not know the amount of the transfer and the scheduled date of the transfer at least 10 days prior to the scheduled date of the transfer? The Bureau solicits comment on whether a special safe harbor should be provided for preauthorized remittance transfers where the amount of the transfers may vary or the date the bill is due each payment period may vary, and if so, what the length of time for that safe harbor should be and why.

In setting the proper length of time for the safe harbor(s), the Bureau also requests comment on the potential impact on senders, and in particular whether senders are likely to use the pre-payment disclosures to decide whether to cancel preauthorized remittance transfers. As discussed in more detail below, the Bureau requests comment on whether the pre-payment disclosures will be useful to a sender in his or her decision about whether to continue the preauthorized remittance transfer arrangement. In setting the proper length of time for the safe harbor(s), is it important to ensure that a sender has sufficient time to review the disclosure and cancel the scheduled transfer in accordance with § 1005.36(c)? Or are senders likely to use the pre-payment disclosures only for other purposes, such as reminders of the upcoming transfers so that the senders can ensure that sufficient funds are in their deposit or other accounts to fund the upcoming transfers?

The Bureau also requests comment on the burden to providers of providing an accurate pre-payment disclosure 10 days before the scheduled date of the transfer, to the extent the provider is not allowed to use estimates for certain disclosures under § 1005.32, and how those benefits and burdens compare to those associated with a longer or shorter disclosure period. The Bureau notes that under § 1005.36(b)(2), the pre-payment disclosure for each subsequent transfer must be accurate when the transfer is made, except to the extent estimates are permitted by § 1005.32. The Bureau recognizes that the further in advance that the pre-payment disclosure is given, the greater need there may be for the provider or other parties involved in processing the remittance transfer to use more sophisticated risk management tools to protect themselves against exchange rate fluctuations.

Second Alternative Approach for Revising Disclosure Requirements for Subsequent Transfers

With respect to the second alternative approach for revising the disclosure requirements for subsequent transfers, the Bureau solicits comment on whether the Bureau instead should eliminate the requirement that a provider mail or deliver a pre-payment disclosure for each subsequent transfer. To effectuate the purposes of the EFTA and facilitate compliance, the Bureau proposes to use its authority under EFTA sections 904(a) and (c) to eliminate this disclosure requirement for subsequent transfers.

The Bureau solicits comment on how the benefit to senders of receiving a pre-payment disclosure for each subsequent transfer compare to the cost to providers of providing this disclosure for each subsequent transfer. Specifically, the Bureau requests comment on how senders are likely to use pre-payment disclosures given for each subsequent transfer. Is a sender like to use the pre-payment disclosure in preparing for each subsequent transfer? For example, a sender may need time to make sure that sufficient funds are in his or her deposit or other account to fund the subsequent transfer. The Bureau also solicits comment on whether the pre-payment disclosure would be helpful to a sender in verifying that the transfer is scheduled as expected (*e.g.,* that the amount to be transferred is accurate). Alternatively, the Bureau solicits comment on whether a pre-payment disclosure would be most useful to a sender in certain circumstances, such as when the amount that will be transferred to the designated recipient will vary, and the amount to be transferred for the upcoming transfer falls outside a specified range or differs by more than a specified amount from the most recent transfer.

The Bureau also requests comment on whether senders will likely use pre-payment disclosures for each subsequent transfer in deciding whether to continue preauthorized remittance transfer arrangements. For example, if a sender receives a pre-payment disclosure where the exchange rate seems significantly less advantageous to the sender than the exchange rate used for the previous transfer, will the sender cancel that transfer and end the entire preauthorized remittance transfer arrangement? Is it important that senders receive pre-payment disclosures for the purpose of deciding whether to continue preauthorized remittance transfer arrangements, or will the receipts that are provided for each subsequent transfer provide senders with sufficient information in a timely manner to make decisions about whether to continue the preauthorized remittance transfer arrangement? In evaluating whether to continue preauthorized remittance transfer arrangements, will senders tend to review the receipts over a period of time (*e.g.,* review the receipts they received in the past six months) to decide whether to continue the arrangements?

[9] The Bureau notes that there are several exceptions to the notice requirement in § 1005.10(d)(1) related to preauthorized EFTs, as set forth in § 1005.10(d)(2) and comment 10(d)(2)–2.

The Bureau also requests comment on the burden to providers in providing pre-payment disclosures for each subsequent transfer. The Bureau solicits comment on whether the benefit to senders of receiving a pre-payment disclosure for each subsequent transfer justifies the cost to providers of providing this disclosure for each subsequent transfer.

Cancellation of Certain Remittance Transfers Scheduled in Advance, Including Preauthorized Remittance Transfers

The January 2012 Final Rule implements a special cancellation rule for certain remittance transfers scheduled in advance by a sender, including preauthorized remittance transfers. Specifically, where the sender schedules a remittance transfer at least three business days [10] before the date of the transfer, the sender must notify the provider at least three business days before the scheduled date of the transfer to cancel the transfer. *See* § 1005.36(c). The general cancellation rule applies where the sender schedules a remittance transfer within three business days of the date of the transfer. In these cases, the sender must notify the provider within 30 minutes of when the sender makes payment in connection with the remittance transfer to cancel the transfer. *See* § 1005.34(a). For purposes of subpart B, payment is considered made when the payment is authorized. *See* comment 31(e)–2. In any event, the receipt for the transfer must include a disclosure of the deadline for cancelling the transfer. *See* § 1005.31(b)(2)(iv). As discussed in more detail below, the Bureau wants to ensure that the three-business-day deadline to cancel remittance transfers scheduled in advance as set forth in the final rule provides appropriate protections for senders and does not impose undue burden on providers, and that senders are informed properly of the right to cancel a transfer.

Three-Business-Day Deadline To Cancel

In the final rule, the Bureau adopted special cancellation provisions for transfers scheduled more than three-business-days in advance (in lieu of the general 30 minute cancellation rule) because the Bureau believes it is appropriate to provide senders with additional time to change their minds about sending a transfer if, for example, circumstances change between when the transfer is authorized and when the transfer is to be made. At the same time, the Bureau believes that it is necessary to give providers sufficient time to process any cancellation requests before a transfer is made.

The Bureau wants to ensure that the special cancellation procedures for remittance transfers scheduled in advance as set forth in the final rule provide appropriate protections for senders and do not impose undue burden on providers. As a result, the Bureau solicits comment on whether the three-business-day deadline to cancel accomplishes these goals, or whether the deadline to cancel these types of remittance transfers should be set earlier or later than three business days prior to the scheduled date of the transfer, and if so, why. The current three-business-day deadline for cancelling this type of remittance transfer is consistent with the three-business-day deadline for cancelling a preauthorized EFT under § 1005.10(c)(1). Specifically, under § 1005.10(c)(1), a consumer may stop payment of a preauthorized EFT from the consumer's account by notifying the financial institution orally or in writing at least three business days before the scheduled date of the transfer. The Bureau requests comment on whether it is important to maintain consistency between the deadline for cancellation for preauthorized remittance transfers and the deadline for cancellation for preauthorized EFTs. The Bureau notes that the transfers that would be subject to the special cancellation rule in § 1005.36(c) would change depending on whether the deadline to cancel was earlier or later than three business days before the scheduled transfer. For example, if the deadline to cancel was no later than two business days prior to the scheduled date of the transfer, the transfers that would be subject to the special cancellation rule in § 1005.36 would be those where the sender schedules the remittance transfer at least two days before the date of the transfer.

Disclosure of Deadline To Cancel

The Bureau also wants to ensure that senders are informed properly of the right to cancel a transfer and the deadline to cancel, without undue burden on providers in providing these disclosures. The January 2012 Final Rule requires that a provider disclose the deadline to cancel in the receipt. Under the final rule, a provider must only disclose in the receipt for a transfer the deadline to cancel that is applicable to that transfer. Thus, for any remittance transfer scheduled by the sender at least three business days before the date of the transfer, a provider may solely disclose in the receipt information about the three-business-day deadline to cancel the transfer. For other transfers, the receipt may solely disclose the 30 minute deadline to cancel. In addition, in disclosing the three-business-day deadline to cancel, under the final rule, the provider is *not* required to disclose a specific date on which the right to cancel will expire, such as disclosing: ''You can cancel for a full refund no later than [insert calendar date].'' Thus, under the final rule, a provider could use a generic disclosure, such as disclosing: ''You can cancel for a full refund no later than three business days prior to the scheduled date of the transfer.'' The Bureau solicits comment on three issues related to the disclosure of the deadline to cancel as set forth in the final rule: (i) Whether the three-business-day deadline to cancel transfers scheduled in advance should be disclosed in a different manner to consumers, such as by requiring a provider to disclose in the receipt the specific date on which the right to cancel will expire; (ii) whether a provider should be allowed on a receipt to describe both the three-business-day and 30 minute deadline-to-cancel time frames and either describe to which transfers each deadline to cancel is applicable, or alternatively, use a check box or other method to indicate which deadline is applicable to the transfer; and (iii) whether a provider should be required to disclose the deadline to cancel in the pre-payment disclosure for each subsequent transfer, rather than in the receipt given for each subsequent transfer.

Disclosure of Deadline To Cancel Transfers Scheduled in Advance

Under the final rule, where the sender schedules a remittance transfer at least three business days before the date of the transfer, the sender must notify the provider at least three business days before the scheduled date of the transfer to cancel the transfer. *See* § 1005.36(c). The term ''business day'' is defined in the final rule to mean ''any day on which the offices of a remittance transfer provider are open to the public for carrying on substantially all business functions.'' *See* § 1005.30(b). Under the final rule, an abbreviated statement about the sender's cancellation rights generally must be disclosed in the receipt for the transfer. *See* § 1005.31(b)(2)(iv). Under the final rule, the provider is *not* required to disclose a specific date on which the right to cancel will expire, such as disclosing: ''You can cancel for a full refund no later than [insert calendar date].'' Thus,

[10] The term ''business day'' is defined in the January 2012 Final Rule to mean ''any day on which the offices of a remittance transfer provider are open to the public for carrying on substantially all business functions.'' *See* § 1005.30(b).

under the final rule, in disclosing the three-business-day deadline to cancel, a provider could use a generic disclosure, such as disclosing: ''You can cancel for a full refund no later than three business days prior to the scheduled date of the transfer.'' As discussed above, the current three-business-day deadline for cancelling this type of remittance transfer set forth in the January 2012 Final Rule is consistent with the three-business-day deadline for cancelling a preauthorized EFT under § 1005.10(c)(1). In addition, the generic disclosure of the current three-business-day deadline for cancelling this type of remittance transfer set forth in the January 2012 Final Rule is consistent with the generic disclosure that is permitted under § 1005.10(c)(1) in disclosing the three-business-day deadline for cancelling a preauthorized EFT.

The Bureau is concerned that senders may have difficulty determining the specific date the right to cancel expires for a particular remittance transfer. This difficulty might arise because the sender may not know the exact business days of the provider. For example, assume the scheduled date of the transfer is Monday, March 11, 2013. Also, assume that a provider's business days are Monday through Saturday, except for State and Federal holidays. In this example, if a sender believed that the provider's business days generally were Monday through Friday, the sender might calculate the deadline to cancel as Wednesday, March 6, 2013, when the deadline to cancel actually is Thursday, March 7, 2013. If the sender believed that the provider's business days generally were Monday through Sunday, the sender might calculate mistakenly the deadline to cancel as Friday, March 8, 2013. In addition, the fact in this example that a provider's business days do not include State and Federal holidays could also make it difficult for senders to calculate the exact date on which the right to cancel a particular transfer expires. For example, assume in the example above that Friday is a State holiday. The sender would need to know that Friday is a State holiday in calculating the date the right to cancel expires.

The Bureau solicits comments on whether the disclosure in the final rule of the three-business-day deadline to cancel adequately informs senders of their right to cancel. The Bureau also solicits comments on alternatives for disclosing the three-business-day deadline to cancel. Under the first alternative, the Bureau solicits comment on whether a provider should be required to disclose its business days on the receipt, so that senders will know this information and could use it in calculating the deadline to cancel the particular transfer. In the example above, the provider would disclose in the receipt that its business days are Monday through Saturday, excluding State and Federal holidays. The Bureau notes that under Regulation E, in § 1005.7(b)(3), a financial institution is required to disclose its business days in the disclosures required at the time a consumer contracts for an electronic fund transfer service or before the first electronic fund transfer is made involving the consumer's account. Nonetheless, not all providers are ''financial institutions,'' as that term is defined in § 1005.2(i). In addition, even in cases where a financial institution has provided a disclosure of its business days to a sender under § 1005.7(b)(3), the sender may not recall this information when a remittance transfer is conducted at a significantly later time than when the consumer contracts for an electronic fund transfer service.

Specifically, the Bureau solicits comment on whether disclosure of a provider's business days in receipts are necessary for senders to determine the date the right to cancel expires for a particular transfer. Are senders likely to be familiar with the State and Federal holidays to know when to take them into account in calculating the deadline? Will senders that are contemplating cancelling transfers consult the receipt and attempt to calculate the three-business-day deadline to cancel based on information in the receipt, or will senders typically call providers to find out when the right to cancel expires for those transfers?

Under a second alternative, the Bureau solicits comment on whether the provider should be required to disclose in the receipt a specific date on which the right to cancel will expire, such as disclosing ''You can cancel for a full refund no later than [insert calendar date].'' This alternative would relieve senders from the potential difficulty of calculating the deadline to cancel. The provider would know its business days and would be able to calculate the deadline date for the sender. Nonetheless, the Bureau solicits comments on any operational burdens on providers in providing the specific deadline on the receipt. As noted above, the current three-business-day deadline for cancelling remittance transfers scheduled in advance is consistent with the three-business-day deadline for cancelling a preauthorized EFT under § 1005.10(c)(1). The Bureau requests comment on whether it is important to maintain consistency between the deadline for cancellation for preauthorized remittance transfers and the deadline for cancellation for preauthorized EFTs.

The Bureau also solicits comment on other alternatives for improving the disclosure of the deadline to cancel for transfers scheduled in advance. The Bureau notes that it considered whether the deadline to cancel might be easier for the sender to calculate if the deadline to cancel were based on calendar days instead of business days. For example, in this case, the deadline to cancel could be three calendar days prior to the scheduled date of the transfers, instead of three business days. Nonetheless, the Bureau is concerned that if calendar days were used to calculate the deadline to cancel, the date of deadline could fall on a non-business day for the provider. For example, assume the scheduled date of the transfer is Wednesday, February 20, 2013 and that Monday, February 18, 2013 is a Federal holiday. Also, assume that a provider's business days are Monday through Friday, except for State and Federal holidays. In addition, assume that a sender could cancel the transfer no later than three calendar days prior to scheduled date of the transfer. In this example, the deadline to cancel would be Sunday, February 17, 2013. In this case, though, Sunday is not a business day for the provider. The sender may not be able to exercise his or her right to cancel on that Sunday because the provider would not be open for business that day. In addition, to the extent a sender could notify the provider of the desire to cancel on Sunday, such as sending an email to the provider, the provider may not have sufficient time to process the cancellation once it receives the notice. In this example, the next business day would be Tuesday, February 19, 2013 (because Monday, February 18, 2013 is a Federal holiday), and the provider would have only one business day to act on this cancellation. Thus, the Bureau does not believe that using calendar days is an alternative to business days for structuring the deadline to cancel, but solicits comment on this.

The Bureau also considered whether redefining the term ''business day'' for purposes of the deadline to cancel might help senders better understand how to calculate the deadline to cancel. For example, the Bureau could define ''business day'' for purposes of calculating the deadline to cancel as ''Monday through Friday excluding Federal holidays.'' Nonetheless, it is not clear that redefining ''business day'' in this way would help senders calculate the deadline to cancel. Senders would

still need to know that a particular date is a Federal holiday in calculating the deadline to cancel for a particular transfer. In addition, redefining the term ''business day'' in this way might actually in some cases cause the deadline to cancel to be set earlier than if the provider's actual business days were used (*i.e.,* any day on which the offices of a remittance transfer provider are open to the public for carrying on substantially all business functions). For example, assume that a provider's actual business days were Monday through Saturday, except Federal and State holidays. Assume also that the scheduled date of a transfer is Monday, March 11, 2013. If the term ''business day'' was defined as ''Monday through Friday, excluding Federal holidays'' for purposes of the deadline to cancel, the deadline to cancel would be Wednesday, March 6, 2013. Nonetheless, if the provider's actual business days were used to calculate the deadline to cancel, the deadline to cancel would be Thursday, March 7, 2013. Thus, the Bureau does not believe that redefining the term ''business day'' in this way is a preferable alternative, but the Bureau solicits comment on this.

Disclosure of Both the Three-Business-Day Deadline and the 30 Minute Deadline in Same Receipt

Under the final rule, the notice of the deadline to cancel a transfer must be disclosed in the receipt for the transfer. Under the final rule, a provider must disclose in the receipt for a transfer the deadline to cancel that is applicable to that transfer. Thus, for any remittance transfer scheduled by the sender at least three business days before the date of the transfer, a provider may solely disclose in the receipt information about the three-business-day deadline to cancel the transfer. For other transfers, the receipt may solely disclose the 30 minute deadline to cancel. Thus, under the final rule, a provider that offers both types of transfers must create two receipts—one that contains the three-business-day deadline to cancel and one that contains the 30 minute deadline to cancel. The provider also must ensure that it gives the sender the proper receipt.

To ease burden on providers in developing two different receipts and making sure they give a sender the proper receipt, the Bureau is requesting comment on whether a provider that provides both types of transfers should be permitted to describe both cancellation provisions on one receipt. For example, the provider could disclose on the receipt both the three-business-day and the 30 minute time frames and either: (i) describe to which transfers each deadline is applicable; or (ii) use a check box or other method to indicate which deadline is applicable to the transfer. A provider using the option in the first scenario would provide, on one receipt, the language describing each deadline to cancel and describe to which types of transfers each deadline applies. A provider using the option in the second scenario would describe both cancellation provisions on one receipt, but would also use a check box or other method to indicate which deadline is applicable to the transfer. The Bureau solicits comment on whether senders receiving this type of notice under either the first scenario or the second scenario would be able to understand easily which deadline to cancel applies to their particular transfers. The Bureau also solicits comment on the operational burdens on providers to comply with the final rule, if the providers make both types of transfers. The Bureau recognizes that whether the Bureau should adopt this type of provision depends on how the three-business-day day deadline to cancel is disclosed to the sender, such as whether it is a generic disclosure or a specific date, as discussed in more detail above.

Disclosure of Deadline To Cancel for Subsequent Transfers

Under the final rule, a sender may not receive a receipt for each subsequent transfer until the transfer has already occurred. When this happens, the deadline to cancel that transfer will have already expired by the time a sender receives the receipt for that subsequent transfer. As discussed above, the Bureau solicits comment on whether it should eliminate the requirement that a provider mail or deliver a pre-payment disclosure for each subsequent transfer. Nonetheless, to the extent the pre-payment disclosure requirement for each subsequent transfer is retained, the Bureau solicits comment on whether a provider should be required to disclose the deadline to cancel in the pre-payment disclosure for each subsequent transfer, rather than in the receipt given for each subsequent transfer, to ensure that senders receive disclosure of the deadline to cancel a subsequent transfer prior to the time that deadline expires. If the requirement to provide a pre-payment disclosure for each subsequent transfer is not retained, the Bureau would leave the disclosure of the deadline to cancel in the receipt for each subsequent transfer. In this case, the Bureau recognizes that it would be confusing to consumers to disclose the three-business-day deadline to cancel as a specific date, rather than as a generic disclosure, where the pre-payment disclosure is not retained because the specific date by which the sender may cancel the transfer may have passed by the time the sender receives the receipt for the transfer. Nonetheless, a generic disclosure about the three-business-day deadline to cancel in the receipt may still provide helpful information to the sender about the deadline to cancel upcoming subsequent transfers and help ensure that senders are informed of their cancellation rights before the cancellation period has passed for those subsequent transfers.

VII. Section 1022(b)(2) of the Dodd-Frank Act

In developing the proposed rule, the Bureau has conducted an analysis of potential benefits, costs, and impacts as required by section 1022(b)(2)(A) of the Dodd-Frank Act.[11] The Bureau also consulted with appropriate Federal agencies regarding the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies as required by section 1022(b)(2)(B) of the Dodd-Frank Act.[12]

In this rulemaking, the Bureau is proposing to amend Regulation E, which implements the EFTA, and the official interpretation to the regulation, which interprets the requirements of Regulation E. The proposal is related to the January 2012 Final Rule, published elsewhere in today's **Federal Register**, that implements section 1073 of the Dodd-Frank Act regarding remittance transfers. The proposal requests comment on a safe harbor with respect to the phrase ''normal course of business'' in the definition of ''remittance transfer provider.'' The proposal also requests comment on several aspects of the final rule regarding remittance transfers that are scheduled in advance, including preauthorized remittance transfers.

[11] Section 1022(b)(2)(A) of the Dodd-Frank Act requires the Bureau to consider the potential benefits and costs of its regulations to consumers and industry, including the potential reduction of access by consumers to consumer financial products or services. The statute also requires the Bureau to consider the impact of proposed rules on depository institutions and credit unions with $10 billion or less in total assets (as described in section 1026 of the Dodd-Frank Act) and the impact on consumers in rural areas.

[12] Section 1022(b)(2)(B) of the Dodd-Frank Act requires that the Bureau consult with the appropriate prudential regulators or other Federal Agencies prior to proposing a rule and during the comment process regarding consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.

The proposal contains both specific proposed provisions with regulatory or commentary language (proposed provisions) as well as requests for comment on modifications where regulatory or commentary language was not specifically included (additional proposed modifications). The analysis below considers the benefits, costs and impacts of each proposed provision and the additional proposed modifications. It bears note that one of the purposes of the proposed provisions and the additional proposed modifications is to remove barriers to the development of the market for remittance transfers that are scheduled in advance. Since the market for these services is still developing, there is little information with which to evaluate the proposed provisions and modifications that will be most useful to providers and consumers. The Bureau generally requests comment on the proposed provisions and additional proposed modifications and on the Bureau's assessment of the benefits, costs and impacts of the proposed provisions and additional proposed modifications.

The analysis generally examines the benefits, costs and impacts of the provisions of the proposed provisions and additional proposed modifications against the baseline of the January 2012 Final Rule published elsewhere in today's **Federal Register**. This baseline focuses the discussion of benefits, costs and impacts on the incremental effect of this rulemaking on the development of the market for remittance transfers scheduled in advance.

The Bureau will further consider the benefits, costs and impacts of the proposed provisions and additional proposed modifications before finalizing the proposal. The Bureau asks interested parties to provide general information, data, and research results on the number of firms that schedule remittance transfers in advance, the number of transfers they schedule over a given period of time, the characteristics of the transfers (*e.g.,* the typical amount of the transfers and whether multiple transfers are scheduled in advance), the revenue earned from these transfers, and related general information. The Bureau also requests specific information on the number and characteristics of consumers who send remittance transfers via remittance transfer providers who would meet the conditions of the safe harbor for normal course of business in the proposed rule, information on the number and characteristics of the remittance transfer providers just described, and the quantitative and qualitative characteristics of the service provided and the transfers. The Bureau asks for similar factual information regarding consumers who schedule remittance transfers in advance, the number and characteristics of providers of this service, and the quantitative and qualitative characteristics of the service and the transfers.

Costs and Benefits to Consumers and Covered Persons

The analysis below discusses (i) the proposed provisions; and (ii) the additional proposed modifications.

Proposed Provisions

Each specific proposed provision reduces the cost of complying with the January 2012 Final Rule for some remittance transfer providers and leaves the costs of other providers unaffected. The proposed rule provisions therefore provide only benefits to covered persons and no costs.

The proposed provisions include a proposed revision to comment 30(f)–2 of the January 2012 Final Rule. Comment 30(f)–2 in the January 2012 Final Rule states that whether a person provides remittance transfers in the ''normal course of business'' depends on the ''facts and circumstances.'' The proposed revision provides a safe harbor under which this facts and circumstances test is met. Specifically, a person that performs 25 or fewer remittance transfers in the previous calendar year will not be deemed to be providing remittance transfers ''in the normal course of business'' on the first 25 remittance transfers in the current year. If that person, however, makes a 26th remittance transfer in the current calendar year, the person would be evaluated under the facts and circumstance test to determine whether the person is a remittance transfer provider for that transfer and any additional transfers provided through the rest of the year.

Consumers may experience benefits and costs from the proposed safe harbor provision for ''normal course of business.'' Some consumers will benefit if the entities they use to send remittance transfers would stop offering remittance transfers if not for the safe harbor. Other consumers may incur costs associated with not receiving the disclosures and protections set forth in the remittance transfer rules from entities who do not provide remittance transfers ''in the normal course of business.'' Businesses should only benefit. The proposed provision removes the burden from businesses that perform few remittance transfers from having to argue that they meet a general facts and circumstances test. This reduces the cost of complying with the January 2012 Final Rule. The proposed provision imposes no new burden on providers that do not meet the safe harbor. Thus, these other providers are not affected by the proposed provision.

Proposed § 1005.32(b)(2) mitigates the burden on providers imposed by §§ 1005.31(f) and 1005.36(b)(1) of the January 2012 Final Rule. This proposed provision allows providers to estimate certain amounts in the pre-payment disclosure and receipt for certain standalone transfers or the first scheduled transfer in a series of preauthorized transfers. Specifically, proposed § 1005.32(b)(2) would permit estimates for these transfers when they are scheduled by the sender more than 10 days in advance of the consumer's requested transfer date.

There may be both benefits and costs for consumers from the proposed provision relative to the January 2012 Final Rule. Certain providers may not schedule transfers more than 10 days in advance without the option of estimating certain information in the disclosures. Consumers who want to schedule transfers more than 10 days in advance may therefore find it easier to find a provider or they may find more competition among providers of this service. Some consumers may incur costs from receiving estimated disclosures instead of accurate disclosures. The cost would depend on the size of any discrepancy between estimated and accurate disclosures.

Providers can only benefit from the proposed provision. The proposed provision removes from providers the burden of having to give accurate pre-payment disclosures and receipts for transfers scheduled more than 10 days in advance. The proposed provision does not affect providers that would not allow senders to schedule transfers more than 10 days in advance, and it benefits all others.

Proposed comment 36(a)–1 provides guidance on the ''within a reasonable time'' requirement for pre-payment disclosures in § 1005.36(a)(2)(i). Under § 1005.36(a)(2)(i), a provider must provide a pre-payment disclosure for each subsequent transfer (after the first scheduled transfer) in a series of preauthorized remittance transfers, and the pre-payment disclosure for each subsequent transfer must be provided ''within a reasonable time'' prior to the scheduled date of the transfer. The proposed comment clarifies that a provider is deemed to have provided a pre-payment disclosure within a reasonable time prior to the scheduled date of the transfer if the provider mails

or delivers the disclosure 10 or more days prior to the scheduled date of the transfer.

There may be both benefits and costs for consumers from the proposed provision relative to the January 2012 Final Rule. Consumers will benefit from the proposed provision relative to the January 2012 Final Rule if some consumers use providers that would not schedule transfers in advance without clarification of the ''within a reasonable time'' requirement. It is possible that a provider might shorten the time between the issuance of the pre-payment disclosure and the transfer because of the safe harbor (*e.g.,* from more than 10 days without the safe harbor to just 10 days with it). This might impose a cost on some consumers who benefit from having the longer period between receiving the pre-payment disclosure and the transfer.

Providers can benefit from the proposed provision relative to the January 2012 Final Rule. The proposed provision removes the burden of uncertainty and litigation risk from providers that meet the terms of the proposed provision in regards to whether they are complying with the requirement to provide the pre-payment disclosure within a reasonable time prior to the scheduled date of the respective subsequent transfer. The proposed provision does not impact providers that choose not to comply with the safe harbor.

Regarding access to remittance transfer services by consumers, each proposed provision reduces the cost of complying with the January 2012 Final Rule for some remittance transfer providers and leaves other providers unaffected. For this reason, the Bureau believes that all provisions of this rulemaking will tend to increase access by consumers to consumer financial products or services.

As stated above, in finalizing the proposal, the Bureau will further consider the benefits, costs and impacts of the provisions of the proposed rule. The Bureau asks interested parties to provide data, research results and other factual information that may be useful for this analysis.

Additional Proposed Modifications to the January 2012 Final Rule

The Bureau is requesting for comment on a number of additional proposed modifications to the final rule but has not included specific regulatory or commentary language in the proposal on them. In addition, the Bureau requests comment on whether to allow providers to provide estimates in the pre-payment disclosure and receipt for certain standalone transfers or the first scheduled transfer in a series of preauthorized transfers, subject to the requirement that providers who disclose estimates give a second and accurate receipt. Consumers would benefit from this proposed modification to the extent that the additional option to provide initial disclosures with estimates and a second accurate receipt after the transfer causes more providers to schedule remittance transfers in advance compared to the final rule, which requires that they provide accurate pre-payment disclosures and receipts at the time the transfer is requested and authorized. Even more providers might schedule remittance transfers in advance if the proposed modification did not require the second receipt, but, in that circumstance, the proposed modification would provide greater access but less precise disclosures. Providers are no worse off under these proposed modifications to the January 2012 Final Rule compared with the requirements under the final rule since they would still have the option to provide accurate disclosures at the time the transfers are authorized, as currently required under the final rule. Providers in this case would not be required to provide a second receipt.

The Bureau is also requesting comment on an additional proposed modification to mitigate the burden on providers imposed by § 1005.36(b)(1) of the final rule by allowing providers to use estimates for the first preauthorized remittance transfer if the amount of the transfer can vary. Another additional proposed modification to the proposal would require providers who use estimates for this purpose to give a second and accurate receipt. The analysis of these additional proposed modifications are identical to the analysis for proposed § 1005.32(b)(2) and the additional proposed modification to that provision discussed above.

The Bureau is also requesting comment on mitigating the burden on providers imposed by § 1005.31(b)(1) in the January 2012 Final Rule as it pertains to subsequent transfers by eliminating the pre-payment disclosure for transfers that occur after the first transfer in a series of preauthorized remittance transfers. See § 1005.36(a)(2)(i). Consumers may benefit from the proposed modification insofar as it provides an incentive for more providers to offer preauthorized remittance transfers. However, consumers would forego any benefits from the reminder that a transfer is going to occur and from knowing some of the terms of the transfer prior to the transfer. The proposed provision would not impose any additional costs on providers.

The Bureau is also soliciting comment on whether changes should be made to the cancellation rights for certain transfers, as provided for in § 1005.36(c). Under the January 2012 Final Rule, when a sender schedules a remittance transfer at least three business days before the date of the transfer, the provider must cancel the transfer if the sender notifies the provider to cancel the transfer at least three business days before the scheduled date of the transfer. Requiring providers to allow senders to cancel the transfer less than three business days before the date of the transfer likely provides greater benefits to consumers but imposes greater costs on providers. Senders may benefit from the flexibility to cancel the transfer closer to the transfer date if circumstances change for the senders, and they decide they do not want to complete the transfer. On the other hand, providers may have difficulty processing the sender's request to cancel the transfer in time to stop the transfer if the notice of cancellation is given too close to the date of the transfer. Requiring senders to cancel the transfer more than three business days from the date of the transfer likely has the opposite benefits and costs for consumers and providers, respectively, compared with a shorter cancellation period.

The remaining issues on which the Bureau is soliciting comment concern the disclosure of the sender's cancellation rights (deadline to cancel). Under § 1005.31(b)(2)(iv) in the January 2012 Final Rule, a provider must only disclose the deadline to cancel that is applicable to a transfer in the receipt for the transfer. Thus, under the January 2012 Final Rule, providers must prepare receipts with different descriptions of cancellation rights for remittance transfers scheduled more than three business days before the date of the transfer and for remittance transfers scheduled within three business days of the date of the transfer and make sure they give the sender the proper receipt.

One modification on which the Bureau is requesting comment allows a provider that provides both types of transfers to describe both cancellation provisions on one receipt. For example, the provider could disclose on the receipt both the three-business-day and the 30 minute time frames and either: (i) describe to which transfers each deadline is applicable; or (ii) use a check box or other method to indicate which deadline is applicable to the transfer.

A provider using the option in the first scenario would provide, on one receipt, the language describing each deadline to cancel and describe to which types of transfers each deadline applies. Relative to the January 2012 Final Rule, providers would be relieved of the burden of developing two different receipts and making sure they give a sender the proper receipt. This option may lower costs for providers. This additional proposed modification would be optional, such that providers might, at their discretion, instead comply with the notice provision in the January 2012 Final Rule. Thus, this additional proposed modification to the January 2012 Final Rule would not increase costs for providers relative to the January 2012 Final Rule. On the other hand, it is possible that senders given the type of notice permitted by the additional proposed modification would not understand which deadline to cancel applied to their particular transfers compared with the notice requirements under the January 2012 Final Rule. The Bureau solicits comment on this consideration of costs and benefits.

A provider using the option in the second scenario under the additional proposed modification would describe both cancellation provisions on one receipt, but would also use a check box or other method to indicate which deadline is applicable to the transfer. This disclosure would therefore be customized to the particular transaction. The cost of this option might be lower than the cost of the notice provision in the January 2012 Final Rule. In addition, under the additional proposed modification, providers could, at their discretion, still comply with the notice provision in the January 2012 Final Rule. Thus, the additional proposed modification to the January 2012 Final Rule would not increase costs for providers relative to the January 2012 Final Rule.

The Bureau does not have data from which it could evaluate whether the disclosure in the second scenario or the disclosure required under the January 2012 Final Rule provides senders with a better understanding of the deadline to cancel for their particular transfers. Both disclosures are customized to the transaction, but the customization is different. Both of them may cause senders to better understand which deadline to cancel applies to their transaction than would the disclosure from the first scenario, which may be the least expensive for providers. Again, the Bureau solicits comments on this consideration of costs and benefits.

The Bureau is also requesting comment on whether a provider should be required to provide the disclosure of the deadline to cancel in the pre-payment disclosure for transfers subsequent to the first in a series of preauthorized remittance transfers. Under the January 2012 Final Rule, a sender may not receive a receipt for transfers subsequent to the first (and with it, the disclosure of the deadline to cancel) until the transfer has already occurred. At that point, the deadline to cancel will generally have expired. *See* §§ 1005.31(b)(2)(iv) and 1005.36(a)(2)(ii).

This proposed modification to the January 2012 Final Rule requires providers to have two standard types of pre-payment disclosures and possibly three standard types of receipts. One pair of disclosures would be used for individual remittance transfers and the first transfer in a series of preauthorized remittance transfers that are scheduled within three business days of the scheduled date of the transfer. The 30-minute deadline to cancel would be on the receipt only. Another pair of disclosures would be used for individual remittance transfers and the first transfer in a series of preauthorized remittance transfers that are scheduled more than three business days prior to the scheduled date of the transfer. The three-business-day deadline to cancel would appear only on the receipt. The final pair would be used for transfers subsequent to the first in a series of pre-authorized remittance transfers. The three-business-day deadline to cancel would be on the pre-payment disclosure. Relative to the January 2012 Final Rule, the provider would have the additional cost of preparing another type of pre-payment disclosure and possibly another type of receipt and ensuring that senders receive the correct pre-payment disclosure and receipt for each type of transfer. Providers would not have to prepare a third standard type of receipt, however, if they could use the receipt with the three-business-day deadline to cancel as the receipt for both the first and for transfers subsequent to the first in a series of pre-authorized remittance transfers.

On the other hand, under these additional proposed modifications to the January 2012 Final Rule, consumers sending preauthorized remittance transfers would receive a disclosure that would more effectively inform them of their cancellation rights. However, consumers who wished to cancel would benefit from the proposed modification only insofar as they are not already aware of the deadline to cancel from prior disclosures, including prior receipts.

Finally, the Bureau is considering two modifications to make consumers aware of when they can cancel a remittance transfer scheduled more than three days in advance of the transfer. Under the January 2012 Final Rule, consumers can cancel these transactions up to three business days before the transfer. Consumers also receive a disclosure on the receipt stating their cancellation rights. The statement of rights contains the term ''business day,'' however, and consumers may not know a particular provider's business days.

The Bureau is requesting comment on whether a provider should be required to state the provider's business days on the receipt. There may be little cost to this modification, since under the January 2012 Final Rule providers must already generate a different receipt for transfers scheduled more than three days in advance from receipts for transfers scheduled within three business days of the transfer date. Under the additional proposed modification, however, providers would have to update the form if they were to change their business days.

The Bureau is also soliciting comment on whether the receipt should actually state the specific date on which the right to cancel expires. This proposed modification would provide the sender with the most precise information about cancellation rights. The cost to providers of this modification would likely be greater, however, than a disclosure of the provider's business days because it would require customization for each transfer.

Potential Reduction of Access by Consumers to Consumer Financial Products or Services

Regarding access to consumer financial products and services by consumers, each proposed provision would reduce the cost of complying with the January 2012 Final Rule for some remittance transfer providers and leave other providers unaffected. For this reason, the Bureau believes that all proposed provisions would tend to increase access by consumers to consumer financial products or services. However, some of the additional proposed modifications on which the Bureau is soliciting comment would provide greater consumer protections that might increase certain costs of certain providers. These include modifications to allow consumers to cancel remittance transfers scheduled in advance to cancel less than three days before the transfer, to require providers to disclose the deadline to cancel in the

pre-payment disclosure instead of the receipt for subsequent preauthorized transfers, and to provide consumers with a specific expiration date for the right to cancel when the transfer is scheduled more than three days in advance of the transfer. The Bureau therefore asks interested parties to provide data, research results and other factual information that may be useful for further analysis of the effect of the proposed provisions and the additional proposed modifications on access by consumers to consumer financial products and services.

Impact of the Proposed Provisions and the Additional Proposed Modifications on Depository Institutions and Credit Unions With Total Assets of $10 Billion or Less as Described in Section 1026

All depository institutions and credit unions that provide 25 or fewer remittance transfers per year would benefit from the proposed safe harbor provision, which would deem them not to be providing remittance transfers in the ''normal course of business.'' All depository institutions and credit unions that schedule remittance transfers in advance would benefit from the option to estimate certain information in disclosures given for standalone transfers or the first transfer in a series of preauthorized remittance transfers that are scheduled by the sender more than 10 days in advance. All depository institutions and credit unions that schedule remittance transfers in advance would benefit from the clarification of the ''within a reasonable time'' requirement in the proposal for pre-payment disclosures given for subsequent preauthorized remittance transfers.

As discussed above, some of the additional proposed modifications on which the Board is seeking comment provide greater consumer protections that may increase certain costs of providers. These include modifications to allow consumers to cancel remittance transfers scheduled in advance to cancel less than three days before the transfer, to require providers to disclose the deadline to cancel in the pre-payment disclosure instead of the receipt for subsequent preauthorized transfers, and to provide consumers with a specific expiration date for the right to cancel when the transfer is scheduled more than three days in advance of the transfer.

The Bureau does not have data to estimate how many depository institutions and credit unions with total assets of $10 billion or less as described in section 1026 of the Dodd-Frank Act will incur the benefits and costs provided by the proposed rule and additional proposed modifications to the final rule. The Bureau therefore asks interested parties to provide data, research results, and other factual information useful for the further consideration of the impact of the proposed provisions and additional proposed modifications to the January 2012 Final Rule.

Impact of the Proposed Provisions and the Additional Proposed Modifications on Consumers in Rural Areas

Consumers in rural areas may experience benefits from the proposed provisions that are different in certain respects to those experienced by consumers in general. If consumers in rural areas choose among fewer remittance transfer providers than do consumers elsewhere, these consumers may benefit more from the tendency of the proposed provisions to reduce the costs of compliance than do consumers elsewhere.

Similarly, the benefits and costs to consumers from the additional proposed modifications to the January 2012 Final Rule may be different for consumers in rural areas. The demand by consumers for remittance transfers scheduled in advance, including preauthorized remittance transfers, may be different in rural areas. As a result, the impact on consumers of the additional proposed modifications that may improve certain rights and disclosures but may also increase the costs to providers may be different in rural areas.

The Bureau will further consider the impact of the proposed provisions and additional proposed modifications on consumers in rural areas. The Bureau therefore asks interested parties to provide data, research results, and other factual information on the numbers and characteristics of rural consumers who send remittance transfers, the types of businesses through which they send these transfers, and the quantitative and qualitative characteristics of the service provided and the transfers.

VIII. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to, ''prepare and make available for public comment an initial regulatory flexibility analysis,'' which will ''describe the impact of the proposed rule on small entities.'' (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The proposal contains both specific proposed provisions with regulatory or commentary language (proposed provisions) as well as requests for comment on modifications where regulatory or commentary language was not specifically included (additional proposed modifications). The analysis below first discusses the proposed provisions before discussing the additional proposed modifications.

The analysis generally examines the regulatory impact of the provisions of the proposed rule and additional proposed modifications against the baseline of the January 2012 Final Rule published elsewhere in today's **Federal Register**.

Proposed Provisions

The proposal sets forth regulation text or commentary on three specific provisions. First, the proposal provides a safe harbor through which a person can establish that it is not a ''remittance transfer provider'' because it does not provide remittance transfers in the normal course of business and thus is not required to comply with the remittance transfer rules set forth in Subpart B of Regulation E. Second, the proposal allows providers to estimate certain amounts in the pre-payment disclosure and receipt for a standalone transfer or the first scheduled transfer in a series of preauthorized remittance transfers, where those transfers are scheduled more than 10 days in advance. Third, the proposal provides a safe harbor for complying with the requirement to provide a pre-payment disclosure for subsequent preauthorized remittance transfers ''within a reasonable time'' prior to the scheduled date of the transfer.

These three proposed provisions are designed to facilitate compliance with the January 2012 Final Rule and ease possible compliance burden. All methods of compliance under the January 2012 Final Rule would remain available to remittance transfer providers if these provisions were adopted. However, certain business practices that may not be compliant, or about which a provider is uncertain whether they are compliant, under the January 2012 Final Rule would be deemed compliant under the proposal. Thus, the effect of these provisions is to give remittance transfer providers additional certainty about how to comply, flexibility in complying with the final rule, and additional methods for complying.

Normal Course of Business

Comment 30(f)–2 under the January 2012 Final Rule states that whether a

person provides remittance transfers in the normal course of business depends on the facts and circumstances. The proposal would amend this comment to provide a safe harbor through which a person can establish that it does not provide remittance transfers in the normal course of business. Under the proposed safe harbor provision, if a person makes no more than 25 remittance transfers in the previous calendar year, the person will not be deemed to be providing remittance transfers in the normal course of business for the current year if it provides no more than 25 remittance transfers in the current year. The proposed safe harbor provision relieves the person of having to meet the facts and circumstances test.

Under the proposed provision, small businesses that meet the pattern and frequency requirements of the proposed safe harbor would be relieved of uncertainty about whether they provide remittance transfers in the normal course of business. In particular, those businesses that provide 25 or fewer remittance transfers in a particular year (including 2012, before providers must comply with the January 2012 Final Rule) and continue to do so in the subsequent year (*e.g.,* 2013) would benefit by being relieved of the obligation to evaluate their activities under the facts and circumstances test for that subsequent year. Small businesses that provide more than 25 remittance transfers in a particular year would not experience any impact from the proposed provision. Thus, small businesses that provide remittance transfers would only benefit from the proposed provision.

Transfers Scheduled in Advance

Proposed § 1005.32(b)(2) allows providers to estimate certain amounts in the pre-payment disclosure and receipt for a standalone transfer or the first scheduled transfer in a series of preauthorized remittance transfers where the transfer is scheduled more than 10 days in advance. This provision would remove the burden to providers of having to give an accurate, as opposed to an estimated, pre-payment disclosure and receipt for a standalone transfer scheduled more than 10 days in advance of the transfer date or the first scheduled transfer in a series of preauthorized remittance transfers scheduled more than 10 days in advance of the transfer date. The provision would not impact providers providing a standalone transfer within 10 days of the scheduled transfer date or the first scheduled transfer in a series of preauthorized remittance transfers scheduled within 10 days of the transfer date. For those transfers, providers would still be required under the January 2012 Final Rule to provide accurate pre-payment disclosures and receipts.

Proposed comment 36(a)–1 would provide guidance on the ''within a reasonable time'' requirement for pre-payment disclosures in § 1005.36(a)(2)(i). Under § 1005.36(a)(2)(i) of the January 2012 Final Rule, a provider must provide a pre-payment disclosure for each subsequent transfer (after the first scheduled transfer) in a series of preauthorized remittance transfers within a reasonable time prior to the scheduled date of the transfer. The proposed comment would clarify that a provider is deemed to have provided the pre-payment disclosure within a reasonable time prior to the scheduled date of the transfer if the provider mails or delivers the pre-payment disclosure 10 or more days prior to the scheduled date of the transfer. For providers that meet this condition, this proposed provision would remove the burden of uncertainty and litigation risk regarding whether they are complying with the requirement to provide the pre-payment disclosure within a reasonable time prior to the scheduled date of the respective subsequent transfer. The proposed provision would not impact providers that choose not to comply with the safe harbor; they would still need to meet the ''within a reasonable time'' requirement in providing the pre-payment disclosure for subsequent transfers under the January 2012 Final Rule. This provision imposes no burden on small providers that do not provide preauthorized remittance transfers.

With respect to proposed § 1005.32(b)(2) and proposed comment 36(a)–1, small providers that currently permit standalone transfers to be scheduled more than 10 days in advance or that provide preauthorized remittance transfers would benefit from the proposed provisions. Other small remittance transfer providers would not experience any impact from these proposed provisions. Thus, small businesses that provide remittance transfers would only benefit from these proposed provisions.

Additional Proposed Modifications to the Final Rule

The Bureau has asked for comment on a number of additional modifications to the January 2012 Final Rule but did not include specific regulatory or commentary language in the proposal on these modifications.

As discussed above, the Bureau is proposing to allow providers to estimate certain amounts in the pre-payment disclosure and receipt for certain standalone transfers or the first scheduled transfer in a series of preauthorized transfers for transfers scheduled (*see* proposed § 1005.32(b)(2)). Additionally, the Bureau is requesting comment on whether providers taking advantage of such ability to estimate should be required to give a second and accurate receipt.[13] This proposed modification to the January 2012 Final Rule would have no negative impact on small providers since they would still have the option to provide accurate disclosures at the time the transfers are authorized, as required under the January 2012 Final Rule.[14]

The Bureau is also requesting comment on a proposed modification to mitigate the burden on providers imposed by § 1005.36(b)(1) of the January 2012 Final Rule by allowing providers to use estimates for the first preauthorized remittance transfer if the amount of the transfer can vary. Similar to the proposed modification in connection with the ability to estimate under proposed § 1005.32(b)(2) for transfers scheduled more than 10 days in advance, the Bureau is further seeking comment on a proposed modification under which providers may use estimates for the first preauthorized remittance transfer if the amount of the transfer can vary, provided they give a second and accurate receipt closer to the date of transfer. The Bureau is also seeking comment on whether, for an advance transfer, a provider should be allowed to disclose a formula that will be used to calculate the exchange rate that will apply to a transfer. The analysis of these proposed modifications is identical to the analysis for proposed § 1005.32(b)(2) and the modification to that provision discussed above. Again, the proposed modification to the final rule would have no negative impact on small providers since they would still have the option to provide accurate disclosures at the time the transfers are authorized.

The Bureau is also requesting comment on mitigating the burden on providers imposed by § 1005.31(b)(1) in the January 2012 Final Rule as it pertains to subsequent transfers that occur after the first transfer in a series

[13] This proposed modification to the final rule is the same as the proposed provision that allows estimated disclosures discussed above with the addition of the second disclosure requirement.

[14] Providers in this case would not be required to provide a second receipt.

of preauthorized remittance transfers by eliminating the pre-payment disclosure for such transfers. See § 1005.36(a)(2)(i). The proposed modification to the January 2012 Final Rule would have no negative impact on small providers since it reduces the number of disclosures they must provide.

The Bureau is also soliciting comment on whether changes should be made to the cancellation rights for certain transfers, as provided for in § 1005.36(c). Under the January 2012 Final Rule, when a sender schedules a remittance transfer at least three business days before the date of the transfer, the provider must cancel the transfer if the sender notifies the provider to cancel the transfer at least three business days before the scheduled date of the transfer. The Bureau is soliciting comment on whether the deadline to cancel should be more or less than three business days. The net impact of any change in this deadline is difficult to predict, because the Bureau has no data from which to predict how a change in the cancellation period will affect consumers' likelihood of cancellation or a providers' costs relative to the cancellation deadline. In any case, the Bureau believes that few providers, including small providers, have a large share of their business in transfers scheduled at least three business days in advance of the transfer. Thus, the Bureau does not believe that the proposed modification to the January 2012 Final Rule would cause a substantial number of small providers to incur a significant increase in overall costs.

The remaining issues on which the Bureau is soliciting comment concern the disclosure of the sender's cancellation rights (deadline to cancel). Under § 1005.31(b)(2)(iv) in the January 2012 Final Rule, a provider must only disclose in the receipt for a transfer the deadline to cancel that is applicable to that transfer. Thus, under the January 2012 Final Rule, providers must prepare a different receipt for remittance transfers scheduled more than three business days before the date of the transfer from the one they use for remittance transfers scheduled within three business days of the date of the transfer and make sure they give the sender the proper receipt.

One modification on which the Bureau is requesting comment allows a provider that provides both types of transfers to describe both cancellation provisions on one receipt. For example, the provider could disclose on the receipt both the three-business-day and the 30 minute time frames and either: (i) describe to which transfers each deadline is applicable; or (ii) use a check box or other method to indicate which deadline is applicable to the transfer.

A provider using the option in the first scenario would provide, on one receipt, the language describing each deadline to cancel and describe to which types of transfers each deadline applies. Relative to the January 2012 Final Rule, providers would be relieved of the burden of developing two different receipts and making sure they give a sender the proper receipt. This option may lower costs for providers. Under the additional proposed modification, rather than comply with the modified provision providers could, instead, at their discretion, comply with the notice provision in the January 2012 Final Rule. Thus, this additional proposed modification to the January 2012 Final Rule would not have a negative impact on small providers.

A provider using the option in the second scenario would need to describe both cancellation provisions on one receipt and use a check box or other method to indicate which deadline is applicable to the transfer. This disclosure would therefore be customized to the particular transaction. Under the additional proposed modification, rather than comply with the modified provision providers could, instead, at their discretion, comply with the notice provision in the January 2012 Final Rule. Therefore, this proposed modification to the January 2012 Final Rule would not increase costs for providers relative to the final rule. Thus, this proposed modification to the January 2012 Final Rule would have no negative impact on small providers.

The Bureau is also requesting comment on whether providers should be required to disclose the deadline to cancel in the pre-payment disclosure for transfers subsequent to the first in a series of preauthorized remittance transfers, rather than being required to provide this disclosure in the receipt for such transfers. Under the January 2012 Final Rule, a sender may not receive a receipt for transfers subsequent to the first (and with it the disclosure of the deadline to cancel) until the scheduled date of transfer has passed. At that point, the deadline to cancel will generally have expired. *See* §§ 1005.31(b)(2)(iv) and 1005.36(a)(2)(ii).

This proposed modification to the January 2012 Final Rule would require providers to have two standard types of pre-payment disclosures and possibly three standard types of receipts. One pair of disclosures would be used for individual remittance transfers and the first transfer in a series of preauthorized remittance transfers that are scheduled within three business days of the scheduled date of the transfer. The 30-minute deadline to cancel would be on the receipt only. Another pair of disclosures would be used for individual remittance transfers and the first transfer in a series of preauthorized remittance transfers that are scheduled more than three business days prior to the scheduled date of the transfer. The three-business-day deadline to cancel would appear only on the receipt. The final pair would be used for transfers subsequent to the first in a series of pre-authorized remittance transfers. The deadline to cancel would be on the pre-payment disclosure. A third standard type of receipt would not be required if a provider were permitted to include the disclosure of the deadline to cancel in the receipt, in addition to the pre-payment disclosure.

Under the additional proposed modification, relative to the January 2012 Final Rule, the provider would have the additional cost of preparing another type of pre-payment disclosure and possibly another type of receipt and ensuring that the sender received the correct pre-payment disclosure and receipt for each type of transfer. However, the Bureau believes that few providers, including small providers, have a large share of their business in preauthorized remittance transfers. Thus, the Bureau does not believe that the proposed modification to the final rule would cause a substantial number of small providers to incur a significant increase in overall costs.

Finally, the Bureau is considering two modifications to make consumers aware of when they can cancel a remittance transfer scheduled more than three business days in advance of the transfer. Under the January 2012 Final Rule, consumers can cancel these transactions up to three business days before the transfer. Consumers also receive a disclosure on the receipt stating their cancellation rights. The statement of rights contains the term ''business day,'' however, and consumers may not know a particular provider's business days.

The Bureau is requesting comment on whether a provider should be required to state the provider's business days on the receipt. There may be little cost to this modification relative to the January 2012 Final Rule, since under the final rule providers must already generate a different receipt for transfers scheduled more than three days in advance from receipts for transfers scheduled within three business days of the transfer date. Providers would have to change the

form if they changed their business days, however. The Bureau does not believe that this proposed modification to the January 2012 Final Rule would cause a substantial number of small providers to incur a significant increase in overall costs.

The Bureau is also soliciting comment on whether the receipt should actually state the specific date on which the right to cancel expires. This modification would provide the sender with the most precise information about cancellation rights. The cost to providers could be greater than a disclosure of the provider's business days because it would require customization for each transfer, which might not be automated in all circumstances. However, as stated above, the Bureau believes that few providers, including small providers, have a large share of their business in remittance transfers scheduled at least three business days in advance of the transfer. Thus, the Bureau does not believe that the proposed modification to the January 2012 Final Rule would cause a substantial number of small providers to incur a significant increase in overall costs.

Certification

Accordingly, the Director of the Bureau of Consumer Financial Protection hereby certifies that if promulgated, this rule will not have a significant economic impact on a substantial number of small entities. The Bureau invites comment from members of the public who believe there will be a significant impact on a substantial number of small entities.

IX. Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Under the Paperwork Reduction Act, the Bureau may not conduct or sponsor, and a person is not required to respond to, this information collection unless the information collection displays a currently valid control number. Comments on the collection of information requirements should be sent to the Office of Management and Budget, Attention: Desk Officer for the Consumer Financial Protection Bureau, Office of Information and Regulatory Affairs, Washington, DC 20503, or by the internet to *http://oira_submission@omb.eop.gov,* with copies to the Bureau at the address previously specified.

Comments are specifically requested concerning: (i) Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (ii) the accuracy of the estimated burden associated with the proposed collections of information; (iii) how to enhance the quality, utility, and clarity of the information to be collected; and (iv) how to minimize the burden of complying with the proposed collections of information, including the application of automated collection techniques or other forms of information technology.

The collection of information that is subject to the Paperwork Reduction Act in this proposed regulation is in 12 CFR part 1005. The Bureau's OMB control number for Regulation E is 3170–0014. This information collection is required to provide benefits for consumers and is mandatory. *See* 15 U.S.C. 1693 *et seq.* The respondents and/or recordkeepers are financial institutions and entities involved in the remittance transfer business, including small businesses. Respondents are required to retain records for 24 months, but this proposed regulation does not specify the types of records that must be maintained.

This information is required to provide pre-payment disclosures and receipts to consumers in the United States who wish to send a remittance transfer to a recipient in a foreign country. The disclosures provide pricing information and information regarding cancellation and error resolution rights. This information can be used by consumers for budgeting and shopping purposes and by consumers and Federal agencies to determine when violations of the underlying rules and statute have occurred.

As detailed in the **SUPPLEMENTARY INFORMATION** above, the Bureau is publishing the January 2012 Final Rule elsewhere in today's **Federal Register** to implement the remittance transfer provision in section 1073 of the Dodd-Frank Act. The Bureau is publishing this notice of proposed rulemaking to seek comment on whether to provide additional safe harbors and flexibility in applying the January 2012 Final Rule to certain transfers and remittance transfer providers. The proposal, if adopted, and the January 2012 Final Rule will be implemented on the same date.

The proposal contains both specific proposed provisions with regulatory or commentary language (proposed provisions) as well as requests for comment on modifications where regulatory or commentary language was not specifically included (additional proposed modifications). Disclosures provided under the proposed provisions (new disclosures) would replace certain disclosures already required by the January 2012 Final Rule (old disclosures) and are not in addition to them. The new disclosures required under the proposed provisions are generally similar in format and content requirements to the old disclosures, except respondents may provide estimates of information in certain circumstances.

Specifically, in proposed § 1005.32(b)(2), providers would be permitted to estimate certain information in pre-payment disclosures and receipts given at the time of the request and authorization for standalone transfers or the first scheduled transfer in a series of preauthorized transfers that are scheduled by the sender more than 10 days in advance of the consumer's requested transfer date.

The proposed provisions also provide guidance on the ''within a reasonable time'' requirement for when pre-payment disclosures must be mailed or delivered for each subsequent transfer (after the first scheduled transfer) in a series of preauthorized remittance transfers. Specifically, proposed comment 36(a)–1 provides a safe harbor under which a provider is deemed to have provided a pre-payment disclosure within a reasonable time prior to the scheduled date of the transfer if the provider mails or delivers the disclosure 10 or more days prior to the scheduled date of the transfer. In addition, the proposed provisions provide respondents with additional flexibility that would also reduce burden, such as providing a safe harbor to determine when certain respondents are excluded from the rule because they are not deemed to be providing remittance transfers in the ''normal course of business.'' *See* proposed comment 30(f)–2.

Because the proposed provisions provide safe harbors and additional flexibility to provide estimates that respondents may use at their option in order to reduce compliance burden, the proposed provisions do not impose any additional burden on respondents for PRA purposes. Accordingly, the proposed provisions would not increase the one-time or ongoing burden estimates provided by the Bureau for PRA purposes in the January 2012 Final Rule. Section IX of the **SUPPLEMENTARY INFORMATION** to the January 2012 Final Rule, which is published elsewhere in today's **Federal Register**, sets forth the Bureau's analysis and determinations under the PRA with respect to the burden associated with aspects of the

January 2012 Final Rule. Because the proposed provisions, if adopted, do not increase the Bureau's estimates in Section IX of the **SUPPLEMENTARY INFORMATION** of the January 2012 Final Rule, the Bureau continues to rely on that analysis and determination for the purposes of this rulemaking.

The Bureau's current annual burden to comply with the provision of Regulation E is estimated to be 4,003,000 hours for the 155 large depository institutions and credit unions (including their depository and credit union affiliates) and money transmitters (accounting for the Bureau's allocation of burden) supervised by the Bureau that are deemed to be respondents for the purposes of the PRA.

The Bureau expects that the amount of time required to implement the proposed provisions for a given provider may vary based on the size and complexity of the respondent as well as whether the respondent qualifies for and elects to use the proposed safe harbors or additional flexibility to provide estimates. However, as discussed above, the Bureau believes that the burden associated with providing disclosures under the proposed provisions is already accounted for in the Bureau's January 2012 Final Rule estimates because the final rule already requires certain disclosures addressed by the proposed provisions. Specifically, the Bureau expects respondents that rely on proposed § 1005.32(b)(2) to provide estimates for certain disclosures would incorporate these changes into the updates to their systems already required in order to comply with the disclosure requirements addressed in § 1005.31. Accordingly, for the reasons stated above, the Bureau estimates that there would be no increase in the one-time or ongoing burden to comply with the requirements under proposed § 1005.32(b)(2).

However, the Bureau notes that some of the additional proposed modifications to the January 2012 Final Rule could affect the burden for PRA purposes. As discussed above in the **SUPPLEMENTARY INFORMATION** to the proposal, the proposal solicits comment on whether use of estimates should be permitted in the following two circumstances: (i) a consumer schedules a one-time transfer or the first in a series of preauthorized transfers to occur more than 10 days after the transfer is authorized; or (ii) a consumer enters into an agreement for preauthorized remittance transfers where the amount of the transfers can vary and the provider does not know the exact amount of the first transfer at the time the disclosures for that transfer are given. The Bureau also requests comment on whether in lieu of providing an estimate of the exchange rate on the disclosures for an advance transfer, a provider may disclose a formula and whether a provider that uses estimates in the pre-payment disclosure and receipt given at the time the transfer is requested and authorized in the two situations described above should be required to provide a second receipt with accurate information within a reasonable time prior to the scheduled date of the transfer.

The Bureau notes these proposed modifications would provide additional flexibility and that the second receipt would only be required if the provider used estimates (or formula), at their option, in the two circumstances described above. Generally, these proposed modifications could lower ongoing costs from estimating certain amounts in the pre-payment disclosure and receipt given at the time the transfer is requested and authorized instead of determining accurate amounts; however, the additional accurate receipt could increase burden for PRA purposes. The Bureau notes, however, that this potential increase in burden would be voluntary.

The Bureau estimates that for the 155 large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau, these proposed modifications would increase the one-time burden by 620 hours and would increase the ongoing burden by 7,440 hours. In addition, the Bureau estimates that for money transmitters, these proposed modifications would increase the one-time burden by 24,000 hours and would increase the ongoing burden by 44,468 hours.

The Bureau is soliciting comment concerning the disclosure of the sender's cancellation rights (deadline to cancel). One proposed modification allows, at their option, providers that provide both transfers scheduled more than three business days in advance and within three business days before the date of transfer to describe both cancellation provisions on one receipt. Under another proposed modification, the Bureau is requesting comment on whether providers should be required to disclose the deadline to cancel in the pre-payment disclosure for transfers subsequent to the first in a series of preauthorized remittance transfers, instead of being required to make that disclosure in the receipt for the transfer.

The Bureau estimates that for the 155 large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau, the first proposed modification would increase the one-time burden by 620 hours and the ongoing burden by 7440 hours. In addition, the Bureau estimates that for money transmitters, the proposed modification would increase the one-time burden by 24,000 hours and the ongoing burden by 44,468 hours. The Bureau estimates that for the 155 large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau, the second proposed modification would increase the one-time burden by 1,240 hours and the ongoing burden by 14,880 hours. In addition, the Bureau estimates that for money transmitters, the second proposed modification would increase the one-time burden by 48,000 hours and the ongoing burden by 88,936 hours.[15]

The Bureau also is soliciting comment on whether the disclosure of the three-business-day deadline to cancel in the receipt for these transfers should include a description of the provider's business days or whether the provider should be required to disclose in the receipt the specific date on which the right to cancel that transfer expires.

The Bureau estimates that for the 155 large depository institutions and credit unions (including their depository and credit union affiliates) supervised by the Bureau, the proposed modification to provide a specific date on the receipt would increase the one-time burden by 620 hours and the ongoing burden by 7,440 hours. In addition, the Bureau estimates that for money transmitters, the proposed modification would increase the one-time burden by 24,000 hours and the ongoing burden by 44,468 hours.

The Bureau is requesting comment on mitigating the burden on providers imposed by § 1005.31(b)(1) as it pertains to subsequent transfers by eliminating the pre-payment disclosure for transfers that occur after the first transfer in a series of preauthorized remittance transfers. See § 1005.36(a)(2)(i). The Bureau is also soliciting comment on whether changes should be made to the three-business-day cancellation deadline that applies to transfers

[15] The Bureau notes that there may be other entities that serve as remittance transfer providers and that are not depository institutions, credit unions, or money transmitters, as traditionally defined. These entities could include, for example, brokerages that send remittance transfers. Though the Bureau does not have an estimate of the number of any such providers, the Bureau believes that they would account for a number of entities that is significantly less than the sum of money transmitters and their agents.

scheduled by the sender more than three business days prior to the scheduled date of the transfer, such as whether the deadline to cancel these transfers should be earlier or later than three business days. The Bureau believes that these proposed modifications, if adopted, would not increase the one-time or ongoing burden for PRA purposes. However, the Bureau solicits comment on these modifications or any other aspect of the proposal for purposes of the PRA.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation and official interpretation. New language is shown inside ►bold-faced arrows◄, while language that would be deleted is set off with ❙bold-faced brackets❙.

List of Subjects in 12 CFR Part 1005

Banking, Banks, Consumer protection, Credit unions, Electronic fund transfers, National banks, Remittance transfers, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection proposes to amend 12 CFR part 1005, as amended February 7, 2012 and effective February 7, 2013, as follows:

PART 1005—ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for part 1005 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1693b. Subpart B is also issued under 12 U.S.C. 5601; Pub. L. 111–203, 124 Stat. 1376 (2010).

Subpart B—Requirements for Remittance Transfers

2. In § 1005.32, revise paragraph (b) to read as follows:

§ 1005.32 Estimates.

* * * * *

(b) ►*Permanent exceptions.* (1)◄❙*Permanent exception for t*❙►*T*◄*ransfers to certain countries.* ► (i)◄❙(1)❙ *General.* For disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2), estimates may be provided for transfers to certain countries in accordance with paragraph (c) of this section for the amounts required to be disclosed under §§ 1005.31(b)(1)(iv) through (vii), if a remittance transfer provider cannot determine the exact amounts at the time the disclosure is required because:

►(A)◄❙(i)❙ The laws of the recipient country do not permit such a determination, or

►(B)◄❙(ii)❙ The method by which transactions are made in the recipient country does not permit such determination.

►(ii)◄ ❙(2)❙ *Safe harbor.* A remittance transfer provider may rely on the list of countries published by the Bureau to determine whether estimates may be provided under paragraph (b)(1) of this section, unless the provider has information that a country's laws or the method by which transactions are conducted in that country permits a determination of the exact disclosure amount.

►(2) *Transfers scheduled in advance.* (i) Except as provided in paragraphs (ii) and (iii) of this section, for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1), estimates may be provided in accordance with paragraph (c) of this section for the amounts to be disclosed under §§ 1005.31(b)(1)(iv) through (vii), if the transfer is scheduled by a sender to be made more than 10 days after the date on which the sender authorizes the transfer.

(ii) Taxes described in § 1005.31(b)(1)(vi) may be estimated under paragraph (i) of this section only if those taxes are a percentage of the amount transferred to the designated recipient, as described in § 1005.31(b)(1)(v).

(iii) Fees described in § 1005.31(b)(1)(vi) may be estimated under paragraph (i) of this section only if:

(A) The fees are calculated as a percentage of the amount transferred to the designated recipient, as described in § 1005.31(b)(1)(v); or

(B) A remittance transfer provider is an insured institution as defined in § 1005.32(a)(3), the provider cannot determine the exact amount of the fees for reasons beyond its control, and the remittance transfer is sent from the sender's account with the institution. This paragraph (b)(2)(iii)(B) of this section expires on July 21, 2015.◄

* * * * *

3. In Supplement I to part 1005:

a. Under Section 1005.30—Remittance Transfer Definitions, *30(f) Remittance Transfer Provider,* paragraph 2 is revised.

b. Under Section 1005.32—Estimates:

1. Paragraph 1 is revised;

2. The heading *32(b) Permanent Exceptions for Transfers to Certain Countries* is revised to read as *32(b) Permanent Exceptions;*

3. Under *32(b) Permanent Exceptions,* a new heading *32(b)(1) Transfers to Certain Countries* is added.

4. Under new heading *32(b)(1) Transfers to Certain Countries,* paragraphs 4, 5, and 7 are revised;

5. Under *32(b) Permanent Exceptions,* a new heading *32(b)(2) Transfers Scheduled in Advance* is added.

6. Under *new heading 32(b)(2) Transfers Scheduled in Advance,* paragraph 1 is added;

7. Under *32(c) Bases for Estimates, 32(c)(1) Exchange Rate,* paragraph 1 is revised; and

8. Under *32(c)(3) Other Fees,* paragraph 1 is revised.

c. Under Section 1005.36—Transfers Scheduled in Advance:

1. The heading *36(a) Timing* and paragraph 1 is added; and

2. The heading *36(b) Accuracy* and paragraph 1 is added.

The revisions and additions read as follows:

Supplement I to Part 1005—Official Interpretations

* * * * *

Section 1005.30—Remittance Transfer Definitions

* * * * *

30(f) Remittance Transfer Provider.

* * * * *

2. *Normal course of business.* Whether a person provides remittance transfers in the normal course of business depends on the facts and circumstances, including the total number and frequency of remittance transfers sent by the provider. For example, if a financial institution generally does not make international consumer wire transfers available to customers, but sends a couple of international consumer wire transfers in a given year as an accommodation for a customer, the institution does not provide remittance transfers in the normal course of business. In contrast, if a financial institution makes international consumer wire transfers generally available to customers (whether described in the institution's deposit account agreement, or in practice) and makes transfers multiple times per month, the institution provides remittance transfers in the normal course of business. ►If a person provided no more than 25 remittance transfers in the previous calendar year, the person does not provide remittance transfers in the normal course of business for the current calendar year if it provides no more than 25 remittance transfers in that year. If that person, however, makes a 26th remittance transfer in the current calendar year, the person would be evaluated under the facts and circumstances test to determine whether the person is a remittance transfer provider for that transfer and any other transfer provided through the rest of the year. For instance, assume that in calendar year 2012, a person provided 20 remittance transfers. This person is not providing remittance transfers in the normal course of business for calendar year 2013 if it provides no more than 25 remittance transfers in calendar year 2013. Assume further that the

person makes 15 transfers in calendar year 2013. Because this person limited its remittance transfers to no more than 25 in 2013, it would not be required to comply with the rules in subpart B of this regulation for any of its transfers in 2013. On the other hand, assume the person provides 25 transfers by July 2013 and a 26th transfer in August 2013. In that case, the person would be evaluated under the facts and circumstances test to determine whether the person is a remittance transfer provider for the 26th transfer and any other transfer provided through the rest of the calendar year. In addition, if the person provides a 26th transfer for calendar year 2013, this person would not qualify for the safe harbor in 2014 because the person did not make 25 or fewer remittance transfers in 2013. In this case, in 2014, the person would be evaluated under the facts and circumstances test in determining whether the person is a remittance transfer provider for all transfers made in 2014.◄

* * * * *

Section 1005.32—Estimates

1. *Disclosures where estimates can be used.* Sections 1005.32(a) and (b)►(1)◄ permit estimates to be used in certain circumstances for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2). To the extent permitted in §§ 1005.32(a) and (b)►(1)◄, estimates may be used in the pre-payment disclosure described in § 1005.31(b)(1), the receipt disclosure described in § 1005.31(b)(2), the combined disclosure described in § 1005.31(b)(3), and the pre-payment disclosures and receipt disclosures for both first and subsequent preauthorized remittance transfers described in §§ 1005.36(a)(1) and (a)(2). ►Section 1005.32(b)(2) permits estimates to be used for certain information if the transfer is scheduled by a sender to be made more than 10 days after the date on which the sender authorizes the transfer, for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1). To the extent permitted by § 1005.32(b)(2), estimates may be used in the pre-payment disclosure described in § 1005.31(b)(1), the receipt disclosure described in § 1005.31(b)(2), the combined disclosure described in § 1005.31(b)(3), and the pre-payment disclosure and receipt disclosure for the first preauthorized remittance transfer described in § 1005.36(a)(1). Section 1005.32(b)(2) does not apply to the pre-payment disclosures and receipt disclosures for subsequent preauthorized remittance transfers described in § 1005.36(a)(2).◄

* * * * *

►*32(b) Permanent Exceptions*◄

32(b)►(1)◄ [Permanent Exception for] Transfers to Certain Countries

* * * * *

4. *Example illustrating when exact amounts can and cannot be determined because of the method by which transactions are made in the recipient country.*

i. The method by which transactions are made in the recipient country does not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) when the provider sends a remittance transfer via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is a rate set by the recipient country's central bank on the business day after the provider has sent the remittance transfer.

ii. In contrast, a remittance transfer provider would not qualify for the § 1005.32(b)(1)►(i)(B)◄[(ii)] methods exception if it sends a remittance transfer via international ACH on terms negotiated between the United States government and a private-sector entity or entities in the recipient country, under which the exchange rate is set by the institution acting as the entry point to the recipient country's payments system on the next business day. However, a remittance transfer provider sending a remittance transfer using such a method may qualify for the § 1005.32(a) temporary exception.

iii. A remittance transfer provider would not qualify for the § 1005.32(b)(1)►(i)(B)◄[(ii)] methods exception if, for example, it sends a remittance transfer via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank before the sender requests a transfer.

5. *Safe harbor list.* If a country is included on a safe harbor list published by the Bureau under § 1005.32(b)►(1)(ii)◄[(2)], a remittance transfer provider may provide estimates of the amounts to be disclosed under §§ 1005.31(b)(1)(iv) through (vii). If a country does not appear on the Bureau's list, a remittance transfer provider may provide estimates under § 1005.32(b)(1)►(i)◄ if the provider determines that the recipient country does not legally permit or method by which transactions are conducted in that country does not permit the provider to determine exact disclosure amounts.

* * * * *

7. *Change in laws of recipient country.* i. If the laws of a recipient country change such that a remittance transfer provider can determine exact amounts, the remittance transfer provider must begin providing exact amounts for the required disclosures as soon as reasonably practicable if the provider has information that the country legally permits the provider to determine exact disclosure amounts.

ii. If the laws of a recipient country change such that a remittance transfer provider cannot determine exact disclosure amounts, the remittance transfer provider may provide estimates under § 1005.32(b)(1)►(i)◄ even if that country does not appear on the list published by the Bureau.

* * * * *

►*32(b)(2) Transfers Scheduled in Advance*

1. *Fees imposed on the remittance transfer by a person other than the provider.* The exception in § 1005.32(b)(2)(iii) only allows estimates for fees disclosed in § 1005.31(b)(1)(vi) in two circumstances: (i) where the fees are calculated as a percentage of the amount transferred to the designated recipient, as described in § 1005.31(b)(1)(v); or (ii) where an ''insured institution'' as defined in § 1005.32(a)(3) is permitted to estimate fees under the temporary exemption in § 1005.32(a). *See* § 1005.32(a) and accompanying comments.◄

32(c) Bases for Estimates

32(c)(1) Exchange Rate

1. *Most recent exchange rate for qualifying international ACH transfers.* If the exchange rate for a remittance transfer sent via international ACH that qualifies for the § 1005.32(b)(1)►(i)(B)◄[(ii)] exception is set the following business day, the most recent exchange rate available for a transfer is the exchange rate set for the day that the disclosure is provided, *i.e.* the current business day's exchange rate.

* * * * *

32(c)(3) Other Fees

1. *Potential transmittal routes.* A remittance transfer from the sender's account at an insured institution to the designated recipient's institution may take several routes, depending on the correspondent relationships each institution in the transmittal route has with other institutions. In providing an estimate of the fees required to be disclosed under § 1005.31(b)(1)(vi) pursuant to the § 1005.32(a) temporary exception ►or the § 1005.32(b)(2) exemption◄, an insured institution may rely upon the representations of the designated recipient's institution and the institutions that act as intermediaries in any one of the potential transmittal routes that it reasonably believes a requested remittance transfer may travel.

* * * * *

Section 1005.36—Transfers Scheduled in Advance

* * * * *

►*36(a) Timing.*

1. *Reasonable time.* If a provider mails or delivers the pre-payment disclosure not later than 10 days before the scheduled date of the subsequent transfer, the provider is deemed to have provided that disclosure within a reasonable time prior to the scheduled date of the respective subsequent transfer.

36(b) Accuracy

1. *Estimates.* In providing the disclosures described in § 1005.36(a), providers may use estimates to the extent permitted by §§ 1005.32(a) and (b)(1). In addition, § 1005.32(b)(2) provides that providers may use estimates for certain information for the first scheduled preauthorized

remittance transfer, if this transfer is scheduled by a sender to be made more than 10 days after the date on which the sender authorizes the transfer. When estimates are permitted, they must be disclosed in accordance with § 1005.31(d).◄

Dated: January 23, 2012.

Richard Cordray,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2012–1726 Filed 1–30–12; 11:15 am]

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Part III

Commodity Futures Trading Commission

17 CFR Parts 22 and 190
Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 22 and 190

RIN Number 3038–AC99

Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (the ''Commission'') is adopting final regulations to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act''). Specifically, these regulations impose requirements on futures commission merchants (''FCMs'') and derivatives clearing organizations (''DCOs'') regarding the treatment of cleared swaps customer contracts (and related collateral), and make conforming amendments to bankruptcy provisions applicable to commodity brokers under the Commodity Exchange Act (the ''CEA'').

DATES: The rules will become effective April 9, 2012. All parties must comply with the Part 22 rules by November 8, 2012. All parties must comply with the Part 190 rules by April 9, 2012. Prior to the compliance date for the Part 22 rules, the definition of 190.01(pp) (''Cleared Swap'') shall be limited to transactions where the rules or bylaws of a derivatives clearing organization require that such transactions, along with the money, securities, and other property margining, guaranteeing or securing such transactions, be held in a separate account for Cleared Swaps only.

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Chief Counsel, Division of Clearing and Risk (DCR), at 202–418–5092 or *rwasserman@cftc.gov;* M. Laura Astrada, Associate Chief Counsel, DCR, at 202–418–7622 or *lastrada@cftc.gov;* Alicia Lewis, Special Counsel, DCR, at 202–418–5862 or *alewis@cftc.gov;* or Martin White, Assistant General Counsel, Office of the General Counsel, at 202–418–5129 or *mwhite@cftc.gov,* in each case, at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

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I. Background

A. Segregation Requirements

On July 21, 2010, President Obama signed the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act [2] amended the CEA [3] to establish a comprehensive new regulatory framework for swaps and certain security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; [4] (2) imposing mandatory clearing and trade execution requirements on clearable swap contracts; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

Section 724 of the Dodd-Frank Act prescribes the manner in which Cleared

[1] *See* Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov./LawRegulation/OTCDERIVATIVES/index.htm.*

[2] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[3] 7 U.S.C. 1 *et seq.*

[4] In this release, the terms ''swap dealer'' and ''major swap participant'' shall have the meanings set forth in section 721(a) of the Dodd-Frank Act, which added sections 1a(49) and (33) of the CEA. However, as directed by section 721(c) of the Dodd-Frank Act, the Commission is in the process of promulgating rules to further define, among other terms, ''swap dealer'' and ''major swap participant.'' *See* 75 FR 80173, Dec. 21, 2010.

Swaps (and related collateral) [5] must be treated prior to and after bankruptcy. Section 724(a) of the Dodd-Frank Act amends section 4d of the CEA to add a new paragraph (f), which imposes the following requirements on an FCM, as well as any depository thereof (including, without limitation, a DCO):

1. The FCM must treat and deal with all collateral (including accruals thereon) deposited by a customer [6] to margin its Cleared Swaps as belonging to such customer;

2. The FCM must separately account for and may not commingle such collateral with its own property and may not, with certain exceptions, use such collateral to margin the Cleared Swaps of any person other than the customer depositing such collateral;

3. A DCO may not hold or dispose of the collateral that an FCM receives from a customer to margin Cleared Swaps in any manner that would indicate that such collateral belonged to the FCM or any person other than the customer; and

4. The FCM and the DCO may only invest such collateral in enumerated investments.

In other words, the FCM and the DCO (i) must hold such customer collateral in an account (or location) that is separate from the property belonging to the FCM or DCO, and (ii) must not use the collateral of one customer to (A) cover the obligations of another customer or (B) the obligations of the FCM or DCO. These basic requirements that Cleared Swaps Customer Collateral be treated as the property of customers and maintained in segregated accounts (or locations) are imposed by the statute and have the force of law regardless of the Commission's particular implementing regulations. Moreover, by the terms of the statute, these requirements would apply even if the Commission promulgated no implementing regulations.

Section 724(b) of the Dodd-Frank Act governs bankruptcy treatment of Cleared Swaps by clarifying that Cleared Swaps are ''commodity contracts'' within the meaning of section 761(4)(F) of the Bankruptcy Code.[7] Therefore, in the event of an FCM or DCO insolvency, Cleared Swaps Customers may invoke the protections of Subchapter IV of Chapter 7 of the Bankruptcy Code (''Subchapter IV''). Such protections include: (i) protected transfers of Cleared Swaps and related collateral; [8] and (ii) if Cleared Swaps are subject to liquidation, preferential distribution of remaining collateral.[9] However, section 766(h) of the Bankruptcy Code (''Section 766(h)'') subjects customers to mutualized risk by requiring that customer property be distributed ''ratably to customers on the basis and to the extent of such customers' allowed net equity claims.'' This requirement, in turn, limits the Commission's flexibility in designing a model for the protection of customer collateral.

B. Overview of the Clearing Process as It Relates to the Segregation Requirements

1. Central Counterparties/Derivatives Clearing Organizations

One of the primary objectives of the Dodd-Frank Act was to promote the central clearing of swaps and to establish the regulatory infrastructure for the clearing of swaps.[10] Clearing is the process by which transactions in derivatives are processed, guaranteed, and settled by a central counterparty, also known as a DCO. In accordance with this overall Congressional purpose, section 724 of the Dodd-Frank Act amends the CEA to provide the statutory foundation for the protection of Cleared Swaps Customer Collateral.

A DCO has members (''Clearing Members'') who clear derivatives transactions (*e.g.,* swaps) through the DCO and who are subject to the DCO's rules. Clearing Members may clear transactions on their own behalf (*i.e.,* ''proprietary transactions'') or on behalf of customers (*i.e.,* ''customer transactions''). Clearing members that clear swaps for customers must be registered as futures commission merchants (''FCMs'').[11]

The term ''central counterparty'' means, conceptually, that the DCO becomes the seller to every buyer, and the buyer to every seller. More specifically, the DCO novates swap transactions initially entered into between various market participants, such as swaps users, dealers, or end users, and cleared either directly (if the market participant is itself a Clearing Member) or indirectly (through an FCM that is a Clearing Member) . The contractual obligations between the original parties (''A'' and ''B'') [12] are replaced by sets of equivalent obligations: between the Clearing Member FCMs acting for the original parties and the DCO and between the Clearing Member FCMs and their individual customers. Thus, if the original swap agreement would require a certain payment from A to B, as a result of the clearing process this obligation becomes (1) a duty by A's clearing FCM to pay the DCO, (2) a corresponding claim by A's FCM to recompense from A, (3) a duty by the DCO to pay B's clearing FCM, and (4) a corresponding duty by B's FCM to pay B.

In economic effect, the DCO serves as a guarantor that every Clearing Member party to a cleared swap receives performance according to the terms of the swap, while the clearing FCM serves as a guarantor of its customers' swaps obligations to the DCO.

2. Variation

To avoid the accumulation of large obligations, the DCO conducts a variation payment and collection cycle at least once a day, and in the case of many DCOs, twice a day. The DCO will first calculate the gain (and corresponding loss) on each contract through a process known as ''marking to market,'' using reported market prices where available, or other means (such as surveys of Clearing Members). The DCO will then aggregate and net the gains and losses for each Clearing Member (separately for proprietary and customer accounts), collect from those Clearing Members with net losses, and pay those Clearing Members with net gains. This process is highly time sensitive: The Clearing Member typically has only one or a few hours between the demand for payment and the time payment is due. Similarly, the Clearing Member FCMs will debit the accounts of those customers who have losses on their transactions, and credit the accounts of those customers who have gained.

3. Margin (Collateral)

To secure the prompt payment of variation obligations, the DCO will require each Clearing Member to post collateral (often referred to as ''margin'') for the transactions it clears (separately for customer positions and proprietary positions). If the Clearing Member does not promptly make a variation payment to the DCO—referred to as a default—the collateral may immediately be liquidated and applied to the obligation. Margin may only be used to meet the

[5] Regulation 22.1 defines ''Cleared Swap'' and ''Cleared Swaps Customer Collateral.''

[6] Regulation 22.1 defines ''Cleared Swaps Customer.''

[7] 11 U.S.C. 761(4)(F).

[8] *See, e.g.,* 11 U.S.C. 764.

[9] *See, e.g.,* 11 U.S.C. 766(h) and (i).

[10] *See supra* n. 1; S. Rep. No. 111–176, at 33 (2010) (''[w]ith appropriate collateral and margin requirements, a central clearing organization can substantially reduce counterparty risk and provide an organized mechanism for clearing transactions''); Process for Review of Swaps for Mandatory Clearing, 76 FR 44464, July 26, 2011 (final rule); Derivatives Clearing Organizations General Provisions and Core Principles, 76 FR 69334, Nov. 8, 2011 (final rule).

[11] Section 4d(f)(1) of the CEA, 7 U.S.C. 6d(f)(1).

[12] For purposes of this example, neither A nor B is a Clearing Member.

default of the Clearing Member posting that margin. While proprietary margin may be used to meet obligations in either the Clearing Member's proprietary account or customer account, the reverse is not true: A Clearing Member's customer margin may *not* be used to meet a default in the Clearing Member's proprietary account.

Similarly, FCMs will—indeed, are required to—collect collateral from each of their customers, based on each customer's portfolio of positions, to secure the prompt payment of the customer's variation obligations.[13] If a customer fails to fulfill an obligation to the FCM arising out of a swap agreement the FCM clears for the customer, the FCM may use some or all of the value of the collateral that customer has posted to meet that obligation—that is the purpose of the collateral.

The DCO will generally set minimum collateral levels for each type of swap, and will prescribe a ''margin methodology'' to determine the minimum margin level for portfolios of swaps. The DCO's margin methodology will be designed to estimate the amount of loss a portfolio of swap positions may incur, calculated at a statistical confidence level no less than 99%, over a holding period generally between one and ten days, depending on the time it is estimated to take to liquidate the swaps in the portfolio.[14] The FCM will, in turn, use the same or similar methodology in determining the minimum level of collateral it must collect from each customer.[15]

4. Default Resources

As noted above, the margin collateral collected by a DCO is designed to cover most (*e.g.,* 99%), but not all, potential losses incurred by a Clearing Member. DCOs cover the ''tail risk'' (*i.e.,* the risk that a Clearing Member will incur, and default on, a loss in excess of the margin collected) by means of what is sometimes referred to as a default resources package, or ''waterfall.'' Elements of the waterfall may include a contribution of a specified amount of the DCO's own capital, pre-funded contributions from Clearing Members (a ''guaranty fund''),[16] or (to a limited extent), a power by the DCO to assess additional contributions from Clearing Members. Unlike margin, a Clearing Member's contribution to the guaranty fund will generally be usable to meet the default of another Clearing Member. In other words, the guaranty fund is ''mutualized.'' Elements of the waterfall are applied in an order pre-determined by the DCO's rules. Such rules will often apply the guaranty fund contribution of the defaulter before the DCO's own capital, and the remainder of the guaranty fund (*i.e.,* the guaranty fund contributions of the non-defaulting Clearing Members) thereafter.

Though seemingly complex, centralized clearing has important advantages in terms of transparency, risk management, netting out of countervailing obligations, and reduced exposure of market participants to each other's credit risk (by effectively substituting the DCO's credit risk).

5. Customer Accounts

Generally, a clearing FCM will have two different types of Cleared Swaps Customer Accounts in connection with collateral provided to it by Cleared Swaps Customers. One account is maintained (generally at a bank) by the FCM on behalf of its Cleared Swaps Customers (the ''FCM Customer Account''). The FCM Customer Account holds assets provided by customers, or other assets of equivalent value, that are not currently posted with the DCO to support swaps positions cleared by the FCM on behalf of its Cleared Swaps Customers. The other account is maintained by the DCO for the FCM on behalf of the FCM's Cleared Swaps Customers (the ''DCO Customer Account''). The DCO Customer Account holds customer assets, or assets of equivalent value, that the FCM has posted to the DCO as collateral for swaps positions that have been established and cleared by the FCM for its Cleared Swaps Customers.

The collateral posted by each Cleared Swaps Customer is, however, potentially exposed to risks that do not arise out of the obligations that a Cleared Swaps Customer has directly incurred by assuming his or her swaps position. [17] The most important impact of such risks would occur in the case of an insolvency on the part of the FCM through which the Cleared Swaps Customer clears. As discussed in more detail below, the new CEA section 4d(f), and the Commission's implementing regulations, are designed to provide protection for Cleared Swaps Customer Collateral against certain risks that may arise during an insolvency on the part of the FCM through which the Cleared Swaps Customer clears.

6. Fellow-Customer Risk

''Fellow-Customer Risk'' is the risk that a DCO would need to access the collateral of non-defaulting Cleared Swaps Customers to cure an FCM default. Fellow-Customer Risk arises in circumstances in which a Cleared Swaps Customer (the ''defaulting customer'') of a clearing FCM suffers a (significant) loss in connection with a cleared swap.[18] The loss will result in a call by the DCO for a variation payment from the clearing FCM that carries that Cleared Swaps Customer's Cleared Swaps.[19] The clearing FCM may demand expedited payment from the defaulting Cleared Swaps Customer, but is in any event directly obligated promptly to meet the payment obligation to the DCO.

If the loss is great enough, it may exceed the sum of the FCM's available liquid assets, the swaps collateral posted by the Cleared Swaps Customer, and any additional payments immediately available from the Cleared Swaps Customer. In this situation, sometimes called a ''double default,'' the defaulting Cleared Swaps Customer will have defaulted on its obligation to the clearing FCM which, in turn, will default on its obligation to the DCO. In such circumstances, the FCM will likely have to file for protection in bankruptcy. Meanwhile, the defaulting Cleared Swaps Customer's loss will translate to a gain by one or more other market participants. Notwithstanding the default by the clearing FCM, the DCO, in its capacity as central counterparty, is required to pay out these gains. The DCO will thus be faced with a potentially significant loss.

A potential resource for the DCO to apply to this loss in a double default

[13] See regulation 39.13(g)(8)(ii) (stating that ''[a] derivatives clearing organization shall require its clearing members to collect customer initial margin, as defined in § 1.3 of this chapter, from their customers, for nonhedge positions, at a level that is greater than 100 percent of the derivatives clearing organization's initial margin requirements with respect to each product and swap portfolio.''). 76 FR at 69439.

The purpose of this rulemaking is to protect Cleared Swaps Customer Collateral in the event that an FCM defaults to a DCO due to ''Fellow-Customer Risk'' (as such term is defined in section I(B)(6) herein). However, as section III(B) explores in greater detail, the segregation model selected in this rulemaking provides limited protection from operational and investment risks.

[14] *See generally,* 76 FR 69334. *See* specifically regulation 39.13(g)(2)(ii) (setting forth a one-day minimum liquidation time for agricultural, energy, and metals swaps, and a five-day minimum liquidation time for all other swaps). 76 FR 69438.

[15] The FCM is required to collect a higher level of collateral from its customers than that prescribed for Clearing Members (*see id.*) and may, in its discretion, collect a yet higher level. *See* regulation 22.13(a)(1).

[16] *See also infra* at n. 250.

[17] Examples of other risks include the possibility of misuse or misallocation of a Cleared Swaps Customer's assets by a dishonest or negligent FCM.

[18] *See also supra* n. 13.

[19] As noted above, the amount the DCO will call for or pay to the FCM in respect of its Cleared Swaps Customers is the net of the gains and losses computed on a customer-by-customer basis.

situation is the collateral held in the Cleared Swaps Customer Account maintained by the DCO for the defaulting FCM on behalf of the FCM's Cleared Swaps Customers. Under the current rules applicable to futures clearing, a DCO is permitted to use all of the collateral in the Clearing Member's customer account to meet a loss in that account, without regard to which customer(s) in fact supplied that collateral. Thus, in this case, the non-defaulting customers of the defaulting FCM clearing member would be exposed to loss due to ''Fellow-Customer Risk.''

C. Segregation Alternatives

In implementing new CEA section 4d(f), the Commission considered five alternative segregation models for Cleared Swaps Customer Collateral in the notice of proposed rulemaking issue by the Commission on June 9, 2011 (the ''NPRM'').[20]

1. Legal Segregation With Operational Commingling Model

The first alternative explored by the Commission was legal segregation with operational commingling (the ''LSOC Model'' or ''Complete Legal Segregation Model''). Under the LSOC Model, each FCM and DCO would enter (or ''segregate''), in its books and records, the Cleared Swaps of each individual customer and relevant collateral. Each FCM and DCO would ensure that such entries are separate from entries indicating (i) FCM or DCO obligations, or (ii) the obligations of non-cleared swaps customers. Operationally, however, each FCM and DCO would be permitted to hold (or ''commingle'') the relevant collateral in one account. Each FCM and DCO would ensure that such account is separate from any account holding FCM or DCO property or holding property belonging to non-cleared swaps customers.

Prior to the simultaneous default of an FCM and one of its Cleared Swaps Customers (as discussed above, a ''double default''), the FCM would ensure that the DCO does not use the collateral of one Cleared Swaps Customer to support the obligations of another customer by making certain that the value of the Cleared Swaps Customer Collateral that the DCO holds equals or exceeds the value of all Cleared Swaps Customer Collateral that it has received to secure the contracts of the FCM's customers. Following a double default, the DCO would be permitted to access the collateral of the defaulting Cleared Swaps Customers, but not the collateral of the non-defaulting Cleared Swaps Customers. Thus while, even under the LSOC Model, Section 766(h) requires the pro rata distribution of customer property, the collateral attributable to the non-defaulting Cleared Swaps Customers would be available to be distributed.

2. Legal Segregation With Recourse Model

Second, the Commission contemplated the Legal Segregation with Recourse Model (together with the LSOC Model, the ''Legal Segregation Models''). As with the LSOC Model, under the Legal Segregation with Recourse Model, each FCM and DCO would segregate the Cleared Swaps of each individual customer and relevant collateral in its books and records. However, each FCM and DCO would be permitted to commingle the relevant collateral in one account, provided that such account is separate from any proprietary accounts or accounts property belonging to non-cleared swaps customers.

Again, as with the LSOC Model, prior to a double default, the FCM would ensure that the DCO does not use the collateral of one Cleared Swaps Customer to support the obligations of another customer by making certain that the value of the Cleared Swaps Collateral that the DCO holds equals or exceeds the value of all Cleared Swaps Collateral that it has received to secure the contracts of the FCM's customers. However, unlike the LSOC Model, following a double default, the Legal Segregation with Recourse Model would not prohibit a DCO from accessing the collateral of the non-defaulting Cleared Swaps Customers, after the DCO applies its own capital to cure the default, as well as the guaranty fund contributions of its non-defaulting FCM members.

3. Physical Segregation Model

The Commission also explored the possibility of full physical segregation (the ''Physical Segregation Model'') for Cleared Swaps Customer Collateral. The Physical Segregation Model primarily differs from the Legal Segregation Models operationally. In the ordinary course of business (*i.e.,* prior to a double default), as with the Legal Segregation Models, each FCM and DCO would enter (or ''segregate''), in its books and records, the Cleared Swaps of each individual customer and relevant collateral. However, unlike the Legal Segregation Models, each FCM and DCO would maintain separate individual accounts for the relevant collateral. Hence, the FCM would ensure that the DCO does not use the collateral of one Cleared Swaps Customer to support the obligations of another customer by making certain that the DCO does not mistakenly transfer collateral in (i) the account belonging to the former to (ii) the account belonging to the latter.

Following a double default, the Physical Segregation Model would lead to the same result as the Complete Legal Segregation Model. Specifically, the DCO would be permitted to access the collateral of the defaulting Cleared Swaps Customers, but not the collateral of the non-defaulting customers.

As discussed above, one important limitation on the effectiveness of the Physical Segregation Model is section 766(h) of the Bankruptcy Code, which requires that customer property be distributed ratably. Thus, if because of Physical Segregation, certain Cleared Swaps Customer Collateral was better protected than the property of other Cleared Swaps Customers, it would not be permissible to pay Cleared Swaps Customers in the first group a higher proportion (*i.e.,* a higher cents-on-the-dollar distribution) of their net equity claims than Cleared Swaps Customers in the second group. Rather, Cleared Swaps Customers in both groups would receive the same proportion of their allowed net equity claims. In other words, in spite of incurring greater cost under the Physical Segregation Model, a Cleared Swaps Customer would essentially receive the same level of protection for its Cleared Swaps Customer Collateral under the Physical Segregation Model as it would under the LSOC Model.

4. Futures Model

The Commission also considered replicating the segregation requirement currently applicable to futures (the ''Futures Model''). Under this model, DCOs treat each FCM's customer account on an omnibus basis, that is, as belonging to an undifferentiated group of customers.

Prior to a double default, the Futures Model shares certain similarities with the Legal Segregation Models. Specifically, each FCM would enter (or ''segregate''), in its books and records, the Cleared Swaps of each individual customer and relevant collateral. Each DCO, however, would recognize, in its books and records, the Cleared Swaps that an FCM intermediates on a collective (or ''omnibus'') basis. Each FCM and DCO would be permitted to hold (or ''commingle'') all Cleared Swaps Customer Collateral in one account.

[20] *See* Notice of Proposed Rulemaking on the Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 76 FR 33818, 33822, June 9, 2011.

Following a double default, the Futures Model shares certain similarities with the Legal Segregation with Recourse Model. Specifically, the Futures Model would not prohibit a DCO from accessing the collateral of the non-defaulting Cleared Swaps Customers. However, unlike the Legal Segregation with Recourse Model, under the Futures Model the DCO would be permitted to access such collateral before applying its own capital or the guaranty fund contributions of non-defaulting FCM members.[21]

5. Optionality

Finally, the Commission explored permitting a DCO to choose between (i) the Legal Segregation Models (whether Complete or with Recourse), (ii) the Physical Segregation Model, and (iii) the Futures Model, rather than mandating any particular alternative.

D. Operation of the Segregation Models in an FCM Bankruptcy

When discussing the issues surrounding an FCM bankruptcy under the Bankruptcy Code, analytically there are several scenarios to consider: (1) The bankruptcy is unrelated to the loss of customer funds, and there is no such loss; (2) The bankruptcy involves shortfalls in customer funds due to operational risks; (3) The bankruptcy involves losses due to customer risk (*i.e.,* a customer incurs a loss in excess of the FCM's financial ability to cover); or (4) the bankruptcy involves shortfalls in customer funds due to operational risk and losses due to customer risk.

1. Bankruptcy Unrelated to Loss of Customer Funds

An FCM bankruptcy that is unrelated to the loss of customer funds may arise because of financial difficulties in the FCM, financial difficulties in the proprietary accounts, or because of the impact of difficulties at a corporate parent or affiliate. Under this scenario, all models share important characteristics: Customer positions and related collateral, whether at a DCO or at the FCM, can be transferred to one or more willing transferee FCMs, or may be liquidated and returned to the trustee. With respect to fostering transfer, however, the Legal Segregation Models (whether Complete or with Recourse) and the Physical Segregation Model do have a significant advantage compared to the Futures Model: In each of them, information about the customers as a whole, and about each individual customer's positions, are transmitted to the DCO every day, an information flow (and store) that is not present in the Futures Model. Thus, each DCO will have important customer information on a customer by customer basis that can be used to facilitate and implement transfers, and is thus less reliant upon the FCM for that information.

2. Bankruptcy With Shortfalls Due to Operational Risks or Investment Risks

An FCM bankruptcy with shortfalls due to operational risks would arise because of a shortfall in segregated funds due to, *e.g.,* negligence, theft or other mishap. An FCM may also have shortfalls due to investment risks resulting from extraordinary losses on the set of investments permitted under regulation 1.25 (as included in new regulation 22.2(e)(3)). Under this scenario, all models again share important characteristics: Customer positions and related collateral at a DCO may be delivered to the Trustee, or may transferred by the DCO, but only to the extent of each customer's pro rata share. Under all of the segregation models, to the extent there is a shortfall, each customer will ultimately receive the same cents-on-the-dollar proportion of the value of the customer's account.

However, with respect to fostering transfer, the other models again have a significant advantage compared to the Futures Model: In each of them, information about the customers as a whole, and about each individual customer's positions, are transmitted to the DCO every day, an information flow (and store) that is not present in the Futures Model. Thus, each DCO will have important customer information on a customer by customer basis that can be used to facilitate and implement transfers, and accordingly is less reliant upon the FCM for that information.

3. Bankruptcy With Shortfalls Due to Customer Risk

An FCM bankruptcy with shortfalls due to customer risk would arise because a customer incurs a loss that exceeds both the customer's collateral and the FCM's ability to pay.

Under the Futures Model, the DCO could use the entirety of the FCM's customer account (or as much of it as necessary) to meet the entire loss created by the default. Transfer of customer positions would be difficult, in that the DCO would lack information as to which customers were in default, and which positions belonged to defaulting customers (and, presumably, would not be transferred) and which did not.[22] The DCO would be permitted to liquidate customer positions, a process that might take between one and ten days.[23] Once the loss was crystalized, the DCO would be able to turn over the collateral (less that used to meet the default) to the Trustee for use in the pro rata distribution.

Under the LSOC Model, the DCO could only use the collateral attributable to defaulting customers (those whose positions suffered losses) to meet the loss. Thus, all collateral attributable to customers whose net positions gained or were ''flat'' (neither gained nor lost), and much of the collateral attributable to customers whose net positions lost, would be immediately available for transfer. Moreover, the DCO would have information that is no more than one business day old tying customers to portfolios of positions, and the DCO itself would maintain the margining methodology that would tie such portfolios of positions to the collateral requirement associated with such portfolios. Even if the DCO decided to liquidate all customer positions, the collateral of non-defaulting customers would be exposed to less loss than under the Futures Model because the DCO would not have the right to access it.

The Physical Segregation Model would work in a manner similar to the LSOC Model. Again, all collateral attributable to customers whose net positions gained or were ''flat'' (neither gained nor lost), and the remaining collateral attributable to customers whose net positions lost, would be immediately available for transfer. The DCO would have specific information on how much collateral was, in fact, attributable to each customer. However, because of the ratable distribution requirement, any losses that did exist would be shared ratably among all customers.

Under the Legal Segregation with Recourse, the DCO could only use the collateral attributable to defaulting customers (those whose positions suffered losses) to meet the loss—at first. It would also use the defaulting clearing member FCM's own contribution to the guaranty fund, its own contribution to the guaranty fund, as well as the contributions of non-defaulting clearing members. However, if those resources were insufficient to cover the default, the DCO would have ''recourse'' to the collateral of non-defaulting customers. While such

[21] For a more detailed discussion regarding the operation of the segregation models in an FCM bankruptcy, see section I.D.

[22] *See generally,* CME Group, Inc. (''CME'') at 14–15 (discussing information deficits at bankrupt FCM).

[23] *See* 76 FR at 69366–68.

recourse is much less likely under the Legal Segregation with Recourse Model than under the Futures Model—because the fellow-customer collateral would not be reached unless the loss was great enough to consume the entire guaranty fund—until the amount of loss from the default was crystalized (through liquidation or transfer), the DCO might be reluctant or unable to release the collateral of non-defaulting customers. Accordingly, while Legal Segregation with Recourse would (in most cases) provide customers superior recovery in a liquidation, it would be much less well-suited to a prompt transfer of positions.

E. Solicitation of Public Input

The Commission sought public comment on the segregation alternatives mentioned above, and on the advisability of permitting the DCO to choose between alternatives. First, the Commission, through its staff, held extensive external meetings with three segments of stakeholders (*i.e.,* DCOs, FCMs, and swaps customers).[24] Second, on October 22, 2010, the Commission, through its staff, held a roundtable (the ''First Roundtable'').[25] Third, on November 19, 2010, the Commission issued an Advance Notice of Proposed Rulemaking for Protection of Cleared Swaps Customers Before and After Commodity Broker Bankruptcies (the ''ANPR''). Fourth, on June 3, 2011, the Commission, through its staff, held a second roundtable (the ''Second Roundtable'').[26] Fifth, after careful consideration of the comments the Commission received on the ANPR, the Commission issued the NPRM.

1. First Roundtable

As the ANPR describes, the First Roundtable revealed that stakeholders had countervailing concerns regarding the alternative segregation models that the Commission set forth. On the one hand, a number of swaps customers argued that the Commission should focus on effectively eliminating Fellow-Customer Risk[27] and Investment Risk.[28] Such swaps customers emphasized that (i) They currently transact in uncleared swaps, (ii) they are able to negotiate for individual segregation at independent third parties for collateral supporting such uncleared swaps, and therefore (iii) they are currently subject to neither Fellow-Customer Risk nor Investment Risk. Such customers found it inappropriate that, under certain alternatives set forth by the Commission, they should be subject to Fellow-Customer Risk and Investment Risk when they transact in Cleared Swaps.

On the other hand, a number of FCMs and DCOs argued that the benefits of effectively eliminating Fellow-Customer Risk and Investment Risk are outweighed by the costs. With respect to benefits, these FCMs and DCOs noted that the Futures Model has served the futures industry well for many decades. With respect to costs, these FCMs and DCOs described two potential sources. First, FCMs and DCOs stated that, depending on the manner in which the Commission proposes to eliminate or mitigate Fellow-Customer Risk and Investment Risk, they may experience substantial increases to operational costs (*e.g.,* costs associated with transaction fees, reconciliations, recordkeeping, reporting). Second, and more significantly, FCMs and DCOs stated that they may incur additional risk costs due to proposed financial resources requirements.[29]

In addition, some DCOs may have anticipated including collateral from non-defaulting Cleared Swaps Customers as an element in their financial resources packages. If DCOs no longer have access to such collateral, then those DCOs would need to obtain additional financial resources to meet proposed Commission requirements. Both FCMs and DCOs averred that the costs associated with obtaining such additional financial resources may be substantial, and would ultimately be borne by Cleared Swaps Customers.[30]

2. ANPR

Given the concerns that stakeholders expressed at the First Roundtable, the Commission decided to seek further comment through the ANPR on the potential benefits and costs of (i) The Legal Segregation Models (whether Complete or with Recourse), (ii) the Physical Segregation Model, and (iii) the Futures Model. As the ANPR explicitly stated, ''[t]he Commission [was] seeking to achieve two basic goals: Protection of customers and their collateral, and minimization of costs imposed on customers and on the industry as a whole.'' [31] In addition, the Commission requested comment on the impact of each model on behavior, as well as whether Congress evinced intent for the Commission to adopt any one or more of these models.

[24] A list of external meetings is available at: *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_6_SegBankruptcy/index.htm.*

[25] The transcript from the First Roundtable (the ''First Roundtable Tr.'') is available at: *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission6_102210-transcrip.pdf.*

[26] The transcript from the Second Roundtable (the ''Second Roundtable Tr.'') is available at: *http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission6_060311-transcri.pdf.*

[27] As noted in section I.B.1, an FCM functions as a guarantor of customer transactions with a DCO. Section 4d(f) of the CEA prohibits an FCM from using the collateral deposited by one Cleared Swaps Customer to support the swap transactions of another Cleared Swaps Customer. Therefore, if one Cleared Swaps Customer owes money to the FCM (*i.e.,* the Cleared Swaps Customer has a debit balance), the FCM, acting as guarantor, must deposit its own capital with the DCO to settle obligations attributable to such customer. If the Cleared Swaps Customer defaults to the FCM, and the Cleared Swaps Customer's obligations are so significant that the FCM does not have sufficient capital to meet them, then the FCM would default to the DCO.

As discussed in Section I.B.4, the financial resources DCOs maintain to cover Clearing Member defaults with respect to customer positions in excess of collateral provided by the Clearing Member include property of the defaulting Clearing Member (*i.e.,* collateral deposited to support FCM proprietary transactions and contributions to the DCO guaranty fund). Other elements of such packages may include: (i) The collateral that the FCM deposited to support the transactions of non-defaulting customers; (ii) a portion of the capital of the DCO; and (iii) contributions to the guaranty fund from other DCO Clearing Members. Typically, a DCO would exhaust one element before moving onto the next element. Therefore, the risk that the DCO would use any one element depends on the position of that element in the package.

[28] ''Investment Risk'' is the risk that each Cleared Swaps Customer would share *pro rata* in any decline in the value of FCM or DCO investments of Cleared Swaps Customer Collateral. Section 4d(f) of the CEA permits an FCM to invest Cleared Swaps Customer Collateral in certain enumerated instruments. The Commission is proposing to expand such instruments to include those referenced in regulation 1.25 (as it may be amended from time to time). Even though (i) such investments are ''consistent with the objectives of preserving principal and maintaining liquidity,'' and (ii) both the FCM, as well as the DCO, value such investments conservatively (by, *e.g.,* applying haircuts), the value of such investments may decline to less than the value of the collateral originally deposited. *See* regulation 1.25(b) (as amended in *Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions,* 76 FR 78776, December 19, 2011). In such a situation, all customers would share in the decline *pro rata,* even if the invested collateral belonged to certain customers and not others.

[29] As described below, the term ''Risks Costs'' refers to the costs associated with the allocation of loss in the event of a default under the Complete Legal Segregation Model relative to the Futures Model. For a more detailed explanation of these costs, *see* the discussion in section VII.B.2.b., under the heading titled '''Risk Costs' and potential effects on margin levels and DCO guaranty fund levels in response to complete legal segregation.''

[30] 75 FR at 75163. For example, one DCO estimated that it would have to increase the amount of collateral that each Cleared Swaps Customer must provide by 60 percent, if it could no longer access the collateral of non-defaulting Cleared Swaps Customers to cure certain defaults. *See infra* n. 258.

[31] *Id.*

As described in the NPRM, the Commission received thirty-one comments from twenty-nine commenters.[32] The comments were generally divided by the nature of the commenter: Most (though not all) of the comments from current or potential Cleared Swaps Customers favored either the Legal Segregation Models (whether Complete or with Recourse) or the Physical Segregation Model, manifesting a willingness to bear the added costs.[33] Most of the FCMs and DCOs favored the Futures Model, though one commenter favored the Complete Legal Segregation Model.[34] Finally, another commenter, in its supplemental comment, opined that the most important factor that the Commission should consider is the extent to which a model fostered the portability [35] of Cleared Swaps belonging to non-defaulting customers.[36] This commenter noted that the Physical Segregation Model and what is now referred to as the Complete Legal Segregation Model were most conducive to that goal.[37]

After careful consideration of the First Roundtable discussion and the comments received in response to the ANPR, the Commission issued the NPRM on June 9, 2011.

3. Second Roundtable

Discussions during the Second Roundtable generally reflected the conflicting concerns expressed by market participants regarding the alternative segregation models set forth by the Commission. Swaps customers continued to state that the Commission should focus on mitigating Fellow-Customer Risk, with some also advocating for the elimination of Investment Risk, while FCMs and DCOs reiterated that the Commission should select the Futures Model as the segregation model for Cleared Swaps Customer Collateral because the Futures Model has served the futures industry well for many decades. Pension funds, and a few investment managers, remained concerned about their potential exposure to Fellow-Customer Risk and Investment Risk and continued to press the Commission to adopt the Physical Segregation Model either outright or on an optional basis.

In addition, participants discussed various cost and benefits issues arising in relation to the Futures and the Legal Segregation Models. Specifically, several participants believed that the operational costs would not be significantly different between the Futures Model and the Complete Legal Segregation Model.[38] Moreover, although some participants projected that risk costs would significantly increase if the Commission were to select the Complete Legal Segregation Model,[39] one participant argued that these risk costs would not be incremental risk costs; rather they are risk costs that exist in the Futures Model that would most likely ultimately be borne by customers.[40] Finally, one participant argued that any model that facilitates the ability to port ''is superior to one that doesn't'' because ''the closeout cost in the future's model was the most expensive,'' meaning that ''closing out a client account and rates could be extremely devastating to the market, and * * * be really significant losses * * * [and] any way [the losses] can be avoided would be beneficial to every participant in the market.'' [41]

4. NPRM

After carefully considering all comments to the ANPR and statements made during the First Roundtable discussion, the Commission proposed in the NPRM the Complete Legal Segregation Model as the segregation model for Cleared Swaps Collateral because the Complete Legal Segregation Model provided the best balance between benefits and costs in order to protect market participants and the public. Nonetheless, due in part to the strong opposing views expressed by market participants, the NPRM made clear that the Commission was still considering whether to adopt, in the alternative, the Legal Segregation with Recourse Model, and was continuing to assess the feasibility of an optional approach and the Futures Model.

Commenters to the ANPR generally observed that customers ultimately would bear the costs of implementing whatever segregation model was selected by the Commission. Nonetheless, most (though not all) of the buy-side commenters favored individual protection for Cleared Swaps Customer Collateral. These commenters generally viewed the Complete Legal Segregation Model as the minimum level of protection necessary for Cleared Swaps Customer Collateral. Because it was largely recognized that customers would ultimately bear the costs of implementing the selected segregation model, the Commission believed it appropriate to give weight to the views of market participants who would bear those costs, and found it compelling that most buy-side commenters favored adoption of either the LSOC Model or the Physical Segregation Model. The Commission noted that the Legal Segregation Models and the Physical Segregation Model would provide greater individualized protection to Cleared Swaps Customer Collateral than the Futures Model, and was in accordance with section 4d(f) of the CEA. In addition, the Commission noted that the LSOC Model and the Physical Segregation Model may provide substantial benefits in the form of (i)

[32] All comment letters are available through the Commission's Web site at: *http://www.cftc.gov/LawRegulation/FederalRegister/ProposedRules/2010-29836*.

[33] *See id.*

[34] *See id.*

[35] The terms ''portability,'' ''port,'' and ''porting'' refer to the ability to reliably transfer the swaps (and related collateral) of a non-defaulting customer from an insolvent FCM to a solvent FCM, without the necessity of liquidating and re-establishing the swaps.

[36] *See* ISDA comment letters on ANPR.

[37] *See id.*

[38] *See* Second Roundtable Tr. at 250, l.2 (In response to whether the Complete Legal Segregation Model would impose operational costs over the Futures Model, Ms. Bregasi stated that ''[t]here is no additional cost between LSOC and the futures model;'' Mr. Prager stated that ''[w]e don't see them incurring other than the start-up costs, the one time that everyone will have to incur to set up, the running cost. We don't see any incremental cost;'' and Mr. MacFarlane stated that ''I would agree there are no additional operational costs.''). *See also,* Second Roundtable Tr. at 239, l.8 (Mr. Frankel explaining that operational costs resulting from passing ''the client identity and * * * some other multiplier that explains how much excess there is in the seg account for the client * * * [is] a small build.''); Second Roundtable Tr. at 243, l.22 (Mr. Kahn stating that ''in terms of the cost, the fact is OTC is a little different than futures because there is a tremendous build that everyone is doing in the case of OTC so if we need to build LSOC which in essence we've done in the LCH European model, there is a cost of that but I can't really define what it is. It's relatively small and not material.'').

[39] *See* Second Roundtable Tr. at 255, l.12 (Mr. Frankel arguing that ''Moving to a 99.9 percent confidence of coverage we think will increase margins by about 60 percent [for rates] * * * I think for CDS it could be more than double.''). *See also* Second Roundtable Tr. at 262, l.2 (Mr. Diplas arguing that ''not having the additional pool of funds that are associated with the fellow customers means that we definitely need to actually margin from a CCP perspective, the higher confidence interval. That will differ depending on the asset class we're looking at. Some of them, at least based on the existing pool of trades, it could be manageable like at 60, 70 percent in rates. We'll talk about three to four times the amount that—in credit—and the more we get to instruments with fatter tails the higher the number is going to be. I think that is something that clients need to be cognizant of.'').

[40] *See, e.g.,* Second Roundtable Tr. at 257, l.6 (Mr. MacFarlane stating that ''what's being said, if our transactions had to be margined on an individual basis it would require that we put up 60 to 70 percent more, which says that then the real risk of that transaction is 75 percent more than what we're collateralizing. So in the event of a default, not by us but by another counterparty potentially, they will be under-collateralized relative to what their individual transaction would require, and then that potentially could work its way back to us.'').

[41] *See, e.g.,* Second Roundtable Tr. at 259, l.6 (quoting Mr. Frankel). For a more detailed discussion of cost and benefit considerations, please *see* discussion below in section VII.

Decreased Fellow-Customer Risk, (ii) increased likelihood of portability, (iii) decreased systemic risk, and (iv) positive impact on portfolio margining, and asked for comment as to whether and why commenters favor or oppose adoption of the Futures Model.

In choosing between the Legal Segregation Models and the Physical Segregation Model, the Commission noted that the operational costs for the Physical Segregation Model would be substantially higher than the operational costs for the Legal Segregation Models (whether Complete or with Recourse). With respect to benefits, the Commission believed that the Physical Segregation Model would provide only incremental advantages over the Complete Legal Segregation Model with respect to the mitigation of Fellow-Customer Risk. In addition, the Commission noted that while the Physical Segregation Model does eliminate Investment Risk, (i) the Commission was in the process of further addressing Investment Risk by proposing amendments to regulation 1.25, and (ii) each FCM and DCO already values investments conservatively. Finally, the Commission observed that the Physical Segregation Model would generally enhance portability to the same extent as the Complete Legal Segregation Model, and therefore would have similar effects on systemic risk. In addition, the Commission stated that the Physical Segregation Model and the Complete Legal Segregation Model would likely enhance portfolio margining to the same extent. Therefore, the Commission chose not to propose the Physical Segregation Model in the NPRM.

In choosing between the Complete Legal Segregation Model and the Legal Segregation with Recourse Model, the Commission noted that commenters argued that implementing the former would result in significant Risk Costs,[42] whereas implementing the latter would result in no Risk Costs. In addition, the Commission believes that comments to the ANPR that question the assumptions underlying the upper estimates of Risk Costs for the Complete Legal Segregation Model have raised credible issues regarding the accuracy of those estimates. Nevertheless, the Commission recognized that such assumptions formed an area of divergence between commenters, and therefore asked for additional comment on the Risk Costs for the Complete Legal Segregation Model. The Commission also observed that operational costs for the Complete Legal Segregation Model and the Legal Segregation with Recourse Model were approximately the same. With respect to benefits, the Commission noted that the Complete Legal Segregation Model would (i) Mitigate Fellow-Customer Risk even in extreme FCM defaults, unlike the Legal Segregation with Recourse Model, (ii) enhance portability (and therefore mitigate systemic risk) to a significantly greater extent than the Legal Segregation with Recourse Model, and (iii) have an incremental advantage over the Legal Segregation with Recourse Model with respect to impact on portfolio margining.[43] Consequently, the Commission chose not to propose the Legal Segregation with Recourse Model in the NPRM, but stated that it was still considering this model as an alternative.

F. Clarification of the Application of Financial and Segregation Interpretation No. 10 to Cleared Swaps

In response to the Commission's NPRM, clarification was requested [44] regarding the applicability to the cleared swaps market of the Commission's 2005 Amendment to Financial and Segregation Interpretation No. 10 on the Treatment of Funds Deposited in Safekeeping Accounts (''Segregation Interpretation 10–1'').[45] The commenter noted that ''[u]ntil 2005, the CFTC permitted the use of third-party custodial accounts for futures margin by pension plans and investment companies registered under the 1940 Act * * *. In 1984, the CFTC issued Financial and Segregation Interpretation No. 10 * * *, permitting the use of third party custodial accounts for the holding of customer property subject to certain conditions ensuring that an FCM would have immediate and unfettered access to customer funds.'' [46] However, Segregation Interpretation 10–1 made it clear that, with limited exceptions, FCMs would not be in compliance with the requirements of section 4d(a)(2) of the CEA if they hold customer funds in a third-party custodial account.

The Commission agrees that Segregation Interpretation 10–1 does not apply to Cleared Swaps. Accordingly, and subject to the conditions described below, Cleared Swaps Customer Collateral may be deposited at a bank in a third-party safekeeping account, in lieu of posting such collateral directly to the FCM, without the FCM being deemed in violation of section 4d(f) of the CEA, and FCMs are permitted to allowed Cleared Swaps Customers to elect to have their Cleared Swaps Customer Collateral held in such accounts.

However, if an FCM uses, or allows the use of, a third-party safekeeping account, that FCM must comply with all of the conditions for such accounts set forth in Segregation Interpretation 10 as originally issued in 1984.[47] In addition, as noted in Segregation Interpretation 10, though the use of third-party safekeeping accounts is not prohibited, such collateral constitutes customer property within the meaning of the Bankruptcy Code. As such, positions and collateral held in third-party custodial accounts are subject to the U.S. Bankruptcy Code and applicable provisions in the CEA, which provide for the pro rata share of available customer property.

The commenter also requested that the Commission revise or repeal Segregation Interpretation 10–1 to allow futures and options customers to have their collateral held in third-party safekeeping accounts.[48] However, while the Commission does not believe it would be appropriate to address this request at this time, as it is beyond the scope of this rulemaking, the Commission may address this concern in the future.

The Commission also notes that a number of commenters[49] have proposed alternative arrangements that would provide individual protection for collateral belonging to cleared swaps market participants (and, in some cases, futures customers) that are willing and able to bear the associated costs. However, these proposals raise important risk management and cost externality issues, particularly with respect to ensuring that collateral is promptly available to DCOs in the event of a default, ensuring proper capital treatment for the relevant market participants, and protecting all customers.

The Commission has directed staff to carefully analyze these proposals with the goal of developing proposed rules that provide additional protection for

[42] For a more detailed discussion regarding risk costs, *see* section VII.B.2.b., *infra.*

[43] *See* 33818 FR at 33828.

[44] *See* Committee on Investment of Employee Benefit Assets (''CIEBA'') December 22, 2011 letter (''CIEBA Supplemental'') at 2.

[45] Amendment of Interpretation, 70 FR 24768, May 11, 2005 (Notice) The underlying Financial and Segregation Interpretation No. 10 (''Segregation Interpretation 10'') was issued on May 23, 1984, and can be found at Comm. Fut. L. Rep. (CCH) ¶7120.

[46] CIEBA Supplemental at 4.

[47] These conditions include limitations regarding the titling and location of the third-party safekeeping account, and requirements concerning the FCM's rights to promptly liquidate positions and access collateral.

[48] *See* CIEBA Supplemental at 12

[49] *See generally* CIEBA August 8, 2011 letter (''CIEBA Original'') at 1–5; Salzman at 1–9; CME at 18; State Street at 2–4.

collateral belonging to market participants.[50]

The Commission agrees with the comment that ''swap margin is not meant to enhance the swap dealers' bottom line, but to protect the system against counterparty failure,'' [51] and remains committed to protecting the market and market participants.

II. The Final Rules

In determining the scope and content of the final rules, the Commission has taken into account issues raised by commenters, including those issues with respect to the costs and benefits associated with the proposed segregation model for Cleared Swaps Customer Collateral. The Commission received twenty-eight (28) comment letters on the proposed rules,[52] twenty-five (25) of which addressed the issue of which segregation model the Commission should adopt for Cleared Swaps Customer Collateral. Of these twenty-five (25), the strong weight of the commenters rested in favor of individual protection for Cleared Swaps Customer Collateral, with twenty (20) comment letters supporting implementation of the Complete Legal Segregation Model, the Physical Segregation Model or some combination thereof.[53] Four (4) comment letters supported adoption of the current Futures Model,[54] with one (1) comment letter, from the FIA, showing support for both the Complete Legal Segregation Model and the Futures Model.

After carefully considering all comments, the Commission has selected the Complete Legal Segregation Model as the most appropriate segregation model for Cleared Swaps Customer Collateral under section 4d(f) of the CEA. The Commission believes this model provides the best balance between benefits and costs in order to protect market participants and the public. The Commission has adopted a number of clarifications and corrections suggested in the comment letters. In other cases the final rules are adopted as proposed. The discussion below provides a more detailed analysis of the issues raised by the comment letters.

III. Segregation Model for Cleared Swaps Customer Collateral

In the NPRM, the Commission proposed the Complete Legal Segregation Model but made clear that, because the costs and benefits associated with the Complete Legal Segregation Model were still being evaluated, the Commission was considering whether to adopt the Legal Segregation with Recourse Model as an alternative, and was continuing to assess the feasibility of the Futures Model and a clearinghouse-by-clearinghouse Optional Approach. Below is a summary of the comments the Commission received regarding the alternative segregation models for Cleared Swaps Customer Collateral.

A. Summary of the Comments

1. Complete Legal Segregation Model

As mentioned above, the majority of the comment letters supported adoption of the Complete Legal Segregation Model either outright or as a viable alternative to the Physical Segregation Model, with most arguing that the Complete Legal Segregation Model presents the best balance between costs and adequacy of collateral protections,[55] and several calling it a ''significant improvement over the'' Futures Model.[56] Several commenters also opined that the Complete Legal Segregation Model is supported by the statutory language and purposes of the Dodd-Frank Act.[57]

In addition, many of the comment letters asserted that the Complete Legal Segregation Model largely mitigates Fellow-Customer Risk and enhances the portability of cleared swap positions and associated collateral.[58] One commenter stated that the Complete Legal Segregation Model is ''the most cost effective framework to adequately protect the margin customers post to cleared swap transactions'' because it effectively mitigates Fellow-Customer Risk, avoids the costs associated with establishing the Physical Segregation Model by allowing margin to be held in an omnibus account, and enhances the portability of cleared swap positions and related margin.[59] Another commenter stated that the Complete Legal Segregation Model ''provides the most operationally efficient framework to manage risk on a daily basis or port portfolios especially in periods of stress.'' [60] And yet other commenters argued that there has been little substantiation of the ''increased costs'' that would arise from implementation of the Complete Legal Segregation Model, especially with respect to costs surrounding the reporting requirements associated with maintaining separate legal accounts given that ''other regulatory rulemakings that require similar reporting will likely result in many of these incremental operational costs being incurred regardless of which model is chosen.'' [61]

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[50] The Commission also notes that any market participant may become a clearing member of a DCO, consistent with the DCO's membership eligibility requirements and the CEA and Commission regulations, with all the rights and responsibilities associated therewith.

[51] *See* CIEBA Supplemental at 14.

[52] All comment letters are available through the Commission's Web site at: *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1038*. Comments addressing the proposed rules were received from: APG Algemene Pensioen Groep N.V. and the European Federation Retirement Provision (''APG/EFRP''), American Council of Life Insurers (''ACLI''), Association of Institutional Investors (''AII''), Bank of America, N.A., BlackRock, Inc. (''BlackRock''), Chris Barnard, CME, CIEBA, Federal Home Loan Banks (''FHLB''), Fidelity Management & Research Co. (''Fidelity''), Freddie Mac, Futures Industry Association (''FIA''), IntercontinentalExchange, Inc. (''ICE''), Investment Company Institute (''ICI''), International Swaps and Derivatives Association, Inc. (''ISDA''), LCH.Clearnet Group Limited (''LCH''), Managed Funds Association (''MFA''), Natural Gas Exchange, Inc. (''NGX''), Newedge USA, LLC (''Newedge''), Och-Ziff Capital Management Group (''Och-Ziff''), Jerrold E. Salzman, Securities Industry and Financial Markets Association (''SIFMA''), Tudor Investment Corporation (''Tudor''), and Vanguard. Note, CIEBA, Fidelity and the MFA each submitted two comment letters.

[53] The following commenters support the Complete Legal Segregation Model outright: ACLI, AII, BlackRock, Mr. Barnard, Freddie Mac, ICI, ISDA, LCH, SIFMA, and Vanguard. APG/EFRP, CIEBA, Fidelity, MFA, Tudor and FHLB support implementation of the Physical Segregation Model.

[54] The commenters in favor of adoption of the Futures Model were CME, ICE, Newedge, and Mr. Salzman.

[55] *See* ACLI at 2; AII at 1; BlackRock at 1; Barnard at 2; Fidelity at 2; Freddie Mac at 2; LCH at 1–2; SIFMA at 3; Vanguard at 8.

[56] CIEBA at 1; and FHLB at 1.

[57] *See* BlackRock at 3; Fidelity at 5–6; FIA at 3, n. 10; ICI at 2; Mr. Barnard at 1; and SIFMA at 3, n. 7.

[58] *See, e.g.,* AII at 3 (stating that the Complete Legal Segregation Model effectively eliminates Fellow-Customer Risk, enhances portability of positions and related margin, and largely avoids the costs associated with establishing individually segregated accounts); BlackRock at 2 (arguing that the Complete Legal Segregation Model ''eliminates Fellow-Customer Risk and facilitates 'immediate' portability of customer positions if required''); CIEBA Original at 5 (acknowledging that the Complete Legal Segregation Model could eliminate Fellow-Customer Risk); FHLB at 3 (agreeing that the Complete Legal Segregation Model greatly reduces Fellow-Customer Risk); ICI at 3 (stating that the Complete Legal Segregation Model mitigates Fellow-Customer Risk); ISDA at 1–2 (agreeing that Complete Legal Segregation Model facilitates post-default portability); MFA at 3–4 (stating that the Complete Legal Segregation Model eliminates Fellow-Customer Risk and enhances the portability of customer positions); Vanguard at 4–6 (arguing that the Complete Legal Segregation Model addresses counterparty risk and Fellow-Customer Risk); and SIFMA at 5 (stating that Complete Legal Segregation Model minimizes Fellow-Customer Risk and facilitates the ability of Cleared Swaps Customers to port their positions to a non-defaulting FCM).

[59] AII at 1.

[60] BlackRock at 6.

[61] Fidelity at 6. *See also* LCH at 2–3. The Commission has adopted a gross margining requirement. *See* 76 FR at 69374–76.

Several commenters also argued that, in selecting a segregation model for Cleared Swaps Customer Collateral, the Commission should take into account the differences between the risk profiles of futures and over the counter (''OTC'') swaps.[62]

Furthermore, commenters argued that, unlike the Futures Model, the Complete Legal Segregation Model would not degrade the collateral protections that currently exist in the OTC swaps market.[63] In addition, one commenter indicated that the Complete Legal Segregation Model is ''the model that most closely parallels the protections that [LCH] understand[s] will be required in Europe under the European Commission's proposal for a European Market Infrastructure Regulation (''EMIR'').'' [64]

Commenters who did not support adoption of the Complete Legal Segregation Model largely argued that (1) The costs of implementing the Complete Legal Segregation Model outweigh any of the purported benefits of such model; [65] (2) the Complete Legal Segregation Model would, in the view of the commenter, fail to work operationally or legally,[66] and does not take into account the operational complexities of multi-tiered and multi-DCO clearing; [67] (3) individualized segregation potentially introduces systemic costs because it impedes timely market settlements during periods of market stress; [68] (4) since the Futures Model has served the industry well during times of stress in the futures market, it should be the segregation model for Cleared Swaps Customer Collateral; [69] (5) the Complete Legal Segregation Model introduces moral hazard; [70] or (6) the Complete Legal Segregation Model does not provide enough protection of Cleared Swaps Customer Collateral because there is some residual Fellow-Customer Risk,[71] and it does not protect against fraud-related risks,[72] record-keeping/operational risk, and Investment Risks.[73] Moreover, several commenters disagreed with the Commission's interpretation of the statutory language in the Dodd-Frank Act, and argued that the statutory language cited by the Commission does not indicate Congressional intent for individual protection for Cleared Swaps Customer Collateral.[74]

2. Physical Segregation Model

Comments with respect to the Physical Segregation Model were mixed, with some commenters advocating the adoption of the Physical Segregation Model outright,[75] others advocating for its adoption on an optional basis,[76] and others arguing that the Physical Segregation Model should not be adopted because the increased costs and operational burdens associated with adoption of the Physical Segregation Model outweigh the benefits.[77]

Two commenters requested that the Commission reconsider adoption of the Physical Segregation Model on the basis that (i) Customer collateral should be individually segregated at both the FCM and the DCO to provide the same level of customer collateral protection that currently exists in the OTC swaps market, (ii) none of the other models are sufficient to fully protect customer collateral from recordkeeping/operational, investment and fraud-related risks, (iii) the Physical Segregation Model facilitates porting more than the other models, and (iv) the commenters would be willing to bear any increased costs associated with the adoption of the Physical Segregation Model.[78]

In addition, though several commenters supported the Complete Legal Segregation Model as the best alternative under consideration, these commenters urged the Commission to develop a framework for the adoption of the Physical Segregation Model because (i) The protections offered by the Physical Segregation Model are greater than those offered by the Complete Legal Segregation Model, (ii) the Physical Segregation Model facilitates porting more than the other models, and (iii) the costs assertions resulting from implementing the Physical Segregation Model have either not been substantiated or are costs that the commenters are willing to bear.[79]

Commenters that opposed adoption of the Physical Segregation Model generally did so on the basis that implementation of the model would give rise to substantial increased costs with little increased benefit, as compared with the Complete Legal Segregation Model.[80]

3. Futures Model

As mentioned above, four comment letters supported adoption of the Futures Model, with one commenter supporting adoption of both the Complete Legal Segregation Model and the Futures Model.

CME argued that the Futures Model provides the best balance of costs versus industry risk as a whole and is ''the *only* approach that provides both legal and operational certainty to all parties in the event of an FCM default.'' [81] According to CME, the Complete Legal Segregation Model imperfectly protects customer collateral and thus, ''the Commission [should] not rush [sic] to implement a 'solution' that gives superficial comfort, but may not work either operationally or legally in the event of an actual default.'' [82] CME encouraged the Commission to ''engage in further study, and establish a review process that includes a representative group of interested parties with expertise in the area, in order to evaluate alternative approaches.'' [83] Because the Futures Model has effectively protected customer interests in the futures market, CME recommended that, in the interim, the Commission implement swaps clearing employing the Futures

[62] BlackRock at 2–4; Fidelity at 4; SIFMA at 2; Vanguard at 3–4.

[63] *See* Fidelity at 2–4; Freddie Mac at 1; and LCH at 1. *See also* Tudor at 2 (arguing that the segregation model selected by the Commission should not provide a lesser degree of protection for Cleared Swaps Customer Collateral).

[64] LCH at 1.

[65] *See, e.g.,* ICE at 11.

[66] *See* CME at 5 (stating that ''the framework established by the [Complete Legal Segregation Model] concept and the proposed regulations will be wholly inadequate to achieve the Commission's desired objectives: Namely, in an FCM default, the preservation of non-defaulting cleared swaps customers' collateral and the ability to port their positions and collateral to another FCM.'').

[67] *See, e.g.,* CME at 6–8. *See also* Mr. Salzman at 7 (stating that ''the benefits promised by the proponents of the [Complete Legal Segregation Model] are illusory,'' and arguing that the Commission's authority to adopt, and a bankruptcy court's willingness to respect, such model are questionable).

[68] *See* ICE at 3.

[69] *See, e.g.,* Newedge at 8; and CME at 23.

[70] *See, e.g.,* Newedge at 4–5.

[71] *See, e.g.,* CME at 7.

[72] Fraud-related risks are risks associated to an FCM's fraudulent activity with respect to the cleared swap margin account.

[73] *See, e.g.,* Tudor at 4; CIEBA Original at 1; and FHLB at 3–6 (each advocating for the adoption and implementation, either outright or on an optional basis, of the Physical Segregation Model, though acknowledging that the Complete Legal Segregation Model is preferable to the Futures Model).

[74] *See* CME at 21–22 (arguing that if Congress intended to change the framework for the protection of customer collateral it would have explicitly done so); FIA at 3, n. 10 (agreeing that the complete legal segregation model is permitted by the language of section 4d(f), but arguing that Commission reliance on the differences between sections 4d(a) and 4d(b) are misplaced); and ICE at 5 (arguing that the Commission should not rely on the language in section 4d(f) because there is no legislative history interpreting the statutory language).

[75] FHLB at 1; Tudor at 1–2.

[76] ACLI at 2; CIEBA at 2; MFA at 2; Mr. Salzman at 8.

[77] BlackRock at 6; Vanguard at 6.

[78] *See, e.g.,* ICI at 2 and 9.

[79] *See, e.g.,* ACLI at 2; BlackRock at 5.

[80] *See, e.g.,* AII at 2; ICE at 9; FIA at 6; SIFMA at 4 n. 9; and Vanguard at 6.

[81] CME at 23.

[82] *Id.* at 2.

[83] *Id.*

Model.[84] Moreover, CME suggests that the Commission support a new industry effort to, at some point in the future, develop and implement a guaranteed clearing participant relationship that would allow a client, on an optional basis, to have a direct relationship with a DCO, with the client's positions guaranteed by a guaranteeing clearing member of the DCO and the client's Cleared Swaps Customer Collateral held in an outside account by a third party custodian.

Mr. Salzman supported adoption of the Futures Model with optional full physical segregation of Cleared Swaps Customer Collateral.

ICE advocated adoption of the Futures Model, arguing against fundamentally changing a clearinghouse's existing operations, and positing that customers that wish to avoid Fellow-Customer Risk might explore becoming direct clearing participants once they ''fully appreciate[e] the substantial costs * * * associated with implementing and maintaining [the Complete Legal Segregation Model].'' [85] However, ICE also proposed, as a middle ground, a model that appears to be based on the Futures Model but that provides some protection against Fellow-Customer Risk. ICE explained that its ICE Clear Credit affiliate had adopted a model under which, ''customers are exposed to 'fellow-customer risk' only with respect to the customer's pro-rata share of the net customer-related margin requirement of its clearing member.'' [86] ICE Clear Credit considers ''the difference between a customer's gross margin requirement and the customer's net margin requirement'' to be ''Excess Margin.'' [87] ICE stated that a customer's Excess Margin is segregated and held by ICE Clear Credit on a custodial basis and is therefore not exposed to Fellow-Customer Risk. ICE argued that this model would provide some protection against Fellow-Customer Risk but would be more cost-effective than the proposed Complete Legal Segregation Model. In addition, ICE stated that individual segregation should be offered to customers at the option of a DCO, and also advanced the notion that the Commission should ''carefully consider and weigh the costs and benefits of potential customer-related OTC clearing models by asset class * * *.'' [88]

Newedge, which submitted a comment on behalf of itself, DRW Trading Group and nine ''Customers,'' supported adoption of the Futures Model on the basis that the Futures Model ''is the model most consistent with the general purposes of Title VII of Dodd-Frank as well as least likely to add moral hazard to the industry.'' [89] Newedge argued that Title VII is about the reduction of systemic risk through the mutualization of risk, and that by mutualizing credit risk the Futures Model promotes the purpose of the Dodd-Frank Act because such mutualization encourages the creation and maintenance of well-capitalized FCMs. In addition, Newedge argued that the loss of customer off-sets would increase moral hazard because it would encourage FCMs to maintain less excess capital. Furthermore, Newedge suggested that, as an alternative to the adoption of the Complete Legal Segregation Model, the Commission should require greater FCM disclosure to allow customers to better assess Fellow-Customer Risk.[90]

Comment letters supporting individual protection for customer collateral over the Futures Model generally did so on the basis that the Futures Model (i) does not protect Cleared Swaps Customer Collateral from Fellow-Customer Risk, Investment Risk, operational risk or fraud-related risk, and (ii) does not facilitate the portability of customer positions and associated collateral in the event of an FCM's default.[91]

BlackRock argued that not only does the Futures Model fail to address the core risk differences between futures and OTC swaps, but because of the buffer created by the mutualized risk provided by the customer collateral, the Futures Model may result in less stringent selection and oversight of customers by FCMs.[92] In addition, BlackRock argued that the moral hazard argument advocated by proponents of the Futures Model presumes that futures customers have access to information that allows them to make informed decisions regarding their fellow customers. However, BlackRock stated that access to such information is currently lacking, there are no requirements or incentives for a DCO or FCM to inform a customer when a fellow customer is in a stress or potential default situation and, as a result, customers are forced to rely on DCOs and regulators for protection.[93]

Freddie Mac argued that by allowing DCOs to access the collateral of non-defaulting customers to cover the losses of defaulting customers, the Futures Model provides a ''subsidy to DCOs, FCMs and their riskiest customers at the expense of customers that present less risk[, and] this non-transparent shifting of risk would create moral hazard and inefficient credit decisions.'' [94]

Similarly, FHLB argued that DCOs and FCMs should bear all Fellow-Customer Risk as they are in a superior position to conduct analyses of other cleared swap customers.[95] In addition, FHLB indicated that if the Commission adopts the Futures Model as the segregation model for Cleared Swaps Customer Collateral, it would be anomalous for market participants to have the initial margin they post for Cleared Swaps face greater risk than the initial margin they post for uncleared swaps.[96] Moreover, the Futures Model would impede portability because the collateral posted for Cleared Swaps ''could be tied up in the omnibus account indefinitely.'' [97]

SIFMA stated that avoiding Fellow-Customer Risk presented by the Futures Model should be the most important

[84] *See id.* at 23.

[85] ICE at 3.

[86] *Id.*

[87] *Id.* at 3, n. 3.

[88] ICE at 1–2.

[89] Newedge at 2.

[90] Newedge argues that such disclosure be provided in ''plain English'' on an annual basis, and include the following data:

The FCM's total equity, regulatory capital and net worth;

The dollar value of the FCM's proprietary margin requirements as a percentage of its segregated and secured customer margin requirements;

What number of the FCM's customers comprise an agreed significant percentage of its customer segregated funds;

The aggregate notional value of non-hedged, principal OTC transactions into which the FCM has entered;

The amount, generic source and purpose of any unsecured and uncommitted short-term funding the FCM is using;

The aggregate amount of financing the FCM provides for customer transactions involving illiquid financial products for which it is difficult to obtain timely and accurate prices;

The percentage of customer ''bad debts'' the FCM had during the prior year compared to its year-end segregated and secured customer funds; and

A summary of the FCM's current risk practices, controls and procedures.

Newedge at 7. *See also* FHLB at 7, n. 14 (encouraging the Commission, in response to a question in the NPRM regarding additional disclosure of FCM financial information, to make such information publicly available on a real time basis); and MFA at 5 (arguing that ''if the Commission mandates the disclosure by FCMs of certain financial information, customers will be in a better position than they are today to evaluate the financial strength of their FCM.'').

[91] *See, e.g.,* AII at 1–2; BlackRock at 2, 7–8; CIEBA Original at 5; FHLB at 6–7; Fidelity at 3; Freddie Mac at 1–2; SIFMA at 5; and Vanguard at 4–5.

[92] Blackrock at 8.

[93] *Id.*

[94] Freddie Mac at 2.

[95] FHLB at 6–7.

[96] FHLB at 7. FHLB also states that market participants have a statutory right to segregate initial margin they post for uncleared swaps with an independent custodian. *Id.* at 6.

[97] FHLB at 7.

objective in selecting a segregation model for Cleared Swaps Customer Collateral and, as such, none of the members of the Asset Management Group supports the Futures Model.[98] In addition, SIFMA argued that the Futures Model does not facilitate portability to the same extent as the Complete Legal Segregation Model and, therefore, is not as effective at reducing systemic risk.[99]

Vanguard asserted that the Futures Model exposes market participants to Fellow-Customer Risk and because this risk is not a factor in the OTC swaps markets, the magnitude of such risk is not something that a customer could ever assess, especially given the ''complete lack of transparency with respect to [an] FCM's other customers and their trading positions.'' [100] Furthermore, Vanguard stated that mutualization of customer losses effectively allows ''less sophisticated analysis of the risk presented by individual customers and their trading portfolios as such individual risk can ultimately be covered by the overall pool of margin posted by all of the FCM's customers,'' with the result that ''riskier customers (and trading portfolios) [are] likely to be under margined and safer clients (and trading portfolios) [are] likely to be over margined relative to their actual level of risk presented to the system.'' [101] In sum, Vanguard stated that, given the differences between the swaps and futures markets, the Futures Model could expose a Cleared Swaps Customer to significantly greater and potentially unlimited risk.[102]

4. Legal Segregation With Recourse Model

None of the comment letters received by the Commission appeared to support the Legal Segregation with Recourse Model. Commenters that discussed this model generally stated that the Commission should not adopt the Legal Segregation with Recourse Model because either (1) by failing to mitigate Fellow-Customer Risk, it is substantially inferior to the Complete Legal Segregation Model [103] or (2) it suffers from the same shortcomings as the Complete Legal Segregation Model since it is costly to implement and fails to mitigate investment and operational risks.[104]

5. Optional Approach

Though some commenters expressed a desire to have optional full physical segregation of Cleared Swaps Customer Collateral, none of the commenters supported the Optional Approach outlined by the Commission.[105] Under this approach, each DCO would choose the level of customer collateral protection it chooses to offer.[106] The Commission noted that this approach might be reconciled with section 766(h) of the Bankruptcy Code by permitting DCOs to require that FCMs establish separate legal entities, each of which is limited to clearing at DCOs that use only the same customer collateral protection model.[107]

One commenter stated that it is ''likely that the benefits of creating such a regulatory structure would be illusory,'' [108] while another argued that ''[o]ptionality will produce complexity and expense that might be tolerable when the cleared swaps market is well established, but that will be burdensome to a developing market.'' [109] In addition, one commenter expressed concern regarding the appropriateness of the Commission adopting a segregation regime ''that provides protection to customers based on their ability and willingness to pay.'' [110]

B. Discussion of the Comments

After careful analysis of the issues raised by the comment letters with respect to the selection of a segregation model for Cleared Swaps Customer Collateral, the Commission is adopting the Complete Legal Segregation Model. As described above, the majority of market participants supported adoption of either the Complete Legal Segregation Model or the Physical Segregation Model. In addition, while certain technical corrections/clarifications were requested, none of the commenters identified material new information with respect to costs or benefits associated with the adoption of the Complete Legal Segregation Model or any other model under consideration. Some commenters did, however, re-iterate their view that their business model depended upon receiving stronger protection for their Cleared Swaps Customer Collateral than what exists under the Futures Model. These commenters are accustomed to paying for the higher costs implicit in separate accounting in the current bilateral market.

On the other hand, CME, ICE, and Mr. Salzman identified a number of issues with the Complete Legal Segregation Model, including a number of limitations on the protection it provides to customers. They did not, however, provide reason to reject the conclusion that the Complete Legal Segregation Model provides substantially greater protection against Fellow-Customer Risk than the Futures Model.

CME notes [111] that a portion of the Cleared Swaps Customer Collateral will be held at the FCM, not the DCO, and that this collateral will not be protected by Complete Legal Segregation in the event that an FCM becomes insolvent. This proposition is true [112] but is of little or no relevance to the comparison of Complete Legal Segregation with the Futures Model favored by these commenters. Complete Legal Segregation is intended to protect against Fellow-Customer Risk. As discussed in the NPRM and above,[113] Fellow-Customer Risk is the risk that the collateral of one customer will be used to compensate a DCO for market losses resulting from the swaps of another customer.[114] In other words, Fellow-Customer Risk arises in connection with collateral maintained in an FCM's customer account posted with a DCO because, under the Futures Model, the DCO is potentially entitled to take all of the collateral in this account to cover losses created by the swaps of any customer. However, Cleared Swaps Customer Collateral held at the FCM (or at a location other than at the DCO, such as a bank) is not accessible to the DCO. Thus, such

[98] SIFMA at 3.

[99] *See* SIFMA at 4–6.

[100] Vanguard at 5.

[101] *Id.*

[102] *Id.*

[103] *See* BlackRock at 7; FHLB at 7; Freddie Mac at 2; FIA at 6–7; MFA at 2; and Vanguard at 4.

[104] *See, e.g.,* CME at 16.

[105] *See, e.g.,* MFA at 3 n. 11 (stating ''[t]he Commission should allow market participants to elect the Physical Segregation Model but only to the extent that it is compatible with the Complete Legal Segregation Model. We are not advocating that the Commission adopt the ''Optional Approach'' set forth in the Proposing Release, because we believe that approach would be very difficult to implement.''); ACLI at 2 (supporting the option to negotiate and select the Physical Segregation Model); BlackRock at 5 (stating that BlackRock would support an optional approach if the Commission believes such an approach would be prudent, but cautions that optionality may present implementation challenges and result in portability delays); CIEBA Original at 1 (promoting optional individual segregation of Cleared Swaps Customer Collateral); CME at 17–20 (arguing that the Commission should support efforts to establish programs that would permit individuals to physically segregate the collateral associated with their Cleared Swaps positions on an optional basis); and Tudor at 6 (arguing that if the Commission does not adopt the Physical Segregation Model, the Commission should ''require DCOs to offer various segregation models to their cleared swaps customers, including full physical segregation.'').

[106] *See* 76 FR at 33825.

[107] *See* 76 FR at 33829.

[108] CME at 20.

[109] ISDA at 2.

[110] FIA at 6.

[111] CME at 6.

[112] *See supra* note 13.

[113] *See supra* at Section 1.B.6.

[114] 76 FR at 33821 n. 21.

collateral is not subject to Fellow-Customer Risk.[115] While Cleared Swaps Customer Collateral in the customer account at the FCM is available to meet customers' swaps-related obligations to the FCM, the FCM is prohibited by statute from using one customer's Cleared Swaps Customer Collateral as margin or security for another customer's swaps.[116]

To be sure, Cleared Swaps Customer Collateral is subject to operational risk—the risk that, due to fraud, incompetence, or other mishap, customer funds that are required to be segregated are lost. Operational risk, however, is common to all of the segregation models for Cleared Swaps Customer Collateral, including the Physical Segregation Model.[117] Collateral at the FCM is also subject to a modicum of Investment Risk. But Commission regulation 1.25, upon which regulation 22.2(e)(1) is based, is designed to ensure that customer segregated funds are invested in a manner that minimizes their exposure to credit, liquidity, and market risks both to preserve their availability to customers and DCOs and to enable investments to be quickly converted to cash at a predictable value in order to avoid systemic risk. Towards these ends, regulation 1.25 establishes a general prudential standard by requiring that all permitted investments be ''consistent with the objectives of preserving principal and maintaining liquidity.'' [118]

CME also provides a detailed description of how, due to the ''the extended operational timeline for derivatives clearing and the netting of payments,'' a customer could default on a payment on Tuesday, but the DCO would, due to a countervailing gain by a different customer or customers of the same clearing member, not see such a default until after Wednesday's clearing cycle (payments for which may not be due until Thursday morning).[119] This analysis elides the fact that, pursuant to the calculations required under regulation 22.2(f), an FCM with a customer who incurred a loss in excess of that customer's Cleared Swaps Customer Collateral would, unless and until that customer posted additional collateral, be required to have covered such loss with the FCM's own capital deposited into the Cleared Swaps Customer Account. If, at any moment, such customer loss was not covered by the FCM's own capital, then the FCM would be in violation of its segregation requirements. Pursuant to Commission regulation 1.12(h),

> [w]henever a person registered as a futures commission merchant knows or should know that the total amount of its funds on deposit in segregated accounts on behalf of customers * * * is less than the total amount of such funds required by the Act and the Commission's rules to be on deposit in segregated * * * accounts on behalf of such customers, the registrant must report such deficiency immediately by telephonic notice * * * to the registrant's designated self-regulatory organization and the principal office of the Commission in Washington, DC * * *.[120]

Thus, an FCM whose customer suffers such a loss which is not covered by the FCM's own capital on deposit in the Cleared Swaps Customer Account will certainly know of such deficiency no later than noon the next day (Wednesday in CME's example), when it will be required, pursuant to regulation 22.2(g), to compute its segregated funds requirements and the amount of segregated funds it has on deposit to meet such requirements. Moreover, the Commission believes that an FCM carrying a customer account that suffers losses in excess of that firm's ability to cover ''should know'' of such losses by the end of that trading day (Tuesday in CME's example).

Such notice will permit the Commission to act to notify the relevant clearing organizations and to ensure that prompt action is taken to either bring capital in to enable the FCM to meet its segregated funds requirements or to otherwise act to minimize customer losses.

CME implies that a successful porting of customer accounts requires information that is ''100% accurate,'' [121] and that an FCM is unlikely to meet that standard each day. CME also notes that there may be portfolio changes in customer accounts on the day of default.[122] Moreover, CME notes that a defaulting FCM may have systems that fail.[123] CME notes that in the case of Lehman Brothers,[124] there was a ''rushed, confused, uncertain and near-panic atmosphere,'' as described in the report of the SIPA Trustee.[125]

Recent experience demonstrates, however, that transfers can occur despite less than perfect information. For example, in the case of the bankruptcy of Lehman Brothers the commodity customer accounts were effectively transferred to Barclays over the weekend of September 20–21, 2008, immediately following the commencement of the liquidation of the firm,[126] and any discrepancies were resolved, despite the difficulties described. Indeed, the key issue will be to identify the collateral attributable to the defaulting customer, as distinguished from the collateral attributable to all other customers, as discrepancies between non-defaulting customers can be resolved either as transferred accounts are reconciled, or through the claims process.

Thus, while CME is correct in stating that ''the risk of ultimate financial loss to customers due to a fellow-customer default is reduced but certainly not eliminated under CLSM,'' [127] the Commission concludes, based on its experience with its rules in general and with FCM bankruptcies in particular, that the probability and probable amount of such loss is far less than CME implies.

Moreover, the swift portability of collateral associated with customer positions in the event of an FCM's default remains problematic under the Futures Model where there is a customer default. Furthermore, many of the imperfections of the Complete Legal Segregation Model and the residual Fellow-Customer Risk associated therewith that were highlighted by CME arise from the ''last-day risk'' that results from the fact that information about each customer's positions is only provided once each day. However, the NPRM made clear in relevant portions of sections 22.11 and 22.12, and the Commission reiterates herein, that information must be provided and calculations must be made *at least* once a business day. In other words, many of the imperfections discussed by CME are not inherent to the Complete Legal Segregation Model. Rather, each DCO is free to make improvements to that

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[115] As explained above, FCMs typically maintain two separate Cleared Swaps Customer Accounts. One is maintained at the DCO and contains collateral required by the DCO to secure current swaps positions. The second is maintained by the FCM itself, typically at a bank, and contains collateral provided to the FCM by customers but not currently posted to the account at the DCO.

[116] Section 4d(f)(2)(B) of the CEA, 7 U.S.C. 6d(f)(2)(B).

[117] Moreover, as noted above (*see supra* section I.D.2), while the LSOC Model does not protect against operational risk any more than the Futures Model, it is superior in that it enhances the ability to transfer collateral after an insolvency caused by operational risk.

[118] *See* regulation 1.25(b).

[119] CME at 9.

[120] Commission regulation 1.12(h) emphasis added.

[121] CME at 13.

[122] *Id.* at 12.

[123] *Id.* at 14.

[124] The Lehman Brothers FCM was placed into a Securities Investor Protection Corporation liquidation on Friday, September 19, 2008.

[125] CME at 14 (citation omitted).

[126] This transfer was authorized in the hours immediately following the commencement of Lehman's liquidation, and was implemented in the hours immediately thereafter.

[127] CME at 15.

minimum regulatory standard if the DCO finds such improvements to be technologically feasible and economically justifiable. For example, a DCO could require its clearing members to identify the customer associated with each swap as it is cleared, and the DCO could use this information to associate gains and losses more tightly with each customer, thereby minimizing ''last-day risk.'' The NPRM and this final rule simply set a minimum threshold for daily tracking.

With respect to costs associated with evaluating the credit risks of individual customers, CME noted that it calculates, ''at the end of each trading day * * * for each FCM's cleared swaps customer account * * * the net position of *each* customer in the account [and] the net margin requirement for *each* customer in the account.'' [128] Thus, based on CME's description of its current clearing practices, it would appear that CME already undertakes an individualized evaluation of the sufficiency of the collateral posted by each customer of an FCM.[129] In addition, as CME notes, ''FCMs are subject to compliance audits that are conducted for each FCM by the DCO serving as its ''designated self-regulatory organization.'' [130] It would therefore seem that at least some of the costs associated with evaluating the credit risk of individual customers are already being incurred by DCOs.

With respect to ICE's proposal, the Commission notes that it would provide less Fellow-Customer Risk protection than the Complete Legal Segregation Model. The fact that swap customers seem to overwhelmingly favor at least as much Fellow-Customer Risk protection as afforded to them under the Complete Legal Segregation Model, notwithstanding the potential costs, weighs in favor of the Complete Legal Segregation Model rather than ICE's proposal.

With respect to Newedge's suggestion for increased disclosure of FCM information, additional disclosure is often beneficial, and the Commission will consider additional disclosure requirements as a means of enhancing protection for collateral belonging to market participants. However, because of confidentiality concerns, any feasible enhanced disclosure is insufficient for quantifying risk exposure to Fellow-Customer Risk and, thus, insufficient for providing Cleared Swaps Customers with the ability to effectively manage such exposure.[131] Moreover, even if it were practical to provide Cleared Swaps Customers with information sufficient to assess Fellow-Customer Risk, that task is better left to the DCO since (1) DCOs have a concentrated ability to ensure adequate risk mitigation, and (2) having each Cleared Swaps Customer effectively risk-manage each FCM would likely entail duplication with resulting cost.

Thus, after careful analysis of the comments, the Commission believes that the Complete Legal Segregation Model provides the most appropriate framework for the protection of Cleared Swaps Customer Collateral at this time. None of the segregation models the Commission considered provides perfect protection for Cleared Swaps Customer Collateral, and the degree of imperfection of any of the models is influenced by ''the facts and circumstances'' of an FCM default. However, as CME notes, the Complete Legal Segregation Model ''would, on its face, lead to greater protection of cleared swaps customer collateral against Fellow-Customer Risk than the Futures Model'' [132] and is ''more likely to facilitate portability of cleared swaps customer positions than the Futures Model, in the event of an FCM default in its cleared swaps customer account * * *.'' [133] Furthermore, the Complete Legal Segregation Model provides the best balance between benefits and costs in order to protect market participants and the public.

Finally, while the Complete Legal Segregation Model is a critical step in the efforts to protect customers and their collateral, as noted above, the Commission is actively considering seeking notice and comment on a proposal to allow individual protection of client assets. In addition, the Commission is directing staff to look into the possibility of adopting the Complete Legal Segregation Model for the futures market. The Commission remains committed to protecting market participants.

IV. Section by Section Analysis: Regulation Part 22

A. Regulation 22.1: Definitions

Proposed regulation 22.1 established definitions for, *inter alia,* the following terms: ''cleared swap,'' ''cleared swaps customer,'' ''cleared swaps customer account,'' ''cleared swaps customer collateral,'' ''cleared swaps proprietary account,'' ''clearing member,'' [134] ''collecting futures commission merchant,'' ''commingle,'' ''customer,'' ''depositing futures commission merchant,'' ''permitted depository,'' [135] and ''segregate.''

1. ''Segregate'' and ''Commingle''

Regulation 22.1 proposed definitions for the terms ''segregate'' and ''commingle'' that are intended to codify the common meaning of such terms under the part 1 of the Commission's regulations (the ''Part 1 Provisions''). Pursuant to the proposal, to ''segregate'' two or more items means to keep them in separate accounts and to avoid combining them in the same transfer between accounts. In contrast, ''commingle'' means to hold two or more items in the same account, or to combine such items in a transfer between accounts. The Commission did not receive comments on these

[128] *Id.* at 9 (emphasis supplied).

[129] In addition, during the Second Roundtable, Ms. Taylor of CME stated that with respect to risk management, CME is ''set up to do it in the over-the-counter business at the individual customer level.'' *See* Second Roundtable Tr. at168, l. 10.

[130] *See also* Second Roundtable Tr. at 171, l. 18 (Ms. Taylor stating that ''on a day-to-day basis we don't see the collateral that's in the account of a customer at an FCM, but we do have transparency into the efficacy of the practices of holding margin and holding it in segregated accounts through the financial supervision and audit functions so that there is ongoing monitoring of that * * *'').

[131] *See* Second Roundtable at p. 183, 1.12–p. 184, 1.10 (In reference to the disclosure of additional FCM information, Mr. Kahn stating ''Barclays does agree and would be willing to show our risk-management procedures and policies, and we do talk to our buy side clients about that * * * [but] if Barclays is providing clearing services for any of the individual firms on the other side of the table, we do not say that, nor would we ever give out any position level information. It is very important to us that in whatever paradigm it's set up and how you evaluate from a risk-management standpoint that the buy side and their trades that they've put on that we are serving remains confidential and does not leak to the market in any side.''); and Second Roundtable at p. 185, 1.6 (Ms. Taylor stating that ''when we know when people clear, that's very confidential information and I'm very sympathetic to the fear about fellow customer risk, but I'm also very sympathetic to the fact that none of you would want your information disclosed so that there is a balance on the other side * * *''). *See also* In re Stotler and Co., 144 B.R. 385, 393 (Bankr.N.D.Ill. 1992) (''[T]he legislative history of *11 U.S.C. 766* emphasizes that the risk of a broker's bankruptcy is not to be borne by the customer * * *.'' Individual customers ''face a formidable task in researching the relative solvency, reputation, and success of competing FCMs.'').

[132] CME at 16.

[133] *Id.*

[134] Under the Commission's proposal, the term ''clearing member'' means ''any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization.''

[135] The Commission proposed to define ''permitted depository'' as a depository that is a bank located in the United States, a trust company located in the United States, a Collecting Futures Commission Merchant registered with the Commission (but only with respect to a Depositing Futures Commission Merchant providing Cleared Swaps Customer Collateral), or a derivatives clearing organization registered with the Commission. In addition, the FCM or the DCO must hold a written acknowledgment letter from the depository as required by proposed regulation 22.5.

proposed definitions and is, therefore, adopting them as proposed.

2. ''Cleared Swap''

Regulation 22.1 proposed a definition of the term ''Cleared Swap'' that (i) excludes, for purposes of Part 22 only, cleared swaps (and related collateral) that, pursuant either to a Commission rule, regulation, or order (including an order under section 4d(a) of the CEA) or to a DCO rule approved in accordance with regulation 39.15(b)(2),[136] are commingled with futures contracts (and related collateral) in a customer account established for the futures contracts, but (ii) includes, for purposes of Part 22 only, futures contracts or foreign futures contracts (and, in each case, related collateral) that, pursuant to either a Commission rule, regulation, or order (including an order under section 4d(f) of the CEA) or to a DCO rule approved in accordance with regulation 39.15(b)(2),[137] are commingled with cleared swaps (and related collateral) in a customer account established for the cleared swaps. The Commission did not receive comments on the proposed definition of ''Cleared Swap'' and is adopting it as proposed with one change. The Commission finalized regulation 39.15 on October 18, 2011.[138] That final regulation requires a DCO seeking to commingle Cleared Swaps (and related collateral) with futures contracts (and related collateral) in a futures account to petition for a Commission order under section 4d(a) of the CEA. Thus, the final definition of ''Cleared Swap'' in this rulemaking removes the reference to DCO rule approval procedures relevant to such commingling.

3. ''Cleared Swaps Customer'' and ''Customer''

Regulation 22.1 proposed definitions of ''Cleared Swaps Customer'' and ''Customer.'' The Commission is adopting the definitions of ''Cleared Swaps Customer'' and ''Customer'' essentially as proposed, except that a technical amendment is made to the definition of Cleared Swaps Customer to clarify that a clearing member of a DCO is not a Cleared Swaps Customer with respect to Cleared Swaps cleared on that DCO.

4. ''Cleared Swaps Customer Collateral''

Proposed regulation 22.1 defined Cleared Swaps Customer Collateral to include (i) money, securities, or other property that an FCM or a DCO receives, from, for, or on behalf of a Cleared Swaps Customer that is intended to or does margin, guarantee, or secure a Cleared Swap [139] or, if the Cleared Swap is in the form or nature of an option, constitutes the settlement value of such option and (ii) ''accruals,'' which are the money, securities, or other property that an FCM or DCO receives, either directly or indirectly, as incident to or resulting from a Cleared Swap that the FCM intermediates for a Cleared Swaps Customer. The proposed definition explicitly included a Cleared Swap in the form or nature of an option as Cleared Swaps Customer Collateral, but did not explicitly include option premiums as Cleared Swaps Customer Collateral. The proposed definition also explicitly included in ''accruals'' the money, securities, or other property that a DCO may receive relating to the Cleared Swap that an FCM intermediates for a Cleared Swap Customer.

FIA suggested that the Commission confirm that the term Cleared Swaps Customer Collateral includes all assets provided by a Cleared Swaps Customer, including any sums required by an FCM to margin a Cleared Swap, even if that sum is in excess of the amount required by the relevant DCO, as well as collateral ''voluntarily'' deposited by a Cleared Swaps Customer in a Cleared Swaps Customer Account.[140] In response, the Commission is clarifying that the definition of Cleared Swaps Customer Collateral includes any sums required by an FCM that is intended to, or does, margin a Cleared Swap as well as collateral ''voluntarily'' deposited by, or on behalf of, a Cleared Swaps Customer in a Cleared Swaps Customer Account. Moreover, in response to this comment, the Commission is adding a new section 22.13(c), which states that collateral posted by a Cleared Swaps Customer in excess of the amount required by a DCO (the ''excess collateral'') may be transmitted by the Cleared Swaps Customer's FCM to the DCO if, but only if, (i) the FCM is permitted to do so by DCO rule and (ii) the DCO provides a mechanism by which the FCM can identify the amount of such excess collateral attributable to each Cleared Swaps Customer, and such mechanism is employed effectively to accomplish that goal.

5. ''Cleared Swaps Customer Account'' and ''Cleared Swaps Proprietary Account''

As proposed, regulation 22.1 defined a ''Cleared Swaps Customer Account'' as (i) an account that an FCM maintains at a Permitted Depository for the Cleared Swaps (and related collateral) of its Cleared Swaps Customers, or (ii) an account that a DCO maintains at a Permitted Depository for collateral related to Cleared Swaps that the FCM members intermediate for their Cleared Swaps Customers. Regulation 22.1 also proposed a definition for ''Cleared Swaps Proprietary Account'' that is substantially similar to regulation 1.3, which defines ''Proprietary Account'' for futures contracts. The Commission requested comment on whether the proviso in paragraph (b)(8), which states that ''an account owned by any shareholder or member of a cooperative association of producers, within the meaning of section 6a of the Act, which association is registered as an FCM and carries such account on its records, shall be deemed to be a Cleared Swaps Customer Account and not a Cleared Swaps Proprietary Account of such association, unless the shareholder or member is an officer, director, or manager of the association,'' remains relevant, particularly with respect to Cleared Swaps. The Commission did not receive comments on these proposed definitions and is, therefore, adopting the definitions of ''Cleared Swaps Customer Account'' and ''Cleared Swaps Proprietary Account'' as proposed.

6. ''Clearing Member''

Regulation 22.1 proposed a definition of ''Clearing Member.'' The Commission did not receive comments on this proposed definition. Therefore, the Commission is adopting the definition of ''Clearing Member'' as proposed.

7. ''Collecting Futures Commission Merchant'' and ''Depositing Futures Commission Merchant''

Proposed regulation 22.1 defined a ''Collecting Futures Commission Merchant'' or ''Collecting FCM'' as one that carries Cleared Swaps on behalf of another FCM and the Cleared Swaps Customers of that other FCM and, as part of doing so, collects Cleared Swaps

[136] Section 4d(a) of the CEA, 7 U.S.C. 6d(a).

[137] Section 4d(f) of the CEA, 7 U.S.C. 6d(f).

[138] 76 FR 69441.

[139] Proposed regulation 22.1 provides that ''Cleared Swaps Customer Collateral'' includes collateral that an FCM or a DCO receives from, for, or on behalf of a Cleared Swaps Customer that either (i) is actually margining, guaranteeing, or securing a Cleared Swap or (ii) is intended to margin, guarantee, or secure a Cleared Swap. This provision is a clarification of ''customer funds'' as defined in regulation 1.3, which includes ''all money, securities, and property received by a futures commission merchant or by a clearing organization from, for, or on behalf of, customers or option customers * * * to margin, guarantee, or secure futures contracts.''

[140] *See* FIA at 7–8.

Customer Collateral.[141] In contrast, a ''Depositing Futures Commission Merchant'' or ''Depositing FCM'' was defined as one that carries Cleared Swaps on behalf of its Cleared Swaps Customers through a Collecting FCM, and, as part of doing so, deposits Cleared Swaps Customer Collateral with such Collecting FCM. The Commission did not receive comments on these proposed definitions and is adopting the definitions of ''Collecting Futures Commission Merchant'' and ''Depositing Futures Commission Merchant'' as proposed.

8. ''Permitted Depository''

Regulation 22.1 proposed a definition of ''Permitted Depository.'' The Commission did not receive comments on this proposed definition and is, therefore, adopting the definition of ''Permitted Depository'' as proposed.

B. Regulation 22.2—Futures Commission Merchants: Treatment of Cleared Swaps Customer Collateral

Regulation 22.2 proposed requirements for an FCM's treatment of Cleared Swaps Customer Collateral, as well as the associated Cleared Swaps.

1. In General

Proposed regulation 22.2(a) required an FCM to treat and deal with the Cleared Swaps of Cleared Swaps Customers, as well as associated Cleared Swaps Customer Collateral, as belonging to the Cleared Swaps Customers. The Commission did not receive any comments on regulation 22.2(a) and is therefore adopting regulation 22.2(a) as proposed.

2. Location of Collateral

Proposed regulation 22.2(b) required that an FCM segregate all Cleared Swaps Customer Collateral that it receives. Additionally, proposed regulation 22.2(b) required that an FCM adopt one of two methods to hold segregated Cleared Swaps Customer Collateral, which parallel either implicit assumptions or explicit provisions of regulation 1.20(a).

The Commission did not receive any comments on regulation 22.2(b) and is therefore adopting regulation 22.2(b) as proposed.

3. Commingling

Proposed regulation 22.2(c) permitted an FCM to commingle the Cleared Swaps Customer Collateral of multiple Cleared Swaps Customers, while prohibiting the FCM from commingling Cleared Swaps Customer Collateral with:

- FCM property, except as permitted under proposed regulation 22.2(e) (as discussed below); or
- ''customer funds'' (as regulation 1.3 defines such term) for futures contracts or the ''foreign futures or foreign options secured amount'' (as regulation 1.3 defines such term), except as permitted by a Commission rule, regulation or order (or a derivatives clearing organization rule approved pursuant to regulation 39.15(b)(2)).[142]

The Commission did not receive any comments on regulation 22.2(c) and is therefore adopting regulation 22.2(c) as proposed.

4. Limitations on Use

Proposed regulation 22.2(d) prohibited an FCM from (i) using, or permitting the use of, the Cleared Swaps Customer Collateral of one Cleared Swaps Customer to purchase, margin, or settle the Cleared Swaps, or any other transaction, of a person other than the Cleared Swaps Customer; (ii) using Cleared Swaps Customer Collateral to margin, guarantee, or secure the non-Cleared Swap contracts (*e.g.,* futures or foreign futures contracts) of the entity constituting the Cleared Swaps Customer; [143] (iii) imposing, or permitting the imposition of, a lien on Cleared Swaps Customer Collateral, including on any FCM residual financial interest therein; and (iv) claiming that any of the following constitutes Cleared Swaps Customer Collateral:

- Money invested in the securities, memberships, or obligations of any DCO, designated contract market (''DCM''), swap execution facility (''SEF''), or swap data repository (''SDR''); or
- Money, securities, or other property that any DCO holds and may use for a purpose other than to margin, guarantee, secure, transfer, adjust or settle the obligations incurred by the FCM on behalf of its Cleared Swaps Customers.

ISDA argued that these proposed rules could prevent or inhibit portfolio margining, even where netting itself is legally enforceable, and stated that the Commission should ''acknowledge in rule that *excess* collateral may be managed and applied so as to facilitate portfolio based-margining (including to the benefit of uncleared swaps).'' [144] FIA requested that the Commission confirm that regulation 22.2(d) will permit FCMs to take security interests in their Cleared Swaps Customers' Cleared Swaps Customer Accounts in support of other positions held by such customers at the FCM, or for other entities (including affiliates of FCMs) to take such security interests in support of financing the Cleared Swaps Customer's margin obligations. MFA asked the Commission to ensure that Cleared Swaps Customers are able to grant liens on Cleared Swaps Customer Collateral (subordinate to a DCO's rights) to be able to continue entering into cross-product, and other multilateral, netting agreements. MFA also argued that the Commission should either (i) modify proposed regulation 22.2(d)(2) to limit application of the rule to ''prohibiting an FCM's creditors from obtaining a lien on [Cleared Swaps Customer Collateral]'' or (ii) clarify in the final rule release or in interpretive guidance that the language of proposed regulation 22.2(d) is not intended to limit a Cleared Swaps Customer's ability ''to grant liens on entitlements to cleared swap positions and related collateral as contemplated by UCC 9–102(14), 102(15), 9–102(16), 9–102(17), 9–102(49);'' provided such lien does not impair a DCO's first priority interests to such collateral.[145]

As explained above, ''excess'' collateral refers to the collateral that a Cleared Swaps Customer deposits with an FCM or DCO that is more than the amount required by the FCM or DCO to margin such customer's Cleared Swaps portfolio. Since the ''excess'' collateral belongs to the Cleared Swaps Customer, and is not required by the FCM or DCO, it is entirely proper for the Cleared Swaps Customer to manage the collateral. The Cleared Swaps Customer may manage ''excess'' collateral by giving instructions to the FCM to,

[141] For the avoidance of doubt, an FCM does not become a Collecting FCM simply by intermediating the proprietary transactions of another FCM. An FCM only becomes a Collecting FCM by intermediating, on behalf of another FCM, Cleared Swaps belonging to Cleared Swaps Customers (and the relevant collateral).

[142] As the discussion on the proposed definition of ''Cleared Swaps'' highlights, if the Commission adopts a rule or regulation or issues an order pursuant to section 4d(a) of the CEA, or if the Commission approves DCO rules pursuant to regulation 39.15(b)(2) permitting such commingling, the Commission would apply the corresponding provisions and Part 190 to the Cleared Swap (and related collateral) as if the swap constituted a futures contract (and related collateral).

In contrast, if the Commission adopts a rule or regulation or issues an order pursuant to section 4d(f) of the CEA, or if the Commission approves DCO rules pursuant to regulation 39.15(b)(2) permitting such commingling, the proposed definition of ''Cleared Swap'' would operate to apply Part 22 and Part 190 to (i) the futures contract (and related collateral) or (ii) the foreign futures contract (and related collateral) as if such contracts constituted Cleared Swaps (and related collateral).

[143] As mentioned above, an entity may simultaneously transact (i) Futures contracts, (ii) foreign futures contracts, (iii) Cleared Swaps, and (iv) uncleared swaps. Such entity would constitute a Cleared Swaps Customer only with respect to its Cleared Swaps.

[144] ISDA at 4–5.

[145] *See* MFA at 5–6.

among other things, transfer such collateral from one account (*e.g.,* a Cleared Swaps Customer Account) to another account (*e.g.,* a futures account).[146] However, it is less clear how collateral that is not ''excess''—namely, collateral margining cleared positions (for which the counterparty is the DCO, through the FCM)—can also be used to margin uncleared positions (for which the counterparty is, by definition, other than a DCO). Accordingly, while the Commission supports the benefits of portfolio margining, the Commission does not believe it would be prudent to permit collateral margining cleared positions to simultaneously be used to margin uncleared positions.

In addition, the Commission clarifies that an FCM may not, under any circumstances, grant a lien to any person (other than to a DCO) on its Cleared Swaps Customer Account, or on the FCM's residual interest in its Cleared Swaps Customer Account. On the other hand, a Cleared Swaps Customer may grant a lien on the Cleared Swaps Customer's individual cleared swaps account (an ''FCM customer account'') that is held and maintained at the Cleared Swaps Customer's FCM.[147] The Commission notes that by permitting a Cleared Swaps Customer to grant a lien on that Cleared Swaps Customer's FCM customer account, an FCM is *not* permitting the grant of a lien on Cleared Swaps Customer Collateral. Furthermore, the Commission confirms that regulation 22.2(d) permits (i) FCMs to take a security interest in a Cleared Swaps Customer's FCM customer account in support of other positions held by such customer at the FCM, and (ii) other entities (including affiliates of FCMs) to take a security interest in a Cleared Swaps Customer's FCM customer account in support of financing the Cleared Swaps Customer's margin obligations.

5. Exceptions

Regulation 22.2(e) proposed certain exceptions to the abovementioned requirements and limitations. Specifically, proposed regulation 22.2(e)(1) allowed an FCM to invest Cleared Swaps Customer Collateral in accordance with regulation 1.25, as such regulation may be amended from time to time. Proposed regulation 22.2(e)(2) permitted an FCM to withdraw Cleared Swaps Customer Collateral for such purposes as meeting margin calls at a DCO or a Collecting FCM, or to meet charges lawfully accruing in connection with a cleared swap, such as brokerage or storage charges. Proposed regulation 22.2(e)(3) permitted an FCM (i) to place its own property in an FCM Physical Location or (ii) to deposit its own property in a Cleared Swaps Customer Account.[148] Finally, as proposed, regulation 22.2(e)(4) clarified that, if an FCM places or deposits its own property in an FCM Physical Location or a Cleared Swaps Customer Account, as applicable, then that property becomes Cleared Swaps Customer Collateral. However, an FCM would be permitted to retain a residual financial interest in property in excess of that necessary.

SIFMA and Vanguard argued that the Commission should require an FCM to identify when it has used its own capital to meet a Cleared Swap Customer's margin obligation and whether such capital can be used by a DCO to cure a defaulting Cleared Swap Customer's margin obligations.[149] To address this comment, the Commission is amending regulation 22.2(e)(3) to distinguish between (a) cases where an FCM uses its own capital to cure a Cleared Swaps Customer's undermargined or deficit account and (b) cases where an FCM uses its own capital to create a ''buffer'' in the Cleared Swaps Customer Account. The Commission notes that in case (a), the FCM has, in essence, provided an advance to the Cleared Swaps Customer, and the DCO should be able to use such collateral to meet a default by that Cleared Swaps Customer to the same extent as if that Cleared Swaps Customer provided the collateral. However, in case (b) the FCM has provided collateral that does not belong to any specific Cleared Swaps Customer, and thus there is no reason to restrict the use of that collateral to any specific Cleared Swaps Customer. The Commission also notes that, to the extent the DCO permits the FCM to post ''excess'' collateral, the DCO must, through its own rules, require that the FCM separately account for the separately identified ''buffer collateral'' (which originated from the FCM's own capital) and the collateral attributed (at the DCO) to the FCM's Cleared Swaps Customers (which belongs to those customers).

ISDA noted that the use of ''such'' in regulation 22.2(e)(4)(ii) is ambiguous and could imply that an FCM has a residual interest only in the particular account (*i.e.,* cash versus securities) into which it has deposited property. ISDA argued that this might cause unintended consequences if the customer deposits a security and the FCM, faced with a need to advance variation margin on behalf such customer in cash, does not liquidate the security but rather deposits cash secured by that security. ISDA suggested that the Commission clarify the language by making clear that the FCM has a residual interest in all property in Cleared Swaps Customer Accounts in excess of that required by the regulation 22.2(f)(4) segregation requirement.[150] In response, the Commission clarifies that an FCM has a residual interest in all property in Cleared Swaps Customer Accounts in excess of that required by the regulation 22.2(f)(4) segregation requirements.

e. Requirements As to Amount

As proposed, regulation 22.2(f) set forth an explicit calculation for the amount of Cleared Swaps Customer Collateral that an FCM must maintain in segregation, which did not materially differ in the Form 1–FR–FCM from the calculation for ''customer funds'' of futures customers. First, proposed regulation 22.2(f) defined ''account'' to reference an FCM's books and records pertaining to the Cleared Swaps Customer Collateral of a particular Cleared Swaps Customer. Second, proposed regulation 22.2(f) required an FCM to reflect in its account for each Cleared Swaps Customer the market value of any Cleared Swaps Collateral that it receives from such customer, as adjusted for:

- Any uses that proposed regulation 22.2(d) permits;
- Any accruals or losses on investments permitted by proposed regulation 22.2(e) that, pursuant to the applicable FCM customer agreement,

[146] Regulation Part 22 creates the presumption that all money, securities, and other property deposited in a Cleared Swaps Customer Account constitutes Cleared Swaps Customer Collateral. Therefore, in order for a Cleared Swaps Customer to use ''excess'' collateral to margin, *e.g.,* uncleared swaps, such customer must direct the transfer of such collateral from the Cleared Swaps Customer Account.

[147] An FCM customer account is an account maintained by the FCM on behalf of a specific Cleared Swaps Customer that holds assets provided by that Cleared Swaps Customer, or other assets of equivalent value, that are not currently posted with the DCO to support swaps positions cleared by the FCM on behalf of such Cleared Swaps Customer. Typically, an FCM customer account constitutes a notation in the books and records of the FCM, and not a separate account at a depository. For a more detailed discussion of FCM customer accounts, *see* the discussion in section I.B.5.

[148] Regulation 22.2(e)(3) proposes to permit an FCM to deposit only those securities that are unencumbered and are of the types specified in regulation 1.25. Such proposal accords with regulation 1.23. *See* regulation 1.23. The Commission notes, however, that this proposal does not, and is not meant to, require a DCO to accept all of the types of securities or other property specified in regulation 1.25.

[149] *See* SIFMA at 10; and Vanguard at 7.

[150] *See* ISDA at 8–9.

are creditable or chargeable to such Cleared Swaps Customer;

• Any charges lawfully accruing to the Cleared Swaps Customer, including any commission, brokerage fee, interest, tax, or storage fee; and

• Any appropriately authorized distribution or transfer of the Cleared Swaps Collateral.

Third, proposed regulation 22.2(f) categorized accounts of Cleared Swaps Customers as having credit or debit balances. Accounts where the market value of Cleared Swaps Customer Collateral is positive after adjustments have credit balances. Conversely, accounts where the market value of Cleared Swaps Customer Collateral is negative after adjustments have debit balances. Fourth, proposed regulation 22.2(f) required an FCM to maintain in segregation, in its FCM Physical Location and/or its Cleared Swaps Customer Accounts at Permitted Depositories, an amount equal to the sum of any credit balances that Cleared Swaps Customers have in their accounts, excluding from such sum any debit balances that Cleared Swaps Customers have in their accounts (the ''Collateral Requirement''). Finally, regulation 22.2(f) proposed an exception to the exclusion of debit balances. Specifically, to the extent that a Cleared Swaps Customer deposited ''readily marketable securities'' with the FCM to secure a debit balance in its account, then the FCM must include such balance in the Collateral Requirement. ''Readily marketable'' was defined as having a ''ready market'' as such latter term is defined in rule 15c3–1(c)(11) of the Securities and Exchange Commission (§ 241.15c3–1(c)(11) of this title). Proposed regulation 22.2(f) deemed a debit balance ''secured'' only if the FCM maintains a security interest in the ''readily marketable securities,'' and holds a written authorization to liquidate such securities in its discretion. To determine the amount of the debit balance that the FCM must include in the Collateral Requirement, proposed regulation 22.2(f) required the FCM (i) to determine the market value of such securities, and (ii) to reduce such market value by applicable percentage deductions (*i.e.,* ''securities haircuts'') as set forth in rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission. The FCM would include in the Collateral Requirement that portion of the debit balance, not exceeding 100 percent, which is secured by such reduced market value. The Commission requested comment on the Collateral Requirement proposed in regulation 22.2(f). Specifically, the Commission requested comment on whether the explicit calculation of such Collateral Requirement materially differs from the implicit calculation in the Part 1 Provisions for segregated ''customer funds'' of futures customers.

ISDA expressed concern that the definition of Cleared Swaps Customer Collateral may sweep in investment returns, which may be inconsistent with regulation 22.10 that allows DCOs and FCMs to keep investment returns unless otherwise agreed and regulation 22.2(f)(2)(ii) that refers to investment returns creditable to a customer by agreement.[151] FIA asked the Commission to clarify whether the definition of Cleared Swaps Customer Collateral included the interest earned on investments of customer funds, which FCMs have traditionally been permitted to retain.[152] In addition, FIA stated that because an FCM is required to include accruals or losses on investments of customer collateral under proposed regulation 22.3, the provision appears to state that customers can agree to assume all or a portion of the losses incurred in connection with the investment of customer collateral. FIA ''does not believe that a customer may agree to share in losses incurred in connection with investments under Rule 1.25.'' [153] The Commission confirms that investment returns are includable in Cleared Swaps Customer Collateral only to the extent creditable pursuant to the customer agreement. As such, the Commission is deleting the words ''or losses'' and ''or chargeable,'' from regulation § 22.2(f)(2)(ii). To be clear, Cleared Swaps Customers are not responsible for losses on investments made pursuant to, and in accordance with, regulation 1.25.

AII requested that the Commission ''ensure that swaps customers may direct the investments in which initial margin is invested, as is done today through bilateral agreements with dealer counterparties.'' [154] While Cleared Swaps Customers in the Cleared Swaps Customer Account Class would share in Investment Risk, the Commission notes that these comments are beyond the limited scope of these regulations, and it will consider how to address them outside of this rulemaking. However, nothing contained herein would limit an FCM from adopting as a policy—and commit itself by contract with its customers—to further limit its investments of customer funds for all customers of one or more account classes (*i.e.,* futures, foreign futures, Cleared Swaps).[155]

FIA argued that the calculation requirements set forth in regulation 22.2 pose an excessive burden because an FCM cannot offset negative and positive balances in different currencies. Thus, if a Cleared Swaps Customer has a positive balance in USD but a negative balance in Euro, the FCM would need to deposit its own capital to cover the negative balance in Euro without respect to the Cleared Swaps Customer's positive balance in USD. FIA noted that though proposed regulation 22.2(g) mirrors existing regulation 1.32(a), there is an important difference in circumstances that warrants different treatment of the two cases: while relatively few futures contracts traded on U.S. DCMs are denominated in a foreign currency, a significant number of Cleared Swaps are expected to be denominated in foreign currencies.[156] In response, the Commission recognizes the concerns expressed by the FIA. However, efforts to provide that an FCM may, in making its segregation calculations, include a debit balance to the extent such balance is secured by funds in other currencies, subject to appropriate haircuts, are beyond the limited scope of this rulemaking. The Commission will, therefore, consider how to address these issues outside of this rulemaking.

f. Segregated Account; Daily Computation and Record

Proposed regulation 22.2(g) required an FCM to compute, as of the close of

[151] ISDA at 6–7.

[152] *See* FIA at 7–8 & nn. 25–30.

[153] The FIA cited to a number of cases where courts have stated that ''Congress intended that futures commission merchants be entitled to any and all interest on their investment of customer margin funds.'' *See id.* at n. 29 (citing *Marchese* v. *Shearson Hayden Stone, Inc.* 644 F.Supp. 1381 (C.D. Cal. 1986), aff'd, 822 F.2d 876 (9th Cir. 1987); *Craig* v. *Refco,* 624 F.Supp 944 (N.D. Ill. 1983), aff'd. 816 F.2d 347 (7th Cir. 1987) (confirming that ''the FCM, not the customer, bears the risk of any decline in the value of investments purchased with customer funds''); and *Bibbo* v. *Dean Witter Reynolds, Inc.,* 151 F.3d 559 (6th Cir. 1998). *See also id.* at 8–9 & n. 31.

[154] AII at 4. The term ''initial margin'' is defined in regulation 1.3(ccc) and means ''money, securities, or property posted by a party to a futures, option, or swap as performance bond to cover potential future exposures arising from changes in the market value of the position.'' The term ''variation margin'' is defined in regulation 1.3(fff) and means ''a payment made by a party to a futures, option, or swap to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.''

[155] Because of pro rata distribution, limiting the investments of customer funds attributable to individual customers would be insufficient to protect such customers from Investment Risk attributable to the investment of customer funds attributable to other customers within the same account class.

[156] *See* FIA at 10–11.

each business day, on a currency-by-currency basis:

- The aggregate market value of the Cleared Swaps Customer Collateral in all FCM Physical Locations and all Cleared Swaps Customer Accounts at Permitted Depositories (the ''Collateral Value'');
- The Collateral Requirement; and
- The amount of the residual financial interest that the FCM holds in such Cleared Swaps Customer Collateral (*i.e.,* the difference between the Collateral Value and the Collateral Requirement).

Proposed regulation 22.2(g) also required the FCM to complete the abovementioned computation prior to noon[157] on the next business day, and to keep all computations, together with supporting data, in accordance with regulation 1.31.

The Commission did not receive any comments on regulation 22.2(g) and is therefore adopting regulation 22.2(g) as proposed.

C. Regulation 22.3—Derivatives Clearing Organizations: Treatment of Cleared Swaps Customer Collateral

Regulation 22.3 proposed requirements for DCO treatment of Cleared Swaps Customer Collateral from FCMs, as well as the associated Cleared Swaps. Specifically, regulation 22.3(a) required a DCO to treat Cleared Swaps Customer Collateral deposited by an FCM as belonging to the Cleared Swaps Customers of that FCM and not other persons. Moreover, regulation 22.3(b) required DCOs to segregate all Cleared Swaps Customer Collateral either with itself or a Permitted Depository. Proposed regulation 22.3(c) allowed a DCO to commingle the Cleared Swaps Customer Collateral that it receives from multiple FCMs on behalf of their Cleared Swaps Customers, while prohibiting the DCO from commingling Cleared Swaps Customer Collateral with (i) The money, securities, or other property belonging to the DCO, (ii) the money, securities, or other property belonging to any FCM, or (iii) other categories of funds that it receives from an FCM on behalf of Customers, including ''customer funds'' (as regulation 1.3 defines such term) for futures contracts or the ''foreign futures or foreign options secured amount'' (as regulation 1.3 defines such term), except as permitted by a Commission rule, regulation or order (or by a derivatives clearing organization rule approved pursuant to regulation 39.15(b)(2)).[158]

Regulations 22.3(d) and (e), on the other hand, proposed certain exceptions to the abovementioned requirements and limitations. Regulation 22.3(d) as proposed (i) allowed a DCO to place money, securities, or other property belonging to an FCM in a DCO Physical Location, or deposit such money, securities, or other property in the relevant Cleared Swaps Customer Account, pursuant to an instruction from the FCM, and (ii) to permit FCM withdrawals of money, securities, or other property from a DCO Physical Location or Cleared Swaps Customer Account. Proposed regulation 22.3(d) is being deleted consistent with the changes to regulation 22.2(e)(3), which require delineation between cases where an FCM posts collateral on behalf of a particular customer and cases where an FCM posts collateral on behalf of its customer account in general. Proposed regulation 22.3(e) (now, regulation 22.3(d)) allowed a DCO to invest Cleared Swaps Customer Collateral in accordance with regulation 1.25, as such regulation may be amended from time to time.

The Commission requested comment on what, if any, changes to proposed regulation 22.3 may be appropriate to accommodate the possibility that a depository registered with either domestic or foreign banking regulators may seek to become a DCO, and that such depository may seek to hold Cleared Swaps Customer Collateral, as well as other forms of customer property. Specifically, the Commission requested comment on (i) whether a DCO that is also a registered depository should be permitted to hold both tangible and intangible forms of Cleared Swaps Customer Collateral from FCMs itself, (ii) the challenges that a DCO holding tangible and intangible forms of Cleared Swaps Customer Collateral pose to the protection (including effective segregation) of Cleared Swaps Customer Collateral (as well as other forms of customer property), and (iii) how any challenges identified in (ii) might be addressed.

ISDA stated that the definition of Cleared Swaps Customer Collateral does not distinguish between initial and variation margin. Both FIA and ISDA expressed concerns that, if variation margin is considered as collateral, regulations 22.3(a) and 22.3(b) would prevent a DCO from taking Cleared Swaps Customer Collateral received from one FCM as variation margin ''and transferring it to an FCM whose customers are on the opposite side of the relevant trades.'' [159] FIA asked the Commission to confirm that a DCO may pass variation margin to the receiving party ''if such variation is characterized as collateral and not as a settlement payment *by the parties to the swap.''* [160] Similarly, ICE requested clarification that a DCO that has received ''variation or mark-to-market margin (as opposed to initial margin)'' may be used to settle variation for offsetting swaps. ICE argues that without an amendment permitting DCOs to treat ''variation or mark-to-market'' margin as a pass-through, ''clearinghouses could effectively be prohibited from clearing much of the OTC swaps market as it transacts today.'' [161] The Commission is adopting regulation 22.3 as proposed. The Commission recognizes the concerns expressed by commenters and confirms that regulation 22.3 is intended to permit DCOs to use variation margin collected from Cleared Swaps Customers to pay variation margin to, among others, Cleared Swaps Customers.

ISDA also observed that a variation margin payment ''may be considered as a settlement payment—a realized profit/loss—as in the case of listed futures; or as collateralizing current exposure, a payment representing unrealized profit/loss, as in the case of bilateral (uncleared) swap contracts.'' [162] ISDA argued that Cleared Swaps Customers would be subject to a ''mark-to-market'' tax regime, paying ordinary income on swap returns, if a DCO were to treat as a contract settlement, a variation margin payment made with respect to a Cleared Swap.[163] Accordingly, ISDA noted that recording daily mark-to-market income on swaps would poorly match the periodic realized coupon income on the bonds hedged by such swaps.[164] Similarly, FIA noted that it has ''been advised that, because cleared swaps are not subject to section 1256 of the Internal Revenue Code, the characterization of such payments as settlement payments may have tax consequences that may impair the ability of certain financial end-users * * * to enter into cleared swaps transactions.'' [165] ISDA suggested that Congress did not intend to change the tax treatment of swaps, because section 1601 of the Dodd-Frank Act explicitly exempts Cleared Swaps from being treated as ''section 1256 contracts.'' [166] As such, ISDA requested that the

[157] ''Noon'' refers to noon in the time zone where the FCM's principal office is located.

[158] *See* 76 FR at 69390–92.

[159] ISDA at 5. *See* FIA at 9.

[160] FIA at 9 (emphasis supplied).

[161] ICE at 10.

[162] ISDA at 5.

[163] *Id.*

[164] *Id.* at 6.

[165] FIA at 9, n. 33.

[166] ISDA at 6.

Commission clarify that DCOs can treat variation margin as collateral rather than settlement payments.[167] These comments are beyond the limited scope of these regulations and outside the scope of the Commission's authority. The Commission does not take any view on the proper treatment of variation margin associated with swaps for tax purposes. Rather, the Commission believes that the Internal Revenue Service is the regulatory body best equipped to address the identified taxation issue.

D. Regulation 22.4—Futures Commission Merchants and Derivatives Clearing Organizations: Permitted Depositories

Proposed regulation 22.4 listed depositories permitted to hold Cleared Swaps Customer Collateral (the ''Permitted Depositories''),[168] and noted that an FCM could serve as a Permitted Depository, but only if it is a Collecting FCM carrying the Cleared Swaps (and related Cleared Swaps Customer Collateral) of a Depositing FCM. The Commission sought public comment regarding the appropriateness of allowing an FCM to serve as a Permitted Depository only if the FCM is a ''Collecting FCM.'' The Commission did not receive any comments in response thereto or on regulation 22.4 generally. The Commission is, therefore, adopting regulation 22.4 as proposed.

E. Regulation 22.5—Futures Commission Merchants and Derivatives Clearing Organizations: Written Acknowledgement

As proposed, regulation 22.5 required a DCO or FCM to obtain written acknowledgement letters from depositories (including, by implication, depositories located outside the United States) before opening a Cleared Swaps Customer Account.[169] Proposed regulation 22.5 also set forth substantive requirements for such acknowledgement letter. The Commission requested comment on the appropriateness of the following: (i) the addition of regulation 1.20 (as the Commission may choose to amend such regulation) in proposed regulation 22.5, and (ii) the adaptation of any form letter that the Commission may choose to promulgate under regulation 1.20 to accommodate Cleared Swaps Customer Collateral under regulation 22.5.

ISDA stated that an acknowledgement letter from a foreign depository ''may be difficult to get and of little purpose, if obtained'' because the letter would not alter the fact that the foreign depository would be subject to local bankruptcy jurisdiction.[170] The Commission is adopting regulation 22.5 as proposed. The Commission notes that under regulation 1.49(d)(1) depositories in the futures market must provide the depositing FCM or DCO with the appropriate written acknowledgements required under regulations 1.20 and 1.26. The requirements set forth in regulation 22.5 parallel the requirements set forth under regulations 1.20 and 1.26. The Commission has no reason to believe that written acknowledgements from foreign depositories would be any more difficult to obtain in the swaps market than they would be in the futures market. Moreover, the written acknowledgment is intended to clearly establish the commercial expectations of the parties before a bankruptcy or insolvency event. In addition, the written acknowledgements could aid a bankruptcy judge's or trustee's allocation of assets to the extent a bankruptcy court or other insolvency regime finds the commercial expectations of the parties to be helpful information.

F. Regulation 22.6—Futures Commission Merchants and Derivatives Clearing Organizations: Naming of Cleared Swaps Customer Accounts

Proposed regulation 22.6 required an FCM or DCO to ensure that the name of each Cleared Swaps Customer Account that it maintains with a Permitted Depository (i) clearly identifies the account as a ''Cleared Swaps Customer Account,'' and (ii) clearly indicates that the collateral therein is ''Cleared Swaps Customer Collateral'' subject to segregation in accordance with section 4d(f) of the CEA and Part 22. The Commission did not receive any comments on this regulation and is, therefore, adopting regulation 22.6 as proposed.

G. Regulation 22.7—Permitted Depositories: Treatment of Cleared Swaps Customer Collateral

As proposed, under regulation 22.7 a Permitted Depository is (i) required to treat all funds in a Cleared Swaps Customer Account as Cleared Swaps Customer Collateral and (ii) prohibited from holding, disposing of, or using any Cleared Swaps Customer Collateral as belonging to any person other than the Cleared Swaps Customers of the FCM maintaining such Cleared Swaps Customer Account or the Cleared Swaps Customers of the FCMs for which the DCO maintains such Cleared Swaps Customer Account. The Commission did not receive any comments on this proposed rule and is adopting regulation 22.7 as proposed.

H. Regulation 22.8—Situs of Cleared Swaps Customer Accounts

1. Proposed Requirements

Proposed regulation 22.8 required (i) each FCM to designate the United States as the site (*i.e.,* the legal situs) of the FCM Physical Location and the ''account'' (as regulation 22.2(f)(1) defines such term) that the FCM maintains for each Cleared Swaps Customer, and (ii) each DCO to designate the United States as the site (*i.e.,* the legal situs) of the DCO Physical Location and the Cleared Swaps Customer Account that the DCO maintains on its books and records for the Cleared Swaps Customers of each FCM. The Commission sought comment on whether, as proposed, regulation 22.8 ensured that Cleared Swaps Customer Collateral be treated in accordance with the U.S. Bankruptcy Code, to the extent possible, and if it did not achieve this purpose, what alternatives the Commission should consider to achieve such purpose. Additionally, the Commission requested comment on the benefits and costs of proposed regulation 22.8, as well as any alternatives.

NGX states that the requirement of U.S. situs for a customer account may increase legal uncertainty with respect to the insolvency regime that would apply to a bankruptcy, and such uncertainty may slow down resolution of a clearing participant's default and bankruptcy. Moreover, NGX argues that ''it is unclear how the U.S. account situs requirement will interact with the choice of law provision'' [171] of a non-U.S. DCO that chooses to apply its home country insolvency regime. In light of this uncertainty, NGX recommends that the Commission adopt the approach it proposed for foreign non-U.S. clearinghouses seeking DCO registration; namely, that the DCO registration application include a ''memorandum of local law analyzing

[167] *Id.*

[168] As proposed, for a DCO or an FCM, a Permitted Depository must (subject to regulation 22.9) be: (i) A bank located in the United States; (ii) a trust company located in the United States; or (iii) a DCO.

[169] The function of a written acknowledgment letter is to ensure and provide evidence that a potential Permitted Depository is aware that (i) The FCM or DCO is opening a Cleared Swaps Customer Account, (ii) the funds deposited in such account constitute Cleared Swaps Customer Collateral, and (iii) such Cleared Swaps Customer Collateral is subject to the requirements of section 4d(f) of the CEA and Part 22 (when finalized).

[170] ISDA at 8.

[171] NGX at 4.

insolvency issues in the [relevant] foreign jurisdiction * * * and describing how the applicant has addressed any conflict of law issues, which jurisdiction's law is intended to apply to each aspect of the applicant's clearing house's operations, and the enforceability of the choice of law in the relevant jurisdictions.'' [172] However, NGX requested that the Commission provide greater guidance regarding the operation of the proposed rule if it opts to retain the account situs requirements, specifically making clear that ''a DCO choice of law rule should be able to include both choice of forum as well as the substantive law to be applied'' with respect to a clearinghouse's insolvency and the remedies available to a clearinghouse in the event of a clearing member's default or insolvency.[173]

The Commission notes that, in the event of an FCM's bankruptcy, the legal situs provision is intended to make clear that the insolvency regime that will apply to the customers of the FCM is the U.S. insolvency regime embodied in Subchapter IV of Chapter 7 of the U.S. Bankruptcy Code and Part 190 of the Commission's regulations.[174] While a DCO is free to make the choice that local law applies to all other aspects of a DCO's relationships with its members, the Commission has historically required, and intends to continue requiring, that customers of FCMs in bankruptcy be treated in accordance with U.S. bankruptcy law.

I. Regulation 22.9—Denomination of Cleared Swaps Customer Collateral and Location of Depositories

Proposed regulation 22.9 applies regulation 1.49 to Cleared Swaps Customer Collateral. Regulation 1.49 sets forth rules determining the permitted denominations of customer funds (*i.e.,* permitted currencies and amounts in each currency), permitted locations of customer funds (*i.e.,* permitted countries and amounts in each country), and qualifications that entities outside of the United States must meet to become Permitted Depositories (*e.g.,* minimum regulatory capital). Specifically, regulation 1.49(b)(1)(iii) permits an FCM's obligations to a customer to be denominated in ''a currency in which funds have accrued to the customer as a result of trading conducted on a designated contract market or registered derivatives transaction execution facility,'' while regulation 1.49(d)(3) requires depositories that are located outside the United States to be (i) A bank or trust company that meets certain financial requirements, (ii) an FCM, or (iii) a DCO. In addition, regulation 22.9 proposed to allow an FCM to serve as a Permitted Depository only if the FCM was a Collecting FCM carrying the Cleared Swaps, and associated Cleared Swaps Customer Collateral, for the Cleared Swaps Customers of a Depositing FCM.

ISDA stated that regulation 1.49(b)(1)(iii) should be amended to reflect the wider scope of execution methods available for Cleared Swaps.[175] In response, the Commission is amending regulation 22.9 to allow the FCM's obligations to a Cleared Swaps Customer to be denominated in the currency in which funds have accrued to the Cleared Swaps Customer as a result of a Cleared Swap carried through such FCM, to the extent of such accruals. However, the Commission notes that it cannot amend regulation 1.49(b)(1)(iii) at this time because such an amendment was not part of the NPRM.

ISDA also requested that the Commission make plain that central securities depositories are acceptable depositories.[176] Similarly, FIA argued that Euroclear, a central securities depository for Euro-denominated securities, should be permitted to act as a depository under Commission regulations.[177] The Commission notes that although the notion of a central securities depository as an acceptable depository for securities has considerable intuitive appeal, CEA § 4d(f)(3)(A)(i) limits acceptable depositories for commingled funds to ''any bank or trust company or * * * a derivatives clearing organization.'' [178] Because these comments are beyond the limited scope of these regulations, the Commission will consider how to address them outside of this rulemaking.

Finally, FHLB argued that ''customer collateral should only be held in banks or trust companies located in the United States.'' [179] The Commission does not believe it would be appropriate to address this comment at this time, as it is beyond the scope of this rulemaking.

J. Regulation 22.10—Application of Other Regulatory Provisions

Proposed regulation 22.10 applies 1.27 (Record of investments),[180] 1.28 (Appraisal of obligations purchased with customer funds),[181] 1.29 (Increment or interest resulting from investment of customer funds),[182] and 1.30 (Loans by futures commission merchants; treatment of proceeds) [183] to Cleared Swaps Customers and Cleared Swaps Customer Collateral.

While several commenters cited regulation 22.10, they did so in the context of discussion of other regulations. Because the Commission did not receive any comments regarding the substance of regulation 22.10, it is adopting regulation 22.10 as proposed.

K. Regulation 22.11—Information To Be Provided Regarding Customers and Their Cleared Swaps

Proposed regulation 22.11 required that (i) each Depositing FCM provide to its Collecting FCM and (ii) each FCM member provide to its DCO, in each case, information sufficient to identify Cleared Swaps Customers on a one-time basis, and information sufficient to identify the portfolio of rights and obligations belonging to such customers with respect to their Cleared Swaps ''at least once each business day.'' If a Depositing FCM or FCM member also serves as a Collecting FCM, then it must

[172] *Id.* at 5 (citing to the ''Risk Management Requirements for Derivative Clearing Organizations,'' 76 FR. 3698, 3742, Jan. 20, 2011).

[173] *Id.* at 4–5.

[174] As discussed in the NPRM, the Commission does not intend for regulation 22.8 to affect the actual location in which an FCM or DCO may keep Cleared Swaps Customer Collateral. Though the legal situs of an ''account'' (as regulation 22.2(f)(1) defines the term) and a Cleared Swaps Customer Account must be in the United States, the Commission recognizes that Cleared Swaps Customer Collateral may, in actuality, be kept outside the United States in certain circumstances. However, the Commission notes that regulation 22.8 does not override other Commission regulations regarding the location of customer funds. Specifically, regulation 22.9, which applies regulation 1.49 to Cleared Swaps, requires, among other things, FCMs and DCOs to hold, in a segregated account on behalf of Cleared Swaps Customers, sufficient United States dollars *in the United States* to meet all United States dollar obligations.

[175] ISDA at 8.

[176] *Id.*

[177] *See* FIA at 11.

[178] Section 4d(f)(3)(A)(ii) of the CEA permits customer property to be used to margin a cleared swap with a member of a DCO, *i.e.,* a collecting FCM. However, the Commission notes that a foreign bank that meets the requirements of regulation 1.49(d)(3)(i) is a good depository, and such a foreign bank may itself hold foreign securities in an account at a foreign central securities depository.

[179] FHLB at 9.

[180] Regulation 1.27 requires FCMs and DCOs investing customer funds to maintain specified records concerning such investments.

[181] Regulation 1.28 requires FCMs investing customer funds to record and report such investment at no greater than market value.

[182] Regulation 1.29 permits FCMs and DCOs investing customer funds to receive and retain any increment or interest thereon.

[183] Regulation 1.30 permits FCMs to loan their own funds to customers on a secured basis, and to repledge or sell such security pursuant to agreement with such customers. However, regulation 1.30 does make clear that the proceeds of such loans, when used to purchase, margin, guarantee, or secure futures contracts, shall be treated as customer funds.

provide the specified information with respect to each individual Cleared Swaps Customer for which it acts (on behalf of a Depositing FCM) as a Collecting FCM. As proposed, regulation 22.11 also held the DCO responsible for taking appropriate steps to confirm that the information that it receives is accurate and complete, and ensure that the information is being produced on a timely basis. However, because the DCO may not have a direct relationship with, *e.g.,* a Depositing FCM, the regulation required the DCO to take ''appropriate steps'' to ensure that its FCM members enter into suitable arrangements with, *e.g.,* a Depositing FCM to verify the accuracy and timeliness of information. The Commission requested comment on whether (i) The proposed requirement in regulation 22.11 for a Depositing FCM to provide a Collecting FCM with information sufficient to identify its Cleared Swaps Customers raises any competitive concerns, (ii) such concerns, if any, could be resolved if the identities of the Cleared Swaps Customers are coded, with the DCO, but not the Collecting FCM, receiving a copy of such code, and (iii) other methods were available to resolve any such concerns.

ISDA requested that the Commission further clarify the language of regulation 22.11 to make explicit that an FCM must provide identifying information to the DCO or to the Collecting FCM the first time the FCM intermediates a swap for a Cleared Swaps Customer with the particular relevant DCO or collecting FCM.[184] In response, the Commission is amending the language of regulation 22.11 to make clear that an FCM must provide identifying information to a DCO or Collecting FCM the first time it intermediates a Cleared Swap with that DCO or Collecting FCM.

In addition, a number of commenters raised concerns regarding the need for specific recordkeeping and reporting requirements.[185] These commenters requested that the Commission mandate reporting and recordkeeping requirements for DCOs and require DCOs to implement rules requiring their clearing members to comply with such reporting and recordkeeping requirements. FHLB argued that, at a minimum, an FCM should have to identify (i) collateral posted by an individual customer as cash or securities and (ii) with respect to identifiable securities, which customer posted such securities.[186] CME, by contrast, stated that auditing for accuracy of ''a full breakdown of all forms of collateral at all levels of clearing for each end customer, allocated specifically to each DCO * * * will increase costs exponentially.'' [187] CIEBA, CME, ICE, FHLB, SIFMA, BlackRock, and Vanguard stated that it is important to be able to ensure that an FCM's books and records are accurate in order to support implementation of Cleared Swaps Customer Collateral in bankruptcy. The preferred means of addressing this problem ranged from increasing recordkeeping and monitoring burdens on FCMs and DCOs to abandoning the Complete Legal Segregation Model. On the other hand, CME complained that the phrase ''portfolio of rights and obligations arising from the Cleared Swaps that such futures commission merchant intermediates for such customer'' is unclear as to whether it covers the collateral supporting such positions.[188] CME stated that it ''read[s] the proposed regulations as requiring a DCO to allocate to each non-defaulting customer its specific *required* margin only * * *,'' and that it intends to ''allocate to any defaulting customer the difference between its specific required margin and the collateral within the DCO's access and control * * * .''[189]

AII, SIFMA, and Vanguard requested that the Commission require DCOs to carefully monitor clearing member compliance with DCO rules, including through periodic audits, by amending regulation 22.11(e) to provide specific and concrete examples of the steps a DCO must take to confirm that information from an FCM is accurate, complete and timely. In addition, AII, SIFMA, and Vanguard requested that the words ''appropriate steps'' in regulation 22.11(e) be replaced with ''all steps necessary.'' [190] CME argued that regulation 22.11 should specify the contents of the daily FCM report to the DCO,[191] and that the Commission should clarify the intent behind the language ''take additional steps,'' specifically with respect to what the Commission ''intends each DCO to accomplish under the verification requirement.'' [192]

FIA noted that the proposed rule does not require the information to be provided by any specific time each business day, and recommended that the Commission specify such a deadline.[193] Vanguard, SIFMA and AII also suggested that the Commission consider requiring information to be provided ''as frequently as necessary'' rather than ''at least once each business day.'' [194] Finally, CME stated that it ''presume[d] that the Commission's intention is to continue to treat omnibus accounts of a foreign broker clearing through an FCM as a single 'customer' for purposes of the requirements of Part 22.''[195]

The Commission notes that under the Complete Legal Segregation Model, DCOs must, in the event of the insolvency of a clearing member carrying Cleared Swaps Customer positions, either return to the Trustee, or transfer to another FCM, the value of the collateral associated with each Cleared Swaps Customer's positions (as adjusted in accordance with Commission regulations). This requirement corresponds to the margin required for the Cleared Swaps Customer's swaps cleared through that DCO, including any individualized surcharge or voluntary contribution.[196] Thus, a DCO has no responsibility to monitor the nature or amount of collateral each Cleared Swaps Customer actually posts with the FCM, or the provenance of the specific items of collateral the DCO receives from the FCM. Rather, the DCO should take the steps appropriate, in the professional judgment of its staff, to verify that FCM members have and are using systems and appropriate procedures to track accurately, and to provide to the DCO accurately, the positions of each customer. Furthermore, the Commission is clarifying that the responsibilities of a DCO under Part 22 are analogous to the responsibilities of a DCM under regulation 1.52 with respect to margin (the calculation of which requires an accurate accounting of the customer's positions). As noted by one commenter, FCMs are already subject to DSRO

[184] *See* ISDA at 9.

[185] *See, e.g.,* ICI at 5; SIFMA at 8; and FHLB at 4.

[186] FHLB also argues that this information should be provided to Cleared Swaps Customers on a daily basis so that they can correct any discrepancies in the records, which would, in turn, reduce operational risk. *See* FHLB at 4.

[187] CME at 15, n. 30. *Cf.* FHLB at 3, n. 2 (stating FHLB's understanding that LCH has the technology necessary to track individual customer collateral on a real-time basis, but acknowledging that it is ''not in a position to calculate the costs associated with such technology.'').

[188] CME at 6–7.

[189] *Id.* at 7 (emphasis in original).

[190] *See* AII at 3; SIFMA at 8; and Vanguard at 6.

[191] *See* CME at 3–4, and 13–15.

[192] CME at 15.

[193] *See* FIA at 12. FIA cites to ''Proposed Rule 22.12,'' but it is regulation § 22.11 that requires FCMs to provide information to a clearing FCM or DCO.

[194] AII at 3; SIFMA at 8; and Vanguard at 6–7.

[195] CME at 8, n. 20.

[196] *See* regulation 22.13(a)(1)(C).

audits on an approximately annual basis.[197]

At this time, the Commission is not requiring that information be provided ''as frequently as necessary'' or by a specific time. Regulation 22.11 requires information to be provided ''*at least* once a day,'' thereby permitting DCOs to require by rule the collection of this information more frequently. If more frequent collection of such information becomes an industry standard at a later point in time, the Commission might then consider increasing the frequency of this reporting requirement. In addition, the Commission notes that a DCO may set, by rule, the time or times by which such information must be provided.

Finally, the Commission confirms the presumption ''that the Commission's intention is to continue to treat omnibus accounts of a foreign broker clearing through an FCM as a single 'customer' for purposes of the requirements of Part 22.'' [198] However, to the extent a foreign broker is required to provide individual protection for swaps customer collateral under the laws of another jurisdiction, the Commission intends that the regulations under Part 22 foster compliance with such other laws.

L. Regulation 22.12—Information To Be Maintained Regarding Cleared Swaps Customer Collateral

As proposed, regulation 22.12 required DCOs and Collecting FCMs to use the information provided pursuant to proposed regulation 22.11 to calculate and record, no less frequently than once each business day, the amount of collateral required (i) for each relevant Cleared Swaps Customer (including each such customer of a Depositing FCM), based on the portfolio of rights and obligations arising from its Cleared Swaps; and (ii) for all relevant Cleared Swaps Customers.

SIFMA argued that DCOs and FCMs should be required to perform the calculations specified in regulation 22.12 ''as frequently as technologically possible'' rather than ''no less frequently than once each business day.'' [199] The Commission is adopting regulation 22.12 as proposed. The calculations required by regulation 22.12 are based on information provided under regulation 22.11, which is sent to the DCOs and FCMs ''at least once each business day.'' It would be anomalous for the Commission to require a more frequent calculation of collateral requirements when the information on which such calculation is based is only required to be provided once each business day. However, if more frequent collection of such information becomes an industry standard at a later point in time, the Commission might then consider requiring more frequent calculation of collateral requirements by regulation.

FIA and ISDA observed that the reference in the NPRM in the discussion of regulation 22.12 to an advance by the FCM to a Cleared Swaps Customer as a ''loan'' combined with regulation 22.10, which, among other things, prohibits an FCM from granting unsecured loans to customers, could be read to prohibit unsecured short-term advances of margin funds to Cleared Swaps Customers by FCMs. They asked that the Commission clarify that unsecured short term advances of margin are permissible.[200] The Commission clarifies that, consistent with current practice, unsecured short term advances of margin are not considered ''loans'' for purposes of existing regulation 1.30, or new regulation 22.10. The Commission notes, however, that such advances should be either promptly repaid or promptly replaced with a secured loan.

M. Regulation 22.13—Additions to Cleared Swaps Customer Collateral

Regulation 22.13 proposed two tools that DCOs or Collecting FCMs may use to manage the risk they incur with respect to individual Cleared Swaps Customers. Because the proposed tools were not intended to be mandatory or exclusive, the Commission sought comment on how it could enable DCOs or Collecting FCMs to use other tools to manage such risk. In addition, proposed regulation 22.13(a) clarified that a DCO or Collecting FCM could increase the collateral required of a particular Cleared Swaps Customer or group of such customers, based on an evaluation of the credit risk posed by such customer(s). The proposed clarification was not intended to interfere with the right of any FCM to increase the collateral requirements with respect to any of its customers, and the Commission requested comment regarding whether a DCO or a Collecting FCM wished to increase the collateral required for any reason other than credit risk. Similarly, proposed regulation 22.13(b) provided that collateral deposited by an FCM that is identified as collateral in which such FCM has a residual financial interest (*i.e.,* the FCM's own funds) may, to the extent of such residual financial interest, be used by the DCO or Collecting FCM to secure the Cleared Swaps of any or all Cleared Swaps Customers.

ISDA suggests that the final rule attribute the collateral deposited by an FCM that is identified as collateral in which such FCM has a residual financial interest to individual Cleared Swaps Customers to determine which Cleared Swaps Customers have a credit balance and which have a debit balance.[201] The Commission notes that collateral attributable to an FCM's residual financial interest is, by definition, not the property of any Cleared Swaps Customer. Accordingly, there is no customer-protection-based reason to deny a DCO or Collecting FCM the ability to use such collateral to meet the default of any Cleared Swaps Customer. In addition, as mentioned above, the Commission is adding a new section 22.13(c), which states that, subject to certain requirements, collateral posted by a Cleared Swaps Customer in excess of the amount required by a DCO (the ''excess collateral'') may be transmitted by the Cleared Swaps Customer's FCM to the DCO.[202]

N. Regulation 22.14—Futures Commission Merchant Failure To Meet a Customer Margin Call in Full

Proposed regulation 22.14 required a defaulting FCM to transmit to the DCO or Collecting FCM, as applicable, Cleared Swaps Customer Collateral on deposit at the FCM for each Cleared Swaps Customer whose swaps contributed to the call, and the identity and the amount transmitted on behalf of, each such customer. Regulation 22.14 also proposed a detailed sequence of events following an FCM's default. Specifically, proposed regulations 22.14(e) and (f) addressed the issue of allocation of the loss of value of collateral (also known as Investment Risk) [203] despite the application of haircuts. The Commission sought comment on the proposed allocation of Investment Risk.

FIA suggested that the regulations make clear that the DCO or Collecting FCM may reasonably rely on the information provided by the defaulting FCM (or on information previously provided if the defaulting FCM does not promptly provide information on the day of the default).[204] In response, the Commission is amending regulation 22.14 to add subsection (2) to specifically permit such reliance on

[197] *See* CME at 15.

[198] *See id.* at 8, n. 20.

[199] SIFMA at 9. *See also* AII at 3.

[200] *See* ISDA at 9; FIA at 11–12.

[201] *See* ISDA at 9–10.

[202] For further detail, *see* the discussion above in section IV.A.4. under the definition of ''Cleared Swaps Customer Collateral.''

[203] *See supra* at n. 28.

[204] *See* FIA at 12; SIFMA at 10.

information provided by a defaulting FCM.

Vanguard and SIFMA requested clarification regarding how a DCO should handle simultaneous defaults in a futures and Cleared Swaps Customer Account, and how the FCM and DCO resources should be allocated between the two accounts.[205] The Commission notes that defaults in multiple accounts are already addressed in the Commission's regulations and, in particular, Part 190, which treats account classes separately. For example, in the event of a default in a futures customer account, the default would be treated in accordance with the Futures Model, and the FCM would be permitted to apply all customer collateral to meet that default and would, after liquidation of positions, return any remaining customer collateral to the Trustee for distribution as above. A default in the Cleared Swaps Customer Account, on the other hand, would be treated in accordance with the Complete Legal Segregation Model, with remaining positions and collateral either transferred to another FCM or returned to the Trustee. Thus, swaps customer accounts and futures customer accounts are treated separately by the DCO, with balances that are not transferred being returned to the Trustee for distribution.[206] The Trustee would distribute customer property, including collateral received from a DCO, pari passu within each account class. Any surplus in any account class would be re-distributed in accordance with regulation 190.08. In addition, the Commission notes that a separate proprietary account for swaps is not required under Commission regulations. Thus, a clearing member's own swaps and futures (and related collateral) may be held together in a proprietary account and a default in such account should proceed in accordance with existing Commission regulations. For example, if there is a default only in the proprietary account, property in either customer account will not be liable for that default, and such customer property will either be transferred along with customer positions to another FCM or, after the liquidation of customer positions, would be returned to the Trustee for distribution as part of the appropriate account classes pursuant to regulation 190.08.

With respect to the application of DCO resources, the Commission notes that if there is a shortfall in more than one account class, after the application of collateral as permitted in the proposed and existing rules, the DCO would apply its default resources to the remaining shortfalls in each account in accordance with its then-existing rules.

O. Regulation 22.15: Treatment of Cleared Swaps Customer Collateral on an Individual Basis

As proposed, regulation 22.15 set forth the basic principle of individual collateral protection. It required each DCO and each Collecting FCM to treat the amount of collateral required with respect to the portfolio of rights and obligations arising out of the Cleared Swaps intermediated for each Cleared Swaps Customer as belonging to that customer, which amount could not be used to margin, guarantee or secure the Cleared Swaps, or any other obligations, of an FCM, or of any other customer.

FIA urged the Commission to confirm that, in the event of an FCM default, clearing FCMs and DCOs have flexibility to liquidate all positions in an omnibus account (with the restriction that proceeds of positions of non-defaulting customers may not be used to offset sums owed by defaulting customers to the FCM or by the clearing FCM to the DCO).[207] SIFMA stated that proposed regulation 22.15 required that ''any temporary misallocation of non-defaulting customer property due to [intra-day price movements on the day of a default] * * * be rectified as promptly as possible so that the property of non-defaulting customers is fully restored.'' [208] ICI argued that if at the time of an FCM default there is a misallocation of Cleared Swaps Customer Collateral, the Commission should require such misallocation to be corrected as soon as practicable.[209] Similarly, Vanguard requested that the Commission clarify that any initial misallocation related to delayed recordkeeping be rectified as promptly as possible such that the property of the non-defaulting parties is fully restored.[210] CME cautioned that errors in the § 22.11 information from an FCM could heighten the risk of misallocating Cleared Swaps Customer Collateral in a default scenario, because a DCO will not have the time or legal ability to resolve discrepancies in a portfolio.[211] CME asked the Commission to clarify the allocation of this risk among Cleared Swaps Customers.[212] In addition, CME questioned how to allocate excess collateral that is posted to a DCO for purposes of daily reporting and in response to customer default,[213] and sought confirmation that the Commission intended to preserve the finality of the clearing cycle.[214]

The Commission has amended regulation 22.15 to make clear that clearing FCMs and DCOs have the flexibility to liquidate all positions in an omnibus account in the event of the default of a depositing FCM or clearing member respectively. In addition, the Commission notes that there will not be any unallocated excess collateral because such collateral is either collateral in which the FCM has a residual interest and does not belong to a customer, or collateral that must be attributed to individual Cleared Swaps Customers. Furthermore, any temporary misallocation of non-defaulting Cleared Swaps Customer property or excess collateral would be resolved by the Trustee, in computing the claims by such customers against the estate (or, where appropriate, by the estate against such customers). In addition, these discrepancies would not be the responsibility of the DCO, even if the DCO transferred an amount on behalf of a Cleared Swaps Customer that was later found to be too much, nor would such a transfer be subject to avoidance.[215] Finally, it is not the Commission's intent to disrupt or unwind a complete and final settlement cycle, and northing in these regulations should be construed to do so.

P. Regulation 22.16—Disclosures to Customers

As proposed, regulation 22.16 requires each FCM to disclose, to each of its Cleared Swaps Customers, the governing provisions of each DCO (or the provisions of the customer agreement with respect to a Collecting FCM) relating to use of Cleared Swaps Customer Collateral and related matters.

The FIA advocated that these FCM disclosures be the subject of a uniform disclosure document prepared by the industry, subject to Commission approval.[216] Given the diversity of industry practice in the swaps market, the Commission is reluctant to mandate the use of a uniform disclosure document. Nonetheless, the Commission sees no reason to object to an FCM's use of a document prepared

[205] *See* Vanguard at 7.

[206] Pursuant to regulation 190.06(b)(3)(iii), for a particular customer, a negative equity balance in one account class must be offset against a positive equity balance in any other account class.

[207] *See* FIA at 12–13.

[208] SIFMA at 10.

[209] *See* ICI at 5.

[210] *See* Vanguard at 7.

[211] *See* CME at 14.

[212] *See id.*

[213] *See id.* at 7–8.

[214] *See id.* at 9.

[215] *Cf.* 11 U.S.C. 764(b).

[216] *See* FIA at 12.

by a committee, so long as the document accurately provides the required information for each DCO on which the customer's positions are cleared.

V. Section by Section Analysis: Amendments to Regulation Part 190

A. Background

In April of 2010, prior to the enactment of the Dodd-Frank Act, the Commission promulgated rules to establish an account class for cleared OTC derivatives (and related collateral).[217] At that time, there were questions concerning the Commission's authority to require the segregation of cleared OTC derivatives (and related collateral) or to establish a separate account class for cleared OTC derivatives in a DCO insolvency. As a result, protection for cleared OTC derivatives (and related) collateral was limited to those cases where such derivatives and collateral were required to be segregated pursuant to the rules of a DCO, and the reach of the account class was limited to cases of the bankruptcy of a commodity broker that is an FCM. Moreover, while section 4d(a)(2) of the CEA permitted the inclusion in the domestic futures account class of transactions and related collateral from outside that class, there was no similar provision permitting the inclusion in the cleared OTC account class of transactions and related collateral from outside that latter class.

Section 724 of the Dodd-Frank Act has resolved these questions. As mentioned above, section 4d(f) of the CEA, as amended by the Dodd-Frank Act, requires, among other things, segregation of Cleared Swaps and Cleared Swaps Customer Collateral. Section 4d(f)(3)(B) of the CEA permits the inclusion of positions in other contracts (such as exchange-traded futures) and related collateral with Cleared Swaps and Cleared Swaps Customer Collateral. Section 724(b) of the Dodd-Frank Act amends the Bankruptcy Code to include in the definition of ''commodity contracts'' Cleared Swaps with respect to both FCMs and DCOs. Thus, this section V proposes amendments to regulation Part 190, pursuant to Commission authority under section 20 of the CEA, in order to give effect to section 724 of the Dodd-Frank Act, to implement Public Law 111–16, the Statutory Time-Periods Technical Amendments Act of 2009, and to provide technical clarifications. Such amendments conform to proposed Part 22.

[217] *See* Account Class, 75 FR 17297, Apr. 6, 2010.

B. Definitions

1. Proposed Amendment to Regulation 190.01(a)—Account Class

The Commission proposed amendments to regulation 190.01(a) to change the definition of account class to include a class for cleared swaps accounts, delete commodity option accounts from the definition, make clear that options on futures and options on commodities should not be grouped into one account class, clarify that Commission orders putting futures contracts and related collateral in the cleared swaps account class (pursuant to new section 4d(f)(3)(B) of the CEA) are treated, for bankruptcy purposes, in a manner analogous to orders putting Cleared Swaps and related collateral in the futures account class (pursuant to CEA section 4d(a)(2)), and clarify that if, pursuant to a Commission rule, regulation or order (or a DCO rule approved pursuant to regulation 39.15(b)(2)), positions or transactions that would otherwise belong to one class are associated with positions and related collateral in commodity contracts in another account class, then the former positions and related collateral shall be treated as part of the latter account class. The Commission did not receive any comments on proposed regulation 190.01(a) and is adopting regulation 190.01(a) as proposed.

2. Proposed New Regulation 190.01(e)—Calendar Day

The Commission proposed defining the term ''calendar day'' to include the time from midnight to midnight. The Commission did not receive any comments on proposed regulation 190.01(e) and is adopting regulation 190.01(e) as proposed.

3. Proposed Amendment to Regulation 190.01(f)—Clearing Organization

The Commission proposed to amend the definition of clearing organization to remove, as unnecessary, the reference to commodity options traded on or subject to the rules of a contract market or board of trade. The Commission did not receive any comments on proposed regulation 190.01(f) and is adopting regulation 190.01(f) as proposed.

4. Proposed Amendment to Regulation 190.01(cc)—Non-Public Customer

The Commission proposed to amend the definition of non-public customer to include references to non-public customers under regulation 30.1(c) (with respect to foreign futures and options customers) and in the definition of Cleared Swaps Proprietary Aaccount. The Commission did not receive any comments on proposed regulation 190.01(cc) and is adopting regulation 190.01(cc) as proposed.

5. Proposed Amendment to Regulation 190.01(hh)—Principal Contract

The Commission proposed to amend the definition of principal contract to include an exclusion for cleared swaps contracts. The Commission did not receive any comments on proposed regulation 190.01(hh) and is adopting regulation 190.01(hh) as proposed.

6. Proposed Amendment to Regulation 190.01(ll)—Specifically Identifiable Property

The Commission proposed to amend the definition of specifically identifiable property to update references and change terms to conform to other proposed changes to Part 190 and other business practices. The Commission did not receive any comments on proposed regulation 190.01(ll) and is adopting regulation 190.01(ll) as proposed.

7. Proposed Amendment to Regulation 190.01 (pp)—Cleared Swap

Proposed regulation 190.01(pp) replaced the definition of ''Cleared OTC Derivative'' that the Commission previously adopted with a definition of cleared swap that includes the definition of that term in regulation 22.1. The Commission did not receive any comments on proposed regulation 190.01(pp) and is adopting regulation 190.01(pp) as proposed.

C. Proposed Amendments to Regulation 190.02—Operation of the Debtor's Estate Subsequent to the Filing Date and Prior to the Primary Liquidation Date

The Commission proposed certain clarifications as well as technical amendments to § 190.02 to (1) expand the regulation to apply to Cleared Swaps (and related collateral) and (2) change references to ''business days'' to ''calendar days,'' and require transfer instructions by the sixth calendar day after the order for relief and instruct transfers to be completed by the seventh calendar day after the order for relief, in order to fall within the protection of section 764(b) of the U.S. Bankruptcy Code. The Commission did not receive any comments on proposed regulation 190.02. However, in light of a recent demonstration of the efficiency of transfer arrangements, it appears that a full calendar day may not be necessary to execute such instructions. Accordingly, the Commission is changing the amendment to require transfer instructions to be provided by the *seventh* calendar day after the order

for relief, at an hour to be specified by the trustee.

D. Proposed Amendments to Regulation 190.03—Operation of the Debtor's Estate Subsequent to the Primary Liquidation Date

The Commission proposed certain technical amendments to regulation 190.03 to clarify that maintenance margin refers to the maintenance margin requirements of the applicable designated contract market or swap execution facility. The Commission did not receive any comments on proposed regulation 190.03 and is adopting regulation 190.03 as proposed.

E. Proposed Amendments to Regulation 190.04—Operation of the Debtor's Estate—General

Proposed amendments to regulation 190.04 would extend the liquidation of open commodity contracts to commodity contracts traded on swap execution facilities.[218] These commodity contracts would be liquidated in accordance with the rules of the relevant SEF or DCM. Open commodity contracts that are liquidated by book entry may also be offset using the settlement price as calculated by the relevant clearing organization pursuant to its rules, which rules are required to be submitted to the Commission for approval pursuant to section 5c(c) of the CEA, or approved by the Commission (or its delegate) pursuant to regulation 190.10(d). The Commission did not receive any comments on proposed regulation 190.04 and is adopting regulation 190.04 as proposed.

F. Proposed Amendments to Regulation 190.05—Making and Taking Delivery on Commodity Contracts

The Commission proposed technical amendments to regulation 190.05 to change a reference to ''contract market'' to ''designated contract market, swap execution facility, or clearing organization,'' and require the submission of rules for approval subject to section 5c(c) of the CEA. The Commission did not receive any comments on proposed regulation 190.05 and is adopting regulation 190.05 as proposed.

G. Proposed Amendments to Regulation 190.06—Transfers

The Commission proposed amendments to regulation 190.06 to (i) Clarify that nothing in subparagraph (a) would constrain the contractual right of the DCO to liquidate open commodity contracts, (ii) permit the trustee to transfer accounts with no open commodity contracts, as the Commission has permitted in a number of recent FCM bankruptcies, (iii) prohibit the trustee from avoiding pre-petition transfers made by a clearing organization as long as the money, securities, or other property accompanying such transfer would not exceed the funded balance of accounts held for or on behalf of customers based on information available as of the close of business on the calendar day immediately preceding such transfer minus the value on the date of return or transfer of any property previously returned or transferred thereto, and (iv) change ''business day'' to ''calendar day.'' The Commission did not receive any comments on proposed regulation 190.06 and is adopting regulation 190.06 as proposed.

H. Proposed Amendments to Regulation 190.07—Calculation of Allowed Net Equity

Proposed amendments to regulation 190.07 clarify that individual Cleared Swaps Customer Accounts within an omnibus account are to be treated individually, correct a typographical error, change the valuation of an open commodity contract so that the value of the commodity contract would be derived from the settlement price as calculated by the relevant clearing organization pursuant to its rules, and change references to securities traded over-the-counter pursuant to the National Association of Securities Dealers Automated Quotation System to securities not traded on an exchange. The Commission did not receive any comments on proposed regulation 190.07. However, the Commission is adding ''paragraph (c)'' before ''(1)(ii)'' in regulation 190.7(c)(1)(i)(A) to clarify the cross reference.

I. Proposed Amendments to Regulation 190.09—Member Property

The Commission proposed amendments to regulation 190.09 to include references to an account excluded pursuant to the proviso in regulation 30.1(c) (referring to proprietary accounts in the context of foreign futures and options) and to the Cleared Swaps Proprietary Account. The Commission did not receive any comments on proposed regulation 190.09 and is adopting regulation 190.09 as proposed.

J. Proposed Amendments to Regulation 190.10—General

Proposed amendments to regulation 190.10 have been made to require notice by email and overnight mail. The Commission did not receive any comments on proposed regulation 190.10. However, the Commission is changing the reference to the ''Division of Clearing and Intermediary Oversight'' to the ''Division of Clearing and Risk'' in regulation 190.10(a) to reflect changes based on a structural reorganization within the Commission.

K. Proposed Amendments to Appendix A to Part 190—Bankruptcy Forms, Bankruptcy

The Commission proposed changes to appendix A, form 1 to include references to ''transfers'' generally, and to make certain technical amendments to (i) Reflect the addition of section 4d(f) of the CEA by section 724 of the Dodd-Frank Act, (ii) clarify that Commission approval with respect to the rules of a registered entity that require Commission approval means Commission approval under section 5c(c) of the CEA, and (iii) conform certain time periods to the proposed changes made by the Commission to implement Public Law 111–16, the Statutory Time-Periods Technical Amendments Act of 2009. The Commission did not receive any comments on the proposed amendments to appendix A and is adopting appendix A as proposed.

L. Proposed Amendments to Appendix B to Part 190—Special Bankruptcy Distributions

The Commission proposed amendments to Framework 1 of Appendix B to clarify that the cross margining program is intended to apply only to futures customers and customer funds for futures contracts, and to Framework 2 of Appendix B to address shortfalls in Cleared Swaps Customer Collateral. The Commission did not receive any comments on the proposed amendments to appendix B. However, the Commission is making certain technical corrections to bring the language of the appendix in line with current statutory language.

VI. Effective Date

The Commission asked for comment, in the NPRM and at the Second Roundtable, on the appropriate timing of effectiveness for the final rules, and whether six months after the promulgation of final rules would be sufficient.

At the Second Roundtable, several panelists stated that it would take

[218] Open commodity contracts traded on a designated contract market would continue to be liquidated in accordance with the rules of the relevant designated contract market.

approximately 18 months to 2 years after finalization of the segregation rules to complete all of the documentation and other infrastructure work that would be necessary to implement the segregation regime selected by the Commission.[219] These commenters indicated that this lead time would be the same for the Legal Segregation Models and the Full Physical Segregation Model, but may be longer if the Commission were to select the Futures Model.[220] In other words, this 18 month to 2 year time period is ''a cost of moving to the cleared world regardless of how it's done.'' Another panelist, however, did state that six months did not seem to provide sufficient time to complete all of the work that would need to be completed,[221] though this commenter acknowledged that ''the real constraining factor * * * is getting that final documentation with the clients.'' [222]

Comments to the NPRM generally reinforced the need for additional time. ISDA recommended that there be a minimum of 18 months between final promulgation of the rules and effectiveness.[223] In addition, FIA stated that, according to certain representatives from investment management firms, it would take one to two years to implement whatever model is chosen by the Commission.[224] ICE requested that, if a model other than the Futures Model is adopted, the Commission provide sufficient time to FCMs and DCOs to allow them ''to analyze, develop and implement the necessary systems and processes relating to'' the selected segregation model.[225] In addition, ICI stated that market participants need time to develop ''the operational and systems infrastructure necessary to facilitate a smooth transition to clearing.'' [226]

As acknowledged by some commenters, the 18 month to 2 year time period is the time period needed to transition to clearing. It is not the time period necessary to implement the Complete Legal Segregation Model. Because the Commission did not receive any specific comments regarding the time period needed to implement the Complete Legal Segregation model, the Commission considered adopting the effective date that was proposed in the NPRM. However, given representations from market participants regarding the amount and tenor of the work that would need to be completed to implement clearing, the Commission is extending the compliance date for the Part 22 rules to November 8, 2012, the compliance date set forth in the rules implementing DCO Core Principles for the gross margining requirement of Regulation 39.13(g)(8)(i).

Given the importance of implementing the time period changes in Part 190 as soon as possible, and because the implementation issues raised by Part 22 do not apply to Part 190, which imposes obligations primarily on bankruptcy trustees, the compliance date for the Part 190 rules is the effective date of these rules. However, during the period between the compliance date for Part 190 and the compliance date for Part 22, Commission rules will not require segregation of Cleared Swaps or Cleared Swaps Collateral. Accordingly, consistent with the approach applicable under current Part 190, where protection for cleared OTC derivatives (and related) collateral is limited to those cases where such derivatives and collateral are required to be segregated pursuant to the rules of a DCO, during that period, the definition of 190.01(pp) (''Cleared Swap'') shall be limited to transactions where the rules or bylaws of a derivatives clearing organization require that such transactions, along with the money, securities, and other property margining, guaranteeing or securing such transactions, be held in a separate account for Cleared Swaps only.

VII. Consideration of Costs and Benefits

A. Introduction

Section 15(a) of the CEA [227] requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. To the extent that these new rules reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those mandated by Congress in passing the legislation. However, the rules may generate costs and benefits attributable to the Commission's determinations regarding implementation of the Dodd-Frank Act's statutory requirements. The costs and benefits of the Commission's determinations are considered in light of the five factors set forth in CEA section 15(a).

1. Business and Legal Context of the Segregation Requirement for Cleared Swaps Customer Collateral

The Commission's Part 22 rules are one component of the regulatory infrastructure for clearing [228] swaps transactions mandated by the Dodd-Frank Act. Though a significant fraction of swaps transactions may be required to be cleared through DCOs, many swaps transactions may voluntarily be cleared though DCOs. Swaps users and some swap dealers transact with the DCO through FCMs that the DCO admits as ''clearing members'' and who are subject to DCO rules. As described above in detail, for every transaction received by or matched through its facilities, a DCO acts as the buyer to every seller and the seller to every buyer, essentially guaranteeing financial performance.[229]

2. Overview of the Statute and Regulation

Proposed Part 22 implements the requirement of the newly enacted CEA section 4d(f) that property provided by Cleared Swaps Customers to FCMs to serve as collateral for Cleared Swaps transactions be treated as the property of the customers, not the FCM or DCO; and that such property be maintained in accounts separate from the property of the FCM or DCO, although such accounts can hold the commingled collateral of more than one Cleared Swaps Customer ''for convenience.'' [230] These basic requirements that Cleared

[219] Second Roundtable Tr. at 58, 1.14 to 61, 1.17.

[220] *Id.*

[221] Second Roundtable Tr. at 62, 1.11 to 62, 1.19 (Mr. Diplas stating that six months ''seems to live within the low side from the standpoint in terms of the work, the IT work that needs to take place between, like, FCMs and DCOs, the testing, et cetera, and also even the agreements that we might have to do in terms of consistency, of how these reports should look, and how the client IDs should be done, et cetera, so that we don't have—each DCO have a different methodology in that respect.'').

[222] Second Roundtable Tr. at 63, 1.2 to 63, 1.4.

[223] *See* ISDA at 11.

[224] *See* FIA at 6.

[225] ICE at 11.

[226] ICI at 2.

[227] 7 U.S.C. 19(a).

[228] As described above, clearing is the process by which transactions in derivatives are processed, guaranteed, and settled by a central clearing organization, the DCO. *See* section I.B.

[229] For a detailed discussion of clearing as it pertains to swap transactions, *see* section I.B.

[230] Though treating futures customer collateral on a collective basis may, at one time, have been practically necessary ''for convenience,'' such practice is not standard in the current swaps market nor is it as critical in an era where account information is stored and processed on an automated basis. For example, and as noted above, DCOs are already assessing risks posed by clearing members' customers at the individual customer level. *See supra* n.122.

Swaps Customer Collateral be treated as the property of customers and maintained in segregated accounts are imposed by the statute independently of the Commission's particular implementing regulations and, by the terms of the statute, would apply even if the Commission promulgated no implementing regulations. Generally, the core statutory segregation requirements serve two functions: (1) They help ensure that FCMs, DCOs, and other depositories of assets deposited by swaps customers to serve as collateral for their Cleared Swaps transactions treat such customer collateral as the property of the customers and not use it for their own proprietary business purposes; and (2) in conjunction with Subchapter IV of Chapter 7 of the Bankruptcy Code, they provide protection of Cleared Swaps Customer Collateral from the claims of other creditors in the event of the bankruptcy of an FCM.

Sections 22.2 through 22.10 implement the basic architecture of a system of segregation for swaps customer funds roughly comparable to the system used for customer funds for futures contracts under CEA sections 4d(a)(2) and 4d(b) and Commission regulations 1.20 through 1.30 and 1.49.[231] Some provisions of sections 22.2 through 22.10 essentially restate the statutory requirements. Other provisions of these sections set forth requirements intended to (a) ensure that the objectives of the statute are met and (b) clarify FCMs' and DCOs' duties under the statute and facilitate carrying out those duties in an efficient manner.[232] The basic architecture established by sections 22.2 through 22.10 is supplemented by section 22.16, a disclosure requirement designed to inform swaps customers of DCO and FCM policies regarding the handling of their collateral in case of default and by amendments to part 190 of the Commission's rules intended to ensure that cleared swaps customer accounts of the sort required by Part 22 are treated as a separate account class under bankruptcy law in the event the relevant FCM files for bankruptcy.[233]

Proposed sections 22.11 through 22.15 add to this basic segregation architecture provisions designed to implement the Complete Legal Segregation Model for protecting swaps customer funds against Fellow-Customer Risk.[234] Proposed sections 22.11, 22.12, and 22.14 are intended to ensure that DCOs have available information that will enable them to attribute the value of assets in an FCM's customer account to individual customers in the event of an FCM's default on obligations to the DCO arising in connection with swaps transactions cleared for customers.[235] Section 22.14 also requires certain transfers of customer collateral among FCMs in response to margin calls.[236] Section 22.5 prohibits the DCO from using asset value in an FCM's customer account attributable to one customer to margin, guarantee, or secure the Cleared Swaps or other obligations of the relevant FCM or of other customers.[237] Section 22.13 clarifies that DCO's have the right, at their election, to require (on the grounds of risk management) larger amounts of collateral from selected customers.[238]

3. Organization and Focus of the Consideration of Costs and Benefits

Section VII.B presents the Commission's considerations regarding the costs and benefits arising from the Commission's choice of the Complete Legal Segregation Model as set forth in sections 22.11 through 22.15.[239] The costs and benefits of the Commission's choice of model for addressing Fellow-Customer Risk are, in the view of the Commission, the most significant cost-benefit issues in this final rulemaking, as is reflected in the fact that discussions of cost-benefit issues in comments to the NPRM focused almost exclusively on the choice of model. This section of the discussion employs the Futures Model—in essence, the rule without sections 22.11 through 22.15—as a baseline for comparison because this model was favored by several commenters and because comparison with this model provides a useful and appropriate methodology for isolating, to the extent possible, the relative costs and benefits of the alternative models presented by the commenters and considered by the Commission.[240]

Notably, this comparative analysis pivots, in the first instance, on who bears the cost of the most significant cost driver—Fellow-Customer Risk. Where the risk is assigned to one constituency (*e.g.,* swap users in the Futures Model baseline) a virtually mirror image risk mitigation benefit is conferred on others (*e.g.,* DCOs and clearing members in the Futures Model baseline).

Under any model, however, once such risks are initially assigned, the affected entities and market participants, may then attempt to re-allocate or shift such assigned risks or costs to other entities or market participants. The LSOC Model, in the first instance places fellow risk on DCOs and clearing members with corresponding mitigation of risk to swaps users. However, as explained in detail below, market participants can be expected to adapt to the direct allocation of risk associated with one or another of the models in a variety of ways, and the ultimate costs and benefits of the rule will reflect both its direct allocation of risk and the effect of adaptations to that allocation.

For example, as described below, some, though not all, DCOs commented that they would be likely to adapt to the LSOC Model by increasing margin levels. To the extent that this occurs, the rule would have the effect of reducing the risks of losses to the DCO and the FCM because there would be a reduced

[231] *See* discussion in sections IV.B through IV.J.

[232] *See id.*

[233] *See* discussion above in section IV.P and section V.B.1.

[234] *See* discussion above in section IV.K through section IV.O.

[235] *See* discussion above in sections IV.K., IV.L. and IV.N. Having such information at the DCO can be quite valuable in a situation where the FCM is bankrupt.

[236] *See* discussion above in section IV.N.

[237] *See* discussion above in section IV.E.

[238] *See* discussion above in section IV.M.

[239] As discussed above, in addition to the Futures Model and the Complete Legal Segregation Model, the Commission gave consideration to other alternatives: the Legal Segregation with Recourse Model and the Physical Segregation Model. No commenters supported the Legal Segregation with Recourse Model on grounds that it involved the same costs as the Legal Segregation Model, but with fewer benefits. Accordingly, its costs and benefits are not considered further in this analysis. Several commenters did support the Physical Segregation Model; however, as noted above, the effectiveness of the Physical Segregation Model is limited due to the application of the ratable distribution requirements of section 766(h) of the Bankruptcy Code. As such, these limitations were disqualifying.

[240] CIEBA, FHLB, SIFMA, and Fidelity argue that the correct baseline for making cost and benefit comparisons should be the current practice in the uncleared swaps markets rather than the Futures Model (*See* CIEBA Original at 12; FHLB at 9; SIFMA at 7; and Fidelity at 7). In principle, using this benchmark rather than the Futures Model would change the absolute level of costs and benefits of the alternatives under consideration but would not change the relative ranking of those alternatives so long as comparisons to the benchmark were made in a consistent fashion. There are, however, practical advantages to using the Futures Model as a benchmark because current practice with regard to protection of collateral in the uncleared swaps market is unregulated and the level of protection provided varies considerably across transactions. Moreover, CEA, as amended by the Dodd-Frank Act, does not permit the Commission to retain the current practice regarding uncleared swaps. Because the appropriate baseline for the consideration of costs and benefits is the Futures Model rather than the uncleared swaps model, the costs and benefits of the basic requirement that swaps customer collateral be kept in segregated accounts and treated as the property of customers rather than the property of FCMs or DCOs are included within the baseline and not evaluated separately.

likelihood of any given customer incurring losses that exceed the margin posted by that customer. In return for the benefit of reduced fellow customer risk and legal allocation of the residual risk to DCOs and their members, swaps users would incur the opportunity cost of having to use more capital as collateral for their Cleared Swaps. Thus, to the extent that DCOs adapt to the LSOC Model in this fashion, the rule would function in a manner analogous to insurance, with swaps users incurring somewhat higher costs in their routine use of swaps in return for a lower risk of wholesale loss of collateral as a result of some other swaps user's market losses. As also described below, the LSOC Model is expected to alter behavioral incentives for market participants relative to the Futures Model in variety of other ways that will create costs and benefits but that the Commission believes will lead to a net increase in monitoring of risky behavior by FCMs and that, on balance, will facilitate transfer of customer positions and collateral in the event of the simultaneous default of an FCM and one or more customers.

B. Benefits and Costs of Complete Legal Segregation Model Relative to Futures Model

1. Introduction

As noted above, the Complete Legal Segregation Model is intended to provide swaps customers with protection against Fellow-Customer Risk.[241]

The basic difference between the Complete Legal Segregation Model and the Futures Model thus relates to a difference in the allocation of loss arising out of a double default of both a customer and the customer's FCM. Under the Futures Model, this risk is borne by customers in the form of ''Fellow-Customer Risk''— the risk that a customer will lose some or all of the value of its collateral due to the default of some other swaps customer or customers of the clearing FCM. Under the LSOC Model, this risk to customers is substantially, though not completely, eliminated. However, the corresponding loss, in the event of a double default, falls on the DCO and, through the guaranty fund, its non-defaulting members. In practice, under the LSOC Model, DCOs can be expected to take measures to protect themselves against the risk of loss from a double default, and some of the material benefits and costs are likely to flow from a DCO's adaptations to the rule.

The next section reviews, respectively, the material benefits and costs that the Commission believes will arise from the Commission's selection of the LSOC Model.

2. Material Benefits and Costs Arising From the Complete Legal Segregation Model

a. Benefits to Customers of Protection Against Fellow-Customer Risk

The primary benefit of the Complete Legal Segregation Model to customers is the protection of non-defaulting Cleared Swaps Customers against loss of the value of their collateral due to the use of such value by the relevant DCO in the event of a double default.[242] The associated cost to those customers is the payment they will be required to make for protection against this risk, where this payment will likely originate from some combination of the capital cost of posting higher initial margins and/or higher fees for swaps transactions (see subsection b below).

Comments regarding this rulemaking have indicated that, as a result of the statutory clearing requirements in the Dodd-Frank Act, once the cleared swaps market has matured, Cleared Swaps Customers would be posting upwards of $500 billion in collateral to secure their Cleared Swaps positions.[243] The Commission notes that the precise amount will depend on how the market evolves and can be expected to change over time.[244] Under the Futures Model, the value of this collateral will be exposed to greater Fellow-Customer Risk than under the other models considered. In addition, it does not appear possible to reliably quantify the probability of the actual loss of value of collateral by a given customer due to Fellow-Customer Risk for a number of reasons. By their nature, double defaults are rare events, though potentially important if they involve major FCMs. Because the mandatory clearing of swaps under the Dodd-Frank Act has not yet gone into effect, there is, as yet no body of experience with such clearing in practice, and a fortiori no experience with FCM defaults under the Dodd-Frank clearing regime.[245] There has been experience with FCM default in the futures industry, but the numbers are too small to permit reliable extrapolation.[246] In addition, a number of commenters suggested that Fellow-Customer Risk may be greater in the cleared swaps market than in the futures market because swaps are less liquid than exchange-traded futures (thereby resulting in greater volatility of prices, particularly in times of financial stress) and because the aggregate value of transactions in the swaps market is many times greater than the aggregate value of transactions in the futures market.[247] The Commission notes these commenters requested increased protection for their funds to guard against Fellow-Customer Risk.

Notwithstanding its inability to reasonably quantify the value of benefits associated with Fellow-Customer Risk elimination, the Commission, in light of comments received in response to both the ANPR and NPRM, believes that the Complete Legal Segregation Model confers benefits to swaps users. In fact, buy-side commenters represented that they desired the protection afforded through the Complete Legal Segregation Model, notwithstanding the costs associated with that protection.[248] The

[241] For a discussion of Fellow-Customer Risk, *see supra* section I.B.6.

[242] According to comments on the ANPR, the direct benefit to customers in the form of reduced risk of loss of collateral stemming from the activities of fellow customers may generate indirect benefits. For example, commenters indicated that increased security for collateral could increase their ability to use swaps for business purposes, although this effect could be counterbalanced by increased dollar costs. Commenters also stated that the increased protection against Fellow-Customer Risk would reduce their need to incur costs to protect against the effects of loss of Cleared Swaps Customer Collateral.

[243] CME Comment on ANPR at 7 (estimated $500 billion in collateral for swaps expected to be cleared by CME); ISDA February 16, 2011 Comment on ANPR at 2 (estimated $833 billion industry-wide).

[244] *Id.*

[245] Several clearing houses do, however, have experience clearing swaps on a voluntary basis. For example, LCH has been clearing interest rate swaps for over a decade, and ICE actively clears credit default swaps. In addition, while there are examples of FCM defaults related to clearing futures (*e.g.,* Griffin Trading Co., Klein Futures, Inc. and Lehman Brothers, Inc.), there have been no FCM failures related to the clearing of swaps transactions.

[246] In the past two decades, there have been only two cases of double defaults in the futures markets: Griffin Trading Co. and Klein Futures, Inc. *See Trustee* v. *Griffin,* 440 B.R. 148 (2010); CFTC Division of Trading and Markets, Report on Lessons Learned from the Failure of Klein & Co. Futures, Inc., July 2001, available at *http://www.cftc.gov/files/tm/tmklein_report071101.pdf.* With respect to FCM defaults generally in the futures markets, one commenter observed, ''The United States, fortunately has seen only a handful of FCM failures in recent decades. As a result, the FCM liquidation process, including the availability of porting, has not been tested under a wide variety of circumstances.'' ISDA at 3.

[247] *See, e.g.,* Second Roundtable Tr. at 165, 283–84 (characteristics of swaps may make it more difficult to liquidate or transfer customer positions in case of an FCM insolvency than for futures).

[248] *E.g.* MFA at 7–8; BlackRock at 7; Fidelity at 6; LCH at 2. The numerical estimates of higher margin and guaranty fund levels for Complete Legal Segregation relative to the Futures Model described in the text below were also described in the NPRM so swaps users who commented in response to the NPRM presumably were aware of them. However, some commenters who supported Complete Legal Segregation indicated that they did not give full

ability of a swaps customer to determine Fellow-Customer Risk at a particular FCM is limited, because confidentiality restraints inherently limit the amount of information that an FCM can provide customers with respect to the creditworthiness, swaps positions, and, in some cases, even identity of its other customers.[249] This, in turn, impairs (if not completely precludes) the customer's ability to evaluate Fellow-Customer Risk, hindering their ability to manage it, insure against it, or appropriately account for it in business decision-making.[250]

Both the benefit to customers of greater protection for their collateral provided under the Complete Legal Segregation Model as well as the associated costs depends, to an extent, on customer behavior in advance of a double default. Prior to an FCM insolvency, customers have the right to find another FCM to carry their accounts, and to have their existing FCM transfer their positions and collateral to that clearing FCM.[251] Under the extreme assumption that all customers costlessly anticipate the default and move their positions to another FCM before the default occurs, the Complete Legal Segregation Model offers no apparent greater benefit to customers over the Futures Model. However, on this assumption the Complete Legal Segregation model also imposes no additional losses to the DCO compared with the Futures Model since, in this instance, under neither model is the collateral of non-defaulting customers available to the DCO to cure the default. As a result, the extent to which customers can anticipate a fellow-customer default will tend to decrease both the benefits and the costs of the Complete Legal Segregation Model.

b. ''Risk Costs'' and Potential Effects on Margin Levels and DCO Guaranty Fund Levels in Response To Complete Legal Segregation.

Risk Costs refer to the costs associated with the allocation of loss in the event of a default under the Complete Legal Segregation Model relative to the Futures Model. This can usefully be divided into direct and indirect costs (and associated benefits). The direct cost of the Complete Legal Segregation Model is the increased risk the DCO will face when a Cleared Swaps Customer and its FCM default, which equals the probability of a default by a Cleared Swaps Customer and its FCM, multiplied by the expected contribution that fellow customers would have provided toward the uncovered loss. (As discussed in the previous section, there is a corresponding gain to Cleared Swaps Customers which is the value they place on avoiding this same cost, *i.e.,* the value of having the equivalent of insurance against Fellow-Customer Risk.)[252] Thus, the Complete Legal Segregation Model will potentially result in a decrease in the financial resources package available to the DCO in the event of default. Maintaining the same assurance of performance of the DCO's function as central counterparty in the circumstances of a double default may require the DCO to, therefore, raise additional financial resources.[253] The comments submitted to the Commission by DCOs and others have suggested two possible ways by which DCO's default resource structure under the Complete Legal Segregation Model might differ from the Futures Model: Either through higher initial customer margins or by increasing the size of the DCO's guaranty fund.[254] Of course, actual DCOs could use a mixture of adjustments to margins and guaranty funds. Commenters who estimated higher costs resulting from Complete Legal Segregation therefore estimated potential effects on margins and guaranty funds in isolation, while generally recognizing that this is a simplification of what actual practice is likely to be.[255]

Assuming no change in guaranty fund levels, ISDA suggested that the Complete Legal Segregation Model would require an increase of roughly 60% in initial margins relative to the Futures Model.[256] A number of other participants in the Commission's roundtables thought that the method used to arrive at the estimate was a reasonable way to roughly model the effect of Complete Legal Segregation on margin levels.[257]

CME estimated that Complete Legal Segregation would require an increase in margin in the range of 60% to 90%.[258] CME did not specify the quantitative assumptions underlying its estimate.[259] To illustrate effects on margin in dollar terms, CME made the assumption that, in a mature swaps market, it might expect to clear interest rate swaps with a notional value of $200 trillion. On this assumption, CME projected required margin from

credence to the higher of the cost estimates. *E.g.,* MFA at 7–8.

[249] *Id. See also* Second Roundtable Tr. at 183–185.

[250] *E.g.,* Tudor at 2; Fidelity at 3; MFA at 3–8. *See also supra* at 50–51.

[251] *See* 76 FR at 69442.

[252] In addition, as discussed in section VII.B.3.b.iv., there are efficiency gains in centralizing FCM monitoring in a small number of parties. Moreover, because of confidentiality considerations, among other things, DCOs have greater access to information from their Clearing Members than Cleared Swaps Customers do. As a result of this greater access to information and because of the increased incentive on DCOs to actively monitor the risks posed by their Clearing Member FCMs and Cleared Swaps Customers, the overall effectiveness of risk management may be increased.

[253] Section 725(c)(2)(B)(ii) of the Dodd-Frank Act requires that a DCO possess financial resources that, at a minimum, would allow the DCO to meet its financial obligations notwithstanding a default by the member or participant creating the largest financial exposure for that organization in extreme but plausible market conditions. *See also* 76 FR at 69344–45. In determining what financial resources are needed to comply with section 725(c)(2)(B)(ii) and its implementing regulations, a DCO will need to evaluate and take into consideration the effect of Complete Legal Segregation. However, within limits, the statute and regulations permit the exercise of judgment by the DCO as to the methods it will use to do this. As is indicated in the discussion in the text below, in comments to the proposed rulemaking, different DCOs have suggested that they may differ in their evaluation of the practical effects of Complete Legal Segregation, in the value they ascribe to fellow-customer collateral as a resource, and in the steps they will take to maintain adequate financial resources in light of their evaluation.

[254] A guaranty fund is a fund created by a DCO to which the clearing members contribute, in proportion generally set by DCO rule. *See supra* section I.B.4 and n. 27. The assets in the fund are then available to cover losses resulting from defaults by one or more clearing members, whether in their proprietary capacity or due to customer accounts, to the extent those losses are not covered by available collateral provided by the defaulting Clearing Member (limited to proprietary collateral for a default in the clearing member's proprietary account, or including customer collateral for a customer default). In addition, a DCO may retain by rule the right to call upon the members to contribute additional assets, up to a defined amount, if the pre-funded default resources are insufficient (referred to as an ''assessment power'').

[255] ICE contends that DCOs will choose to adjust to Complete Legal Segregation entirely by increasing margins rather than guaranty funds because Complete Legal Segregation increases the risk that assets in guaranty funds will actually be used to cover losses in the event of a double default. According to ICE, excessive reliance on margin is undesirable because guaranty funds offer the DCO more flexibility in responding to defaults and may be more liquid than assets used as margin. *See* ICE at 6–7. However, while ICE may be correct that clearing member FCMs, all other things being equal, would prefer less risk of loss of assets contributed to guaranty funds, there may be counterbalancing factors. For example, clearing customers may prefer a DCO with a larger guaranty fund and lower margin levels. Similarly, if a structure of default resources with an excessive ratio of margin to guaranty fund is, in fact, less effective or efficient for dealing with FCM defaults, a DCO that employs such a structure might be at a competitive disadvantage.

[256] ISDA January 18, 2011 Comment on ANPR at 9. The assumption that DCOs would use a 99.9% confidence level under Complete Legal Segregation was based on ''suggestions'' made at the Commission's First Roundtable. *See* First Roundtable Tr. at 110–111.

[257] *See, e.g.,* First Roundtable Tr. at 110–114; Second Roundtable Tr. at 255–57.

[258] CME Comment on ANPR at 7–8.

[259] *See* CME Comment on ANPR at 8 (describing methodology used in general terms).

customers clearing through CME of $500 billion under the Futures Model and $800–900 billion under Complete Legal Segregation.[260] ISDA estimated that, industry-wide, Complete Legal Segregation would require $581 billion more margin than the Futures Model (a 69.75% increase over a baseline, for the Futures Modal, of $833 billion). ISDA made clear that this estimate was based on a number of assumptions about future market activity and on data obtained from only four FCMs. Therefore, this figure is best construed as an estimate of the general magnitude of the effects expected by ISDA and not as a precise predicted dollar figure.[261] Nonetheless and notwithstanding this estimate of higher initial margin, ISDA concluded that Complete Legal Segregation was ''the most appropriate choice of holding model for cleared swaps collateral'' of the models proposed in the NPRM and supported this approach because it facilitated porting of customer positions in the event of an FCM default.[262]

Although the above estimates were based on data for interest rate swaps, commenters and participants in roundtable discussions indicated that somewhat higher margin levels might be needed to maintain adequate default resources in connection with credit default swaps because of the high volatility and idiosyncratic risks associated with this type of swap.[263] Using data concerning credit default swaps it currently clears, albeit not under the Dodd-Frank legal regime, ICE estimated that the required initial margin increases would range from 40% to 371%.

These estimates assume that the entire default resource shortfall resulting from the DCO's lost reliance on collateral posted as margin by non-defaulting customers is reflected in higher initial margins. To illustrate the other extreme, CME estimated the cost of responding to Complete Legal Segregation purely by means of an increase in its guaranty fund. According to CME, it would be necessary to double the size of the guaranty fund using this approach, although their comment indicates that this should be taken as a rough estimate likely to be adjusted based on experience in the future.[264] Under its assumption that in the future it might clear a notional value of $200 trillion in interest rate swaps, CME estimates that it would require a guaranty fund of $50 billion under the Futures Model and $100 billion under Complete Legal Segregation. CME also stated that it might prove possible to adapt to Complete Legal Segregation using ''what is traditionally called 'concentration' margin whereby the DCO sets a level of risk at which it would begin to charge higher margins based on indicative stress-test levels.'' According to CME, if it proved possible to implement such a system, likely ''concentration charges'' would fall in the range of $50-$250 billion.[265] However, CME stated that it currently lacked sufficient information to precisely assess an appropriate methodology using this approach and that this approach could have disadvantages which would need to be addressed before it was considered as a practical approach.[266] ISDA estimated that industry-wide guaranty funds under the Futures Model would come to $128 billion.[267] ISDA apparently did not independently estimate the effect of Complete Legal Segregation on guaranty funds, but, relying upon DCO estimates that they would approximately double, estimated an increment of an additional $128 billion for Complete Legal Segregation industry-wide.[268] If guaranty funds are larger as a result of Complete Legal Segregation, it is likely that some or all of the cost would be passed on by FCMs to their customers in the form of higher fees. However, in the absence of more information about future competitive conditions in the cleared swaps market and similar matters, it is not possible to reliably estimate the extent to which this would occur.

By contrast to CME, ICE, and ISDA, LCH stated that it is not appropriate to attribute higher margins and/or guaranty funds to the Complete Legal Segregation Model than to the Futures Model and that the appropriate level of default resources for DCOs, is the same under both models.[269] LCH has a more than a decade's worth of experience clearing OTC swaps. LCH states that a methodology in which no diversification of customer collateral is assumed represents their current practice, and is appropriately ''conservative'' in terms of capital adequacy.[270] LCH maintains that, even if it is legally permissible for a DCO to take advantage of fellow customer collateral, it is imprudent to assume that any funds in the omnibus Cleared Swaps Customer Account will remain at the time of default.[271] In the event that default occurs not as a sudden shock, but rather, as the end of a process of credit deterioration taking place over a number of days (potentially a number of weeks), the Cleared Swaps Customers may have time (and, if subject to Fellow-Customer Risk, strong incentive) to port (*i.e.,* transfer) their Cleared Swaps Contracts and associated collateral away from the defaulting FCM.[272] CME also has noted that an FCM default is likely to be preceded by a period of financial turmoil: ''In a situation where an FCM has defaulted on its obligations to one or more DCOs, it is entirely possible that the FCM or its parent company has been under severe financial stress for some period of time.'' [273]

Thus, according to the logic of LCH's approach, the size of the guaranty fund and/or initial margin levels would need to be as high under the Futures Model as under the Complete Legal Segregation Model.[274]

The divergence in the approaches of LCH and the other two clearinghouse commenters is due in part to different implicit assumptions about fellow customer behavior, and how such behavior should affect a DCO's design of default resources. Under Complete Legal Segregation, such an approach likely requires an assessment of the largest stressed loss on a small (or concentrated) number of the largest customers of the given FCM since, in this instance, the DCO would not have access to the collateral of non-defaulting customers. Under the Futures Model, by contrast, consideration of the largest

[260] CME Comment on ANPR at 7–8.

[261] ISDA January 18, 2011 Comment on ANPR at 10.

[262] ISDA at 1. For a more detailed discussion of the benefits of Complete Legal Segregation for porting, *see* section VII.B.3.b.ii.

[263] Second Roundtable Tr. at 255.

[264] CME Comment on ANPR at 7–8. The comment states that under Complete Legal Segregation CME, in determining the size of the guaranty fund ''would likely change [from an approach treating customer margin accounts as diversified unitary pools] to an approach geared toward assessing the largest loss associated with a certain number of the largest individual customer accounts. Currently, we presume that five such customer accounts would be our target, although experience and prudence would be our guide. In any event, our stress-test loss profile of the largest customer accounts would almost certainly generate larger 'worst loss' results [under Complete Legal Segregation] than under [the Futures Model].'' *Id.*

[265] *Id.* at 8–9.

[266] *Id.*

[267] ISDA January 18, 2011 Comment on ANPR at 10. ISDA stated that this estimate referred to the funded component of guaranty funds and did not include DCO's right to call for more assets from member FCMs when needed.

[268] ISDA January 18, 2011 Comment on ANPR at 9–10 and n.8 (referring to CME estimate).

[269] Evaluating the Costs of Complete Legal Segregation, Aug. 2011, at 6–11 (''LCH White Paper'').

[270] 76 FR at 33847, n. 177.

[271] LCH White Paper at 8.

[272] LCH at 3.

[273] CME at 14. *See also id.* (describing a situation where ''an increasing number of customers were removing their assets and accounts.'').

[274] LCH White Paper at 8.

stressed loss might occur over an expanded (and, to a degree, more diversified) pool of customers because the DCO is permitted to use the mutualized pool of customer collateral. Hence, the Complete Legal Segregation Model effectively prohibits the DCO from using the mutualized pool of customer deposits as a resource in the event of double default. It follows that the extent to which the Complete Legal Segregation Model actually affects the DCO's resources relative to the Futures Model depends upon the degree to which non-defaulting Cleared Swaps Customers collateral will be present following a default. If all Cleared Swaps Customer Contracts remained with the defaulting FCM through the default, then the DCO could potentially measure the adequacy of guaranty funds based on a fully diversified pool of customer positions. Conversely, if all customers would transfer their positions to a different FCM in anticipation of the default, then the diversification (and its consequence for the DCO's financial resources package) would be eliminated.

More generally, the extent to which the Complete Legal Segregation Model leads to a higher guaranty fund or higher levels of margin per customer than the Futures Model depends on the extent to which Cleared Swaps Customer Contracts can be expected to remain with the defaulting FCM during the period immediately preceding a default. Since the circumstances of particular FCM defaults will vary, DCOs, in determining their financial resources package, should be expected to take into consideration the possibility that, at least for some FCM defaults, there will be warning signs, resulting in a portion of Cleared Swaps Customer Collateral being transferred out of the Cleared Swaps Customer Account maintained by the defaulting FCM.

While determining the appropriate assumptions regarding customer behavior under the Futures Model is central to the issue of the adequacy of a DCO's default resources, it may prove less central to the consideration of relative costs and benefits under this rule, since both of those costs and benefits depend on the extent to which Cleared Swaps Customers will transfer their Cleared Swaps Contracts. In general, the greater the extent to which customers will move their positions, the lower the benefits of the Complete Legal Segregation Model over the Futures Model. However, this benefit afforded the customer needs to be balanced against the cost to the DCO of insuring against the uncertainty.[275] Both the capital costs and associated benefits of the LSOC Model relative to the Futures Model will tend to be lower to the extent customers are likely to move their positions in advance of an FCM default and higher to the extent customers are unlikely to be able to do so. Differing assumptions about customer mobility in advance of default are, therefore, likely to have smaller implications for the relative costs and benefits between approaches than they do for the Risk Costs considered in isolation.

A distinct question in evaluating Risk Cost is how to translate a margin or guaranty fund increase into a cost increase. A customer that is required to post an additional $100 of margin is not adversely affected in the amount of $100. Moreover, the cost to the customer is, at least in part, offset by the benefit to the DCO. The cost to a customer of a margin increase of $100 is the difference between the gain he or she would have received by retaining that $100, and the return he or she will receive on the asset while it is on deposit with the FCM or DCO. For example, the customer might invest the $100 in buying and holding grain over the pendency of the swap if the initial margin were not increased, while he or she is limited to the return on assets the DCO will accept as margin payment (*e.g.,* the T-bill rate) under the new, higher margins. The exact difference in rate of returns is dependent on the individual customer's investment options as well as his/her risk tolerance, and hence is difficult to calculate precisely. Offsetting this cost are the statutory goal of protecting customer funds and the gain to the DCO of having additional assets available in the event of a combined Cleared Swaps Customer and FCM default, which may enable it to obtain a higher rate of return on some of its other assets.[276] Similarly, the cost to an FCM of a guaranty fund contribution increase is equal to the difference in return between acceptable instruments for deposit to the guaranty fund and the FCM's potential return on those additional funds if they were not deposited to the guaranty fund.[277]

[275] In addition, and as discussed above, section 724(a) of the Dodd-Frank Act added a new paragraph (f) to section 4(d) of the CEA, which requires that neither an FCM nor a DCO may not use the collateral of one customer to cover the obligations of another customer or the obligations of the FCM or the DCO.

[276] An additional offset to this cost is the value that customers assign to the increased safety of their collateral from Fellow-Customer Risk, as discussed in section VII.B.2.

[277] There will also be an implicit cost to the FCM reflecting the risk that the contributed assets will need to be used by the DCO to cover losses in a default situation.

c. Effects on Likelihood That Customer Swaps Positions Will Be ''Ported'' to New FCMs Rather Than Liquidated in the Event of an FCM Default

According to several commenters, a central issue to consider when designing a customer collateral protection regime is the ability of customers to ''port,'' *i.e.,* transfer, their swaps positions to a solvent FCM in the event that their current FCM defaults.[278] Following a default by an FCM, the swaps positions of the FCM's customers either have to be moved to another FCM, or closed. Moving a position to another FCM allows the DCO to maintain its net position in that contract at zero, which is generally a goal of a DCO. It also relieves the customer of the necessity of reestablishing a position, which potentially can be costly, especially in a stressed economic state.[279] Finally, according to commenters, the ability to port rather than liquidate customer positions can have important systematic benefits for the market at large, because the forced liquidation of the swaps cleared by a major FCM could have severe disruptive effects on prices and market conditions.[280]

Rules governing customer collateral accounts have an indirect, but potentially important, effect on the likelihood of successful porting in the event of an FCM default. If swaps positions are transferred to a new FCM, the new FCM will have to add to its customer account with the DCO enough collateral to secure the ''ported'' swaps. The most ready source of such collateral is the customer account of the defaulting FCM, which already contains collateral securing the relevant swaps. However, if collateral from the defaulting FCM's customer account cannot be transferred, then porting of market positions requires customers to, at least temporarily, provide the new FCM with new collateral. This is, at best, a burden, and may, in some cases, make porting infeasible—particularly the prompt porting of numerous customers with varied financial resources and liquidity.

From the perspective of porting, the Complete Legal Segregation Model has several related advantages over the Futures Model in circumstances of a double default. As discussed above, under the Futures Model, if even a

[278] Black Rock at 2; Fidelity at 5; FIA at 4; MFA at 4.

[279] *See* ISDA February 16, 2011 Comment on ANPR at 2.

[280] *See, e.g., id.* at 2–4; and MFA at 4.

single customer is in default, the DCO is entitled to as much of the customer account as is necessary to make up its loss. As a result, the DCO has incentives to postpone transfer of the customer account until the full ramifications of the customer default—and thus the size of the DCO's claim against the account—are resolved. By contrast, under Complete Legal Segregation, the DCOs claim against the customer account is limited by law to that portion of the account attributable to individual customers in default. The DCO will therefore have little or no incentive to resist transfer of that portion of the account attributable to other customers. At the same time, the Complete Legal Segregation Model, unlike the Futures Model, provides a legal framework for attributing the value of the customer account to individual customers. Further, it requires that FCMs provide DCOs with the necessary information and that DCOs make the attribution at least once daily, so as to be prepared for a possible FCM default. As a result, the Complete Legal Segregation Model, has clear advantages over the Futures Model in terms of facilitating the transfer of the collateral of non-defaulting customers in circumstances where one or more customers have defaulted.[281]

Because of the infrequent occurrence of double default situations it is not possible to predict how frequently Complete Legal Segregation will permit porting in circumstances where porting would not be possible, or would be delayed, under the Futures Model. Nevertheless, the structural advantages of Complete Legal Segregation for purposes of facilitating porting, and the analysis in ISDA's comment, imply that this is an important benefit of this model.

d. Effects on Incentives for DCOs and Customers to Monitor and Control Risky Behavior by FCMs

CME and other commenters have argued that the Complete Legal Segregation Model could potentially reduce the incentives of individual customers to carefully evaluate clearing FCMs and only do business with the least risky.[282] In effect, they argue that because the financial condition of the FCM, and of the FCM's other customers, will be less relevant to the customer's exposure to loss in the event of a fellow customer's default than under the Futures Model, the customer will devote less effort to monitoring the FCM and its other customers.

However, while it is possible that the protection against Fellow-Customer Risk provided by the Complete Legal Segregation Model may cause customers, on average, to devote less effort to monitoring the activities of their respective FCMs than under the Futures Model, that incentive is not removed. For example, customers remain exposed to Operational Risk.

Moreover, the Complete Legal Segregation Model creates offsetting increased monitoring incentives on the DCO and its member FCMs, to the benefit of customers. Because of the increased likelihood that a customer default would impact the guaranty fund under the Complete Legal Segregation Model, increased incentives exist to protect that fund through more careful monitoring by the suppliers of the guaranty fund and their agent (the DCO). Indeed, commenters observe that the availability of fellow-customer collateral as a buffer reduces the incentives of DCOs to provide vigorous oversight.[283] The net effect of these incentive changes on the incentive to monitor is difficult to quantify. However, the basic economics of monitoring suggest that there are efficiency gains to centralizing monitoring in a small number of parties.[284] This is because of ''free rider'' effects associated with diffuse exposure to risk of loss. When the risk of loss from the activities of a firm, such as an FCM, is spread over a large number of agents, each individual agent gains little from devoting resources to monitoring the firm relative to the total potential benefit of monitoring to the affected agents as a group.[285] This effect is compounded by an information effect; even if the incentive exists, it is difficult for individual customers to gain access to real-time information about the financial condition of the FCM, and even more so to gain real-time information about the financial condition of their fellow customers. In contrast, the DCO is in a position to obtain good information about the financial condition of FCMs and customers since, via its rules, it can require FCMs to provide such information as a condition for becoming and remaining clearing members. Based on these considerations, there is reason to believe that, while Complete Legal Segregation may reduce incentives for customers to monitor their FCMs, it will increase incentives for monitoring of FCMs by DCOs and, on balance is likely to increase the effectiveness and efficiency with which risk taking by clearing FCMs is monitored.

e. Operational Costs

As discussed above, in order for the Complete Legal Segregation Model to work better than the Futures Model in the event of a double default, the DCO must have information that will enable it to attribute the assets in the defaulting FCM's customer account to individual customers of the FCM.[286] Moreover, because the occurrence of a double default is rare, and because an FCM in the process of default may not (despite its regulatory obligations) be able to provide a DCO with accurate and timely information on its customers, section 22.11 requires clearing FCMs to provide the necessary information to DCOs on at least a daily basis. The Commission notes that section 22.12 similarly requires DCOs to use this information to calculate and record the amount of collateral required to support each customer's Cleared Swaps transactions on at least a daily basis. This daily information processing is not provided under the Futures Model and will add to the operational costs of clearing.

The NPRM discussed the likely magnitude of increased operational costs associated with the more extensive information requirement.[287] The Commission noted there that one estimate suggested the operational costs of the Complete Legal Segregation Model (relative to the Futures Model) were likely to be slightly less than $1 million per year per FCM, with one-time costs of about $700,000.[288] A DCO's cost of accommodating this additional information was estimated to be of the same general magnitude. Another comment observed that the operational costs would be the same across all models being considered given a requirement for DCOs to collect margin on a gross basis.[289] The Commission

[281] For a more detailed discussion of the operation of the segregation models in an FCM bankruptcy, *see supra* section I.D.

[282] Second Roundtable Tr. at 253, l.17; FIA at 5; Newedge at 4. Cf. MFA at 4–5; BlackRock at 8.

[283] Blackrock at 8; Freddie Mac at 2; Vanguard at 5.

[284] *See e.g.,* Kevin Dowd, *Re-Examining the Case for Government Deposit Insurance,* 59 S. Econ. J. 363, 370 (1993).

[285] *See, e.g.,* Andrei Shleifer and Robert W. Vishny, *A Survey of Corporate Governance,* 52 J. Fin. 737, 753 (1997) (discussing effect of ''free rider'' issues on monitoring in context of corporate governance).

[286] *See* discussion at section VII.A.2; *supra* n.224.

[287] 76 FR at 33845–33846.

[288] *Id.* (citing ISDA estimates for operational costs received in response to the ANPR).

[289] LCH at 2 (''If the Commission adopts [the gross margining requirement for DCOs], any DCO offering any swaps clearing service under any of the models outlined by the Commission in the Proposed Rulemaking will be required to track margin on an individual client basis and FCMs will be required to do the same.''). *See also* 76 FR at 69374–76. In addition, some individual customer information already resides at the DCO. *See* CME at 9 (''At the

received no alternative quantitative estimates in response to the NPRM,[290] although Fidelity suggested that some of the operational costs associated with Complete Legal Segregation will be incurred regardless of the segregation model that is chosen because other CFTC rulemakings (*i.e.,* the real time reporting rulemaking and the reporting of certain post-enactment swap transactions rulemaking) require similar reporting.[291]

Based on estimates by CME and ISDA described above, the expected scale of the cleared swaps market will require hundreds of billions of dollars of collateral to adequately secure swaps positions under any segregation model, and will thus potentially expose this collateral to some degree of Fellow-Customer Risk. In light of the projected magnitude of the customer funds at stake, the Commission believes that operational costs of the Complete Legal Segregation Model are a relatively minor factor in choosing a model that would protect customer funds consistent with section 4d(f) of the CEA, and that this would be true even if operational costs proved to be considerably higher than the estimate described in the NPRM.

f. Additional Potential Sources of Costs and Benefits Arising From Complete Legal Segregation

As discussed in section I.D.1 above, the Complete Legal Segregation Model provides a significant advantage compared to the Futures Model with respect to fostering transfer. Specifically, under the Complete Legal Segregation Model, information about the Cleared Swaps Customers as a whole, and about each individual Cleared Swaps Customer's positions, are transmitted to the DCO every day, an information flow (and store) that is not present in the Futures Model. Thus, in the event of an FCM bankruptcy, each DCO will have important information on a customer by customer basis that can be used to facilitate and implement transfers, thereby making the DCO less reliant upon the FCM for that information.

3. Application to CEA Section 15(a) Considerations

a. Protection of Market Participants

As discussed above, the primary benefit of the Complete Legal Segregation Model is the protection of Cleared Swaps Customers from the risk of losing the value of their collateral as a result of a double default. Based on estimates by CME and ISDA, the cleared swaps market is likely to require upwards of $500 billion in customer collateral regardless of the segregation model chosen by the Commission.[292] These assets will be potentially exposed to Fellow-Customer Risk. It is not possible to reliably quantify the likelihood of fellow customer losses in the absence of Complete Legal Segregation for reasons discussed in section VII.B.2.a. above. In addition, the magnitude of Fellow-Customer Risk in particular default situations will be affected by the extent to which customers foresee or anticipate a default and accordingly move their accounts to other FCMs; and the extent to which a default is foreseeable or anticipated will vary in different defaults. The risk cost imposed on DCOs and their members by Complete Legal Segregation will be affected by the foreseeability of default in a roughly parallel way.

Notwithstanding these uncertainties, swaps users who participated in this rulemaking process, with only limited exceptions, consistently placed great value on protection against Fellow-Customer Risk and supported either Complete Legal Segregation or stronger measures to provide such protection despite estimates of high dollar costs in the form of the capital cost of higher margins or guaranty funds.[293] Since swaps users most likely ultimately will bear, directly or indirectly, most of the dollar costs of protection against Fellow-Customer Risk, the Commission places substantial weight on their valuation of such protection.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

i. Dollar Costs and Swaps Usage

Complete Legal Segregation could add materially to the dollar cost of clearing swaps, affecting competitiveness in particular.[294] Moreover, there were estimates (albeit somewhat speculative estimates) that Complete Legal Segregation might require on the order of 70% higher margins, 100% higher DCO guaranty funds, or some combination of smaller increases in both. In light of the expected large scale of the cleared swaps market, these estimates imply industry wide increments in margin on the order of $500 billion or more, increments in guaranty funds of over $100 billion, or a combination of smaller increments of both.[295] The cost of these measures would not be the dollar amount of margin or guaranty fund contributions, but, rather, the opportunity cost of using capital for these purposes rather than other business purposes. Considerable uncertainty is added to the evaluation of these estimates of the dollar cost of Complete Legal Segregation by the fact that DCOs do not yet have experience clearing under the Dodd-Frank regime (although they do currently clear swaps pursuant to the rules of the exchanges) and by LCH's observation that, under the method it uses to determine needed financial resources to protect against default, the same level of resources is required under both Complete Legal Segregation and the Futures Model.[296]

If Complete Legal Segregation results in higher dollar costs to swaps users, this may discourage some use of swaps for hedging or other beneficial economic uses. The Commission does not have precise information about the price responsiveness of swaps usage that would make it possible to quantify this effect. A countervailing consideration is that comments to this rulemaking indicate that customers are already transacting in uncleared swaps, and are paying for full segregation of the collateral they are posting because of the importance to them of protection of that collateral against the defaults of others. Moreover, as some commenters noted, concern over exposure to Fellow-Customer Risk that they currently pay for and receive could discourage swaps usage in the absence of Complete Legal Segregation or other protection against such risk.[297] Comments by swaps users indicated that such effects would occur though they did not provide quantitative estimates. The evidence from the comments, specifically the statements of swap users regarding their willingness to pay for legal segregation, suggests that the demand-enhancing

end of each trading day, CME Clearing calculates, for each FCM's cleared swaps customer account* * * the net margin requirement for each customer in the account.'').

[290] In fact, FHLB states that the costs and risks associated with the additional operational complexity ''may be difficult to quantify.'' FHLB at 4.

[291] Fidelity at 6.

[292] *See supra* n. 243.

[293] *See, e.g.,* Second Roundtable Tr. at 245–249; Second Roundtable Tr. at 140, l.12 (Mr. MacFarlane stating that ''Tudor would happily pay the incremental costs, both in terms of collateral and operational costs [for greater protection].'').

[294] This analysis is also informed by the extent to which clearing certain types of swaps is mandatory, as well as by the cost already incurred in the uncleared swaps market.

[295] *See supra* n. 243.

[296] *See supra* n. 269.

[297] *See e.g.,* Second Roundtable at 141, l.3 (Mr. MacFarlane stating''the uncertainty that's created by not knowing who we're sharing risk in the omnibus pool would cause us to pull our capital back from the market.'').

effects of the increased safety associated with Complete Legal Segregation are larger than the demand-reducing effects of higher margins and/or fees associated with it.[298]

ii. Financial Integrity of Markets

Complete Legal Segregation is likely to have several effects on the financial integrity of markets, the specifics of which are discussed in more detail under other headings.[299] As explained above, Complete Legal Segregation is expected to lead to a net improvement in the monitoring of risky behavior by FCMs, with the effects of increased incentives for such monitoring by DCOs outweighing the effects of reduced incentives for such monitoring by customers. This net improvement in monitoring of FCMs can be expected to enhance the financial integrity of the markets in which clearing FCMs participate.

By facilitating porting, Complete Legal Segregation is expected to enhance the financial integrity of cleared swaps markets in financial stress situations involving FCMs by reducing the likelihood that a double default will result in the need to liquidate large volumes of swaps positions with resulting costs to customers and the DCO and the potential to seriously disrupt the market at large.

By prohibiting DCOs from using the collateral of non-defaulting customers in a double default situation, Complete Legal Segregation potentially could have a negative effect on the financial integrity of DCOs by reducing the financial resources available to apply to losses arising from double defaults. However, the record indicates that DCOs would substitute additional resources in the form of higher margin levels, larger guaranty funds, or a combination of both as need to maintain the ability to cover losses from FCM and customer defaults.[300] Importantly, prohibiting DCOs from using the collateral of non-defaulting customers to protect a DCO from risks within a DCO's control is consistent with the statute's goal of protecting customer funds. As a result, the loss of the ability to rely on the collateral of non-defaulting customers would be expected to translate to higher dollar costs than under the Futures Model rather than reduced financial integrity.

c. Price Discovery

Complete Legal Segregation is not expected to have a significant effect on price discovery under normal market conditions. In circumstances of a double default involving a large FCM, Complete Legal Segregation may help protect price discovery in the swaps markets by reducing the likelihood of the need for a large scale liquidation of swaps positions that would disrupt normal pricing.

d. Sound Risk Management Practices

As discussed above,[301] Complete Legal Segregation is expected to produce a net improvement in the monitoring of risky behavior by FCMs. While there may be some reduction in the incentives to Cleared Swaps Customers to monitor their FCMs, there is a corresponding increase in the incentives by DCOs to do so. There are efficiency gains in centralizing this responsibility in a small number of parties, and the DCOs (as membership organizations) have greater access to information from their Clearing Members, in contrast to Cleared Swaps Customers, who (due to considerations of confidentiality) may have little ability to obtain information about an FCM's activities with respect to fellow-customers.

e. Other Public Interest Considerations

By better protecting Cleared Swaps Customer Collateral against fellow-customer risk, the LSOC Model will enhance compliance with the values of CEA Section 4d(f), which requires that the property of each individual customer be protected.

C. Conclusion

The Commission has carefully considered the available evidence regarding the costs and benefits of Complete Legal Segregation Model and has concluded that the Complete Legal Segregation Model best accomplishes the statutory objective of protecting customer deposits. In terms of benefits, customers have much greater assurance of the safety of their margin deposits against Fellow-Customer Risk under the Complete Legal Segregation Model than under the Futures Model. In addition, Complete Legal Segregation will facilitate porting rather than liquidation of customer positions in double default situations with associated benefits to customers and, for defaults of large FCMs, reduced risk of disruption of markets as a result of large volumes of customer positions. Complete Legal Segregation also will increase incentives for DCOs to monitor risky behavior by member FCMs and that this effect can be expected to outweigh reduced incentives for customers to monitor their FCMs. In determining that Complete Legal Segregation is the appropriate model, the Commission has placed weight on, among other considerations, the comments of many swaps users that they place great value on assurance of their margins and their positions and are willing to incur substantial costs to achieve such assurance and on comments by a range of market participants placing great importance on porting of customer positions as a response to FCM defaults.

On the cost side, several DCOs that employ the Futures Model for the futures-side of their business and other commenters argued that Complete Legal Segregation will require some combination of substantially higher margin levels and guaranty fund contributions than the Futures Model. However, one major DCO reported that, under the approach it uses to establish margin and guaranty fund level, these levels would be the same under Complete Legal Segregation and the Futures Model. Complete Legal Segregation will impose some operational costs but such costs are small enough to be a minor consideration relative to the other aspects of cost; *e.g.,* the potential increases in margins and guaranty funds.

The Commission notes that, as discussed above, there are a number of sources of uncertainty in evaluating the costs and benefits of Complete Legal Segregation, such as market participants not yet having experience clearing swaps under the Dodd-Frank legal regime and the infrequency of double defaults. However, the costs and benefits of all the models considered by the Commission are subject to similar uncertainties as to the probability of double defaults and customer behavior in anticipation of such defaults. Accordingly, such uncertainties do not militate against the selection of the Complete Legal Segregation Model as the preferred alternative.

VIII. Related Matters

A. Paperwork Reduction Act

1. Introduction

Sections 22.2(g), 22.5(a), 22.11, 22.12, and 22.16 of these rules impose new information disclosure and recordkeeping requirements that constitute the collection of information

[298] *See e.g.,* Second Roundtable Tr. at 245 (Mr. Thum stating that ''we're prepared to bear the cost to provide for the margin protection that our clients need.'').

[299] *See* discussion at sections VII.B.2.b, VII.B.2.c, VII.B.2.d, and VII.B.3.b.i.

[300] *See supra* n. 255.

[301] *See supra* section VII.B.2.d.

within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[302] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.[303] The Commission therefore has requested that the Office of Management and Budget (''OMB'') assign a control number for this collection of information. The Commission has also submitted the NPRM, this final rule release, and supporting documentation to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is ''Disclosure and Retention of Certain Information Relating to Cleared Swaps Customer Collateral,'' OMB Control Number 3038–0091. This collection of information will be mandatory. The information in question will be held by private entities and, to the extent it involves consumer financial information, may be protected under Title V of the Gramm-Leach-Bliley Act as amended by the Dodd-Frank Act.[304] OMB has not yet approved the collection of this information.

2. Comments Received on Collection of Information Proposed in NPRM

Sections 22.2(g), 22.5(a), 22.11, 22.12, and 22.16 and estimates of the expected information collection burden were published for comment in the NPRM. The collection of information required by the final versions of these rules and the associated information collection burden is identical to that of the rules as proposed. Comments were received regarding proposed sections 22.5(a), 22.11, 22.12, and 22.16. The substance of these comments and the Commission's response to them is set forth above in sections IV.E, IV.K, IV.L., and IV.P of this preamble.

In addition, in response to a comment on the definition of ''Cleared Swaps Customer Collateral'' by the FIA requesting that the Commission confirm that the term ''Cleared Swaps Customer Collateral'' includes all assets provided to an FCM by a Cleared Swaps Customer, including amounts in excess of the amount required to margin a Cleared Swap by the relevant DCO, the Commission has included in the final rule a new permissive provision, subsection 22.13(c)(2). Subsection 22.13(c)(2) provides that an FCM may transmit to a DCO collateral posted by a Cleared Swaps Customer in excess of the amount required by the DCO if (1) the rules of the DCO permit such transmission; and (2) the DCO provides a mechanism by which the FCM is able to, and maintains rules requiring the FCM to, identify each business day, for each Cleared Swaps Customer, the amount of collateral posted in excess of the amount required by the DCO. This rule subsection may have the effect of causing some FCMs to perform a daily computation of the amount of collateral posted in excess of the amount required by the relevant DCO. In the view of the Commission, this provision does not materially change, or add to the burden of, the information collection required by the Part 22 rules as proposed. This is so because the computation of the amount of collateral posted in excess of the amount required by the relevant DCO will be performed using same data sources that would be used for the information collections required by subsections 22.2(g), 22.11, and 22.12. Moreover, this burden would only be imposed (and enforced) by voluntary action of the DCO in permitting, and the FCM in transmitting, such additional collateral.

There were no comments specifically addressing the Commission's numerical estimates of information collection burden in section VII.B.2 of the NPRM.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'')[305] requires that agencies consider whether their rules will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis of that impact. These Part 22 rules and amendments to Part 190 apply to DCOs and FCMs. In the NPRM, the Chairman, pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), certified on behalf of the Commission that these rules and amendments will not have a significant economic impact on a substantial number of small entities based on previous determinations by the Commission that DCOs and FCMs are not small entities for purposes of the RFA.[306]

List of Subjects

17 CFR Part 22

Brokers, Clearing, Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 190

Bankruptcy, Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

IX. Text of Final Rules

For the reasons stated in this release, the Commission hereby amends Chapter 17 as follows:

■ 1. Add Part 22 to read as follows:

PART 22—CLEARED SWAPS

Sec.

22.1 Definitions.
22.2 Futures Commission Merchants: Treatment of Cleared Swaps Customer Collateral.
22.3 Derivatives Clearing Organizations: Treatment of Cleared Swaps Customer Collateral.
22.4 Futures Commission Merchants and Derivatives Clearing Organizations: Permitted Depositories.
22.5 Futures Commission Merchants and Derivatives Clearing Organizations: Written Acknowledgement.
22.6 Futures Commission Merchants and Derivatives Clearing Organizations: Naming of Cleared Swaps Customer Accounts.
22.7 Permitted Depositories: Treatment of Cleared Swaps Customer Collateral.
22.8 Situs of Cleared Swaps Customer Accounts.
22.9 Denomination of Cleared Swaps Customer Collateral and Location of Depositories.
22.10 Application of other Regulatory Provisions.
22.11 Information to be Provided Regarding Customers and their Cleared Swaps.
22.12 Information to be Maintained Regarding Cleared Swaps Customer Collateral.
22.13 Additions to Cleared Swaps Customer Collateral.
22.14 Futures Commission Merchant Failure to Meet a Customer Margin Call in Full.
22.15 Treatment of Cleared Swaps Customer Collateral on an Individual Basis.
22.16 Disclosures to Customers.

Authority: 7 U.S.C. 1a, 6d, 7a–1 as amended by Pub. L. 111–203, 124 Stat. 1376.

§ 22.1 Definitions.

For the purposes of this part:

Cleared Swap. This term refers to a transaction constituting a ''cleared swap'' within the meaning of section 1a(7) of the Act.

(1) This term shall exclude any swap (along with money, securities, or other property received to margin, guarantee, or secure such a swap) that, pursuant to a Commission rule, regulation, or order, is (along with such money, securities, or other property) commingled with a commodity future or option (along with money, securities, or other property

[302] 44 U.S.C. 3501 *et seq.*

[303] *Id.*

[304] *See generally,* Notice of Proposed Rulemaking, Privacy of Consumer Financial Information; Conforming Amendments Under Dodd-Frank Act, 75 FR 66014, Oct. 27, 2010.

[305] 5 U.S.C. 601 *et seq.*

[306] *See* 66 FR 45605, 45609 (Aug. 29, 2001) (DCOs); 47 FR 18618, 18619–20 (April 30, 1982) (FCMs).

received to margin, guarantee, or secure such a future or option) that is segregated pursuant to section 4d(a) of the Act.

(2) This term shall include any trade or contract (along with money, securities or other property received to margin, guarantee, or secure such a trade or contract), that

(i) Would be required to be segregated pursuant to section 4d(a) of the Act, or

(ii) Would be subject to § 30.7 of this chapter, but which is, in either case, pursuant to a Commission rule, regulation, or order (or a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter), commingled with a swap (along with money, securities, or other property received to margin, guarantee, or secure such a swap) in an account segregated pursuant to section 4d(f) of the Act.

Cleared Swaps Customer. This term refers to any person entering into a Cleared Swap, but shall exclude:

(1) Any owner or holder of a Cleared Swaps Proprietary Account with respect to the Cleared Swaps in such account; and

(2) A clearing member of a derivatives clearing organization with respect to Cleared Swaps cleared on that derivatives clearing organization. A person shall be a Cleared Swaps Customer only with respect to its Cleared Swaps.

Cleared Swaps Customer Account. This term refers to any account for the Cleared Swaps of Cleared Swaps Customers and associated Cleared Swaps Customer Collateral that:

(1) A futures commission merchant maintains on behalf of Cleared Swaps Customers (including, in the case of a Collecting Futures Commission Merchant, the Cleared Swaps Customers of a Depositing Futures Commission Merchant) or

(2) A derivatives clearing organization maintains for futures commission merchants on behalf of Cleared Swaps Customers thereof.

Cleared Swaps Customer Collateral. (1) This term means all money, securities, or other property received by a futures commission merchant or by a derivatives clearing organization from, for, or on behalf of a Cleared Swaps Customer, which money, securities, or other property:

(i) Is intended to or does margin, guarantee, or secure a Cleared Swap; or

(ii) Constitutes, if a Cleared Swap is in the form or nature of an option, the settlement value of such option.

(2) This term shall also include accruals, *i.e.,* all money, securities, or other property that a futures commission merchant or derivatives clearing organization receives, directly or indirectly, which is incident to or results from a Cleared Swap that a futures commission merchant intermediates for a Cleared Swaps Customer.

Cleared Swaps Proprietary Account. (1) This term means an account for Cleared Swaps and associated collateral that is carried on the books and records of a futures commission merchant for persons with certain relationships with that futures commission merchant, specifically:

(i) Where such account is carried for a person falling within one of the categories specified in paragraph (2) of this definition, or

(ii) Where ten percent or more of such account is owned by a person falling within one of the categories specified in paragraph (2) of this definition, or

(iii) Where an aggregate of ten percent or more of such account is owned by more than one person falling within one or more of the categories specified in paragraph (2) of this definition.

(2) The relationships to the futures commission merchant referred to in paragraph (1) of this definition are as follows:

(i) Such individual himself, or such partnership, corporation or association itself;

(ii) In the case of a partnership, a general partner in such partnership;

(iii) In the case of a limited partnership, a limited or special partner in such partnership whose duties include:

(A) The management of the partnership business or any part thereof;

(B) The handling, on behalf of such partnership, of:

(*1*) The Cleared Swaps of Cleared Swaps Customers or

(*2*) The Cleared Swaps Customer Collateral;

(C) The keeping, on behalf of such partnership, of records pertaining to

(*1*) the Cleared Swaps of Cleared Swaps Customers or

(*2*) the Cleared Swaps Customer Collateral; or

(D) The signing or co-signing of checks or drafts on behalf of such partnership;

(iv) In the case of a corporation or association, an officer, director, or owner of ten percent or more of the capital stock of such organization;

(v) An employee of such individual, partnership, corporation or association whose duties include:

(A) The management of the business of such individual, partnership, corporation or association or any part thereof;

(B) The handling, on behalf of such individual, partnership, corporation, or association, of the Cleared Swaps of Cleared Swaps Customers or the Cleared Swaps Customer Collateral;

(C) The keeping of records, on behalf of such individual, partnership, corporation, or association, pertaining to the Cleared Swaps of Cleared Swaps Customers or the Cleared Swaps Customer Collateral; or

(D) The signing or co-signing of checks or drafts on behalf of such individual, partnership, corporation, or association;

(vi) A spouse or minor dependent living in the same household of any of the foregoing persons;

(vii) A business affiliate that, directly or indirectly, controls such individual, partnership, corporation, or association; or

(viii) A business affiliate that, directly or indirectly, is controlled by or is under common control with, such individual, partnership, corporation or association. *Provided, however,* that an account owned by any shareholder or member of a cooperative association of producers, within the meaning of section 6a of the Act, which association is registered as a futures commission merchant and carries such account on its records, shall be deemed to be a Cleared Swaps Customer Account and not a Cleared Swaps Proprietary Account of such association, unless the shareholder or member is an officer, director, or manager of the association.

Clearing Member. This term means any person that has clearing privileges such that it can process, clear and settle trades through a derivatives clearing organization on behalf of itself or others. The derivatives clearing organization need not be organized as a membership organization.

Collecting Futures Commission Merchant. A futures commission merchant that carries Cleared Swaps on behalf of another futures commission merchant and the Cleared Swaps Customers of the latter futures commission merchant, and as part of carrying such Cleared Swaps, collects Cleared Swaps Customer Collateral.

Commingle. To commingle two or more items means to hold such items in the same account, or to combine such items in a transfer between accounts.

Customer. This term means any customer of a futures commission merchant, other than a Cleared Swaps Customer, including, without limitation:

(1) Any ''customer'' or ''commodity customer'' within the meaning of § 1.3 of this chapter; and

(2) Any ''foreign futures or foreign options customer'' within the meaning of § 30.1(c) of this chapter.

Depositing Futures Commission Merchant. A futures commission merchant that carries Cleared Swaps on behalf of its Cleared Swaps Customers through another futures commission merchant and, as part of carrying such Cleared Swaps, deposits Cleared Swaps Customer Collateral with such futures commission merchant.

Permitted Depository. This term shall have the meaning set forth in § 22.4 of this part.

Segregate. To segregate two or more items is to keep them in separate accounts, and to avoid combining them in the same transfer between two accounts.

§ 22.2 Futures Commission Merchants: Treatment of Cleared Swaps and Associated Cleared Swaps Customer Collateral.

(a) *General.* A futures commission merchant shall treat and deal with the Cleared Swaps of Cleared Swaps Customers and associated Cleared Swaps Customer Collateral as belonging to Cleared Swaps Customers.

(b) *Location of Cleared Swaps Customer Collateral.* (1) A futures commission merchant must segregate all Cleared Swaps Customer Collateral that it receives, and must either hold such Cleared Swaps Customer Collateral itself as set forth in paragraph (b)(2) of this section, or deposit such collateral into one or more Cleared Swaps Customer Accounts held at a Permitted Depository, as set forth in paragraph (b)(3) of this section.

(2) If a futures commission merchant holds Cleared Swaps Customer Collateral itself, then the futures commission merchant must:

(i) Physically separate such collateral from its own property;

(ii) Clearly identify each physical location in which it holds such collateral as a ''Location of Cleared Swaps Customer Collateral'' (the ''FCM Physical Location'');

(iii) Ensure that the FCM Physical Location provides appropriate protection for such collateral; and

(iv) Record in its books and records the amount of such Cleared Swaps Customer Collateral separately from its own funds.

(3) If a futures commission merchant holds Cleared Swaps Customer Collateral in a Permitted Depository, then:

(i) The Permitted Depository must qualify pursuant to the requirements set forth in § 22.4 of this part, and

(ii) The futures commission merchant must maintain a Cleared Swaps Customer Account with each such Permitted Depository.

(c) *Commingling.* (1) A futures commission merchant may commingle the Cleared Swaps Customer Collateral that it receives from, for, or on behalf of multiple Cleared Swaps Customers.

(2) A futures commission merchant shall not commingle Cleared Swaps Customer Collateral with either of the following:

(i) Funds belonging to the futures commission merchant, except as expressly permitted in paragraph (e)(3) of this section; or

(ii) Other categories of funds belonging to Customers of the futures commission merchant, including customer funds (as § 1.3 of this chapter defines such term) and the foreign futures or foreign options secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation, or order, or by a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter.

(d) *Limitations on Use.* (1) No futures commission merchant shall use, or permit the use of, the Cleared Swaps Customer Collateral of one Cleared Swaps Customer to purchase, margin, or settle the Cleared Swaps or any other trade or contract of, or to secure or extend the credit of, any person other than such Cleared Swaps Customer. Cleared Swaps Customer Collateral shall not be used to margin, guarantee, or secure trades or contracts of the entity constituting a Cleared Swaps Customer other than in Cleared Swaps, except to the extent permitted by a Commission rule, regulation or order.

(2) A futures commission merchant may not impose or permit the imposition of a lien on Cleared Swaps Customer Collateral, including any residual financial interest of the futures commission merchant in such collateral, as described in paragraph (e)(4) of this section.

(3) A futures commission merchant may not include, as Cleared Swaps Customer Collateral,

(i) Money invested in the securities, memberships, or obligations of any derivatives clearing organization, designated contract market, swap execution facility, or swap data repository, or

(ii) Money, securities, or other property that any derivatives clearing organization holds and may use for a purpose other than those set forth in § 22.3 of this part.

(e) *Exceptions.* Notwithstanding the foregoing:

(1) *Permitted Investments.* A futures commission merchant may invest money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter, which section shall apply to such money, securities, or other property as if they comprised customer funds or customer money subject to segregation pursuant to section 4d(a) of the Act and the regulations thereunder.

(2) *Permitted Withdrawals.* Such share of Cleared Swaps Customer Collateral as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle a Cleared Swaps Customer's Cleared Swaps with a derivatives clearing organization, or with a Collecting Futures Commission Merchant, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with such Cleared Swaps.

(3) *Deposits of Own Money, Securities, or Other Property.*

(i) In order to ensure that it is always in compliance with paragraph (f) of this section, a futures commission merchant may place in an FCM Physical Location or deposit in a Cleared Swaps Customer Account its own money, securities, or other property (*provided, that* such securities or other property are unencumbered and are of the types specified in § 1.25 of this chapter).

(ii) Money, securities, or other property deposited by a futures commission merchant pursuant to 22.13(b) and available to a derivatives clearing organization or Collecting Futures Commission Merchant to meet the obligations of the futures commission merchant's Cleared Swaps Customers collectively, shall be maintained in an account separate from the Cleared Swaps Customer Account.

(4) *Residual Financial Interest.* (i) If, in accordance with paragraph (e)(3)(i) of this section, a futures commission merchant places in an FCM Physical Location or deposits in a Cleared Swaps Customer Account its own money, securities, or other property, then such money, securities, or other property (including accruals thereon) shall constitute Cleared Swaps Customer Collateral.

(ii) The futures commission merchant shall have a residual financial interest in any portion of such money, securities, or other property in excess of that necessary for compliance with paragraph (f)(4) of this section.

(iii) The futures commission merchant may withdraw money, securities, or other property from the FCM Physical

Location or Cleared Swaps Customer Account, to the extent of its residual financial interest therein. At the time of such withdrawal, the futures commission merchant shall ensure that the withdrawal does not cause its residual financial interest to become less than zero.

(f) *Requirements as to Amount.* (1) For purposes of this § 22.2(f), the term ''account'' shall reference the entries on the books and records of a futures commission merchant pertaining to the Cleared Swaps Customer Collateral of a particular Cleared Swaps Customer.

(2) The futures commission merchant must reflect in the account that it maintains for each Cleared Swaps Customer the market value of any Cleared Swaps Customer Collateral that it receives from such customer, as adjusted by:

(i) Any uses permitted under § 22.2(d) of this part;

(ii) Any accruals on permitted investments of such collateral under § 22.2(e) of this part that, pursuant to the futures commission merchant's customer agreement with that customer, are creditable to such customer;

(iii) Any charges lawfully accruing to the Cleared Swaps Customer, including any commission, brokerage fee, interest, tax, or storage fee; and

(iv) Any appropriately authorized distribution or transfer of such collateral.

(3) If the market value of Cleared Swaps Customer Collateral in the account of a Cleared Swaps Customer is positive after adjustments, then that account has a credit balance. If the market value of Cleared Swaps Customer Collateral in the account of a Cleared Swaps Customer is negative after adjustments, then that account has a debit balance.

(4) The futures commission merchant must maintain in segregation, in its FCM Physical Locations and/or its Cleared Swaps Customer Accounts at Permitted Depositories, an amount equal to the sum of any credit balances that the Cleared Swaps Customers of the futures commission merchant have in their accounts, excluding from such sum any debit balances that the Cleared Swaps Customers of the futures commission merchant have in their accounts.

(5) Notwithstanding the foregoing, the futures commission merchant must include, in calculating the sum referenced in paragraph (f)(4) of this section, any debit balance that a Cleared Swaps Customer may have in its account, to the extent that such balance is secured by ''readily marketable securities'' that the Cleared Swaps Customer deposited with the futures commission merchant.

(i) For purposes of this section, ''readily marketable'' shall be defined as having a ''ready market'' as such latter term is defined in Rule 15c3–1(c)(11) of the Securities and Exchange Commission (§ 241.15c3–1(c)(11) of this title).

(ii) In order for a debit balance to be deemed secured by ''readily marketable securities,'' the futures commission merchant must maintain a security interest in such securities, and must hold a written authorization to liquidate the securities at the discretion of the futures commission merchant.

(iii) To determine the amount secured by ''readily marketable securities,'' the futures commission merchant shall:

(A) Determine the market value of such securities; and

(B) Reduce such market value by applicable percentage deductions (*i.e.,* ''securities haircuts'') as set forth in Rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission (§ 240.15c3–1(c)(2)(vi) of this title). The portion of the debit balance, not exceeding 100 per cent, that is secured by the reduced market value of such readily marketable securities shall be included in calculating the sum referred to in paragraph (f)(4) of this section.

(g) *Segregated Account; Daily Computation and Record.* (1) Each futures commission merchant must compute as of the close of each business day, on a currency-by-currency basis:

(i) The aggregate market value of the Cleared Swaps Customer Collateral in all FCM Physical Locations and all Cleared Swaps Customer Accounts held at Permitted Depositories (the ''Collateral Value'');

(ii) The sum referenced in paragraph (f)(4) of this section (the ''Collateral Requirement''); and

(iii) The amount of the residual financial interest that the futures commission merchant holds in such Cleared Swaps Customer Collateral, which shall equal the difference between the Collateral Value and the Collateral Requirement.

(2) The futures commission merchant must complete the daily computations required by this section prior to noon on the next business day and must keep such computations, together with all supporting data, in accordance with the requirements of § 1.31 of this chapter.

§ 22.3 Derivatives Clearing Organizations: Treatment of Cleared Swaps Customer Collateral.

(a) *General.* A derivatives clearing organization shall treat and deal with the Cleared Swaps Customer Collateral deposited by a futures commission merchant as belonging to the Cleared Swaps Customers of such futures commission merchant and not other persons, including, without limitation, the futures commission merchant.

(b) *Location of Cleared Swaps Customer Collateral.* (1) The derivatives clearing organization must segregate all Cleared Swaps Customer Collateral that it receives from futures commission merchants, and must either hold such Cleared Swaps Customer Collateral itself as set forth in paragraph (b)(2) of this section, or deposit such collateral into one or more Cleared Swaps Customer Accounts held at a Permitted Depository, as set forth in paragraph (b)(3) of this section.

(2) If a derivatives clearing organization holds Cleared Swaps Customer Collateral itself, then the derivatives clearing organization must:

(i) Physically separate such collateral from its own property, the property of any futures commission merchant, and the property of any other person that is not a Cleared Swaps Customer of a futures commission merchant;

(ii) Clearly identify each physical location in which it holds such collateral as ''Location of Cleared Swaps Customer Collateral'' (the ''DCO Physical Location'');

(iii) Ensure that the DCO Physical Location provides appropriate protection for such collateral; and

(iv) Record in its books and records the amount of such Cleared Swaps Customer Collateral separately from its own funds, the funds of any futures commission merchant, and the funds of any other person that is not a Cleared Swaps Customer of a futures commission merchant.

(3) If a derivatives clearing organization holds Cleared Swaps Customer Collateral in a Permitted Depository, then:

(i) The Permitted Depository must qualify pursuant to the requirements set forth in § 22.4 of this part; and

(ii) The derivatives clearing organization must maintain a Cleared Swaps Customer Account with each such Permitted Depository.

(c) *Commingling.* (1) A derivatives clearing organization may commingle the Cleared Swaps Customer Collateral that it receives from multiple futures commission merchants on behalf of their Cleared Swaps Customers.

(2) A derivatives clearing organization shall not commingle the Cleared Swaps Customer Collateral that it receives from a futures commission merchant on behalf of Cleared Swaps Customers with any of the following:

(i) The money, securities, or other property belonging to the derivatives clearing organization;

(ii) The money, securities, or other property belonging to any futures commission merchant; or

(iii) Other categories of funds that it receives from a futures commission merchant on behalf of Customers, including customer funds (as § 1.3 of this chapter defines such term) and the foreign futures or foreign options secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation or order, (or a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter).

(d) *Exceptions; Permitted Investments.* Notwithstanding the foregoing and § 22.15 of this part, a derivatives clearing organization may invest the money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter, which section shall apply to such money, securities, or other property as if they comprised customer funds or customer money subject to segregation pursuant to section 4d(a) of the Act and the regulations thereunder.

§ 22.4 Futures Commission Merchants and Derivatives Clearing Organizations: Permitted Depositories.

In order for a depository to be a Permitted Depository:

(a) The depository must (subject to § 22.9) be one of the following types of entities:

(1) A bank located in the United States;

(2) A trust company located in the United States;

(3) A Collecting Futures Commission Merchant registered with the Commission (but only with respect to a Depositing Futures Commission Merchant providing Cleared Swaps Customer Collateral); or

(4) A derivatives clearing organization registered with the Commission; and

(b) The futures commission merchant or the derivatives clearing organization must hold a written acknowledgment letter from the depository as required by § 22.5 of this part.

§ 22.5 Futures Commission Merchants and Derivatives Clearing Organizations: Written Acknowledgement.

(a) Before depositing Cleared Swaps Customer Collateral, the futures commission merchant or derivatives clearing organization shall obtain and retain in its files a separate written acknowledgment letter from each depository in accordance with §§ 1.20 and 1.26 of this chapter, with all references to ''customer funds'' modified to apply to Cleared Swaps Customer Collateral, and with all references to section 4d(a) or 4d(b) of the Act and the regulations thereunder modified to apply to section 4d(f) of the Act and the regulations thereunder.

(b) The futures commission merchant or derivatives clearing organization shall adhere to all requirements specified in §§ 1.20 and 1.26 of this chapter regarding retaining, permitting access to, filing, or amending the written acknowledgment letter, in all cases as if the Cleared Swaps Customer Collateral comprised customer funds subject to segregation pursuant to section 4d(a) or 4d(b) of the Act and the regulations thereunder.

(c) Notwithstanding paragraph (a) of this section, an acknowledgement letter need not be obtained from a derivatives clearing organization that has made effective, pursuant to section 5c(c) of the Act and the regulations thereunder, rules that provide for the segregation of Cleared Swaps Customer Collateral, in accordance with all relevant provisions of the Act and the regulations thereunder.

§ 22.6 Futures Commission Merchants and Derivatives Clearing Organizations: Naming of Cleared Swaps Customer Accounts.

The name of each Cleared Swaps Customer Account that a futures commission merchant or a derivatives clearing organization maintains with a Permitted Depository shall:

(a) Clearly identify the account as a ''Cleared Swaps Customer Account'' and

(b) Clearly indicate that the collateral therein is ''Cleared Swaps Customer Collateral'' subject to segregation in accordance with the Act and this part.

§ 22.7 Permitted Depositories: Treatment of Cleared Swaps Customer Collateral.

A Permitted Depository shall treat all funds in a Cleared Swaps Customer Account as Cleared Swaps Customer Collateral. A Permitted Depository shall not hold, dispose of, or use any such Cleared Swaps Customer Collateral as belonging to any person other than:

(a) The Cleared Swaps Customers of the futures commission merchant maintaining such Cleared Swaps Customer Account or;

(b) The Cleared Swaps Customers of the futures commission merchants for which the derivatives clearing organization maintains such Cleared Swaps Customer Account.

§ 22.8 Situs of Cleared Swaps Customer Accounts.

The situs of each of the following shall be located in the United States:

(a) Each FCM Physical Location or DCO Physical Location;

(b) Each ''account,'' within the meaning of § 22.2(f)(1), that a futures commission merchant maintains for each Cleared Swaps Customer; and

(c) Each Cleared Swaps Customer Account on the books and records of a derivatives clearing organization with respect to the Cleared Swaps Customers of a futures commission merchant.

§ 22.9 Denomination of Cleared Swaps Customer Collateral and Location of Depositories.

(a) Subject to paragraph (b) of this section, futures commission merchants and derivatives clearing organizations may hold Cleared Swaps Customer Collateral in the denominations, at the locations and depositories, and subject to the same segregation requirements specified in § 1.49 of this chapter, which section shall apply to such Cleared Swaps Customer Collateral as if it comprised customer funds subject to segregation pursuant to section 4d(a) of the Act.

(b) Notwithstanding the requirements set forth in § 1.49 of this chapter, a futures commission merchant's obligations to a Cleared Swaps Customer may be denominated in a currency in which funds have accrued to the customer as a result of a Cleared Swap carried through such futures commission merchant, to the extent of such accruals.

(c) Each depository referenced in paragraph (a) of this section shall be considered a Permitted Depository for purposes of this part. *Provided, however,* that a futures commission merchant shall only be considered a Permitted Depository to the extent that it is acting as a Collecting Futures Commission Merchant (as § 22.1 of this part defines such term).

§ 22.10 Application of other Regulatory Provisions.

Sections 1.27, 1.28, 1.29, and 1.30 of this chapter shall apply to the Cleared Swaps Customer Collateral held by futures commission merchants and derivatives clearing organizations to the same extent as if such sections referred to:

(a) ''Cleared Swaps Customer Collateral'' in place of ''customer funds;''

(b) ''Cleared Swaps Customers'' instead of ''commodity or option customers'' or ''customers or option customers;''

(c) ''Cleared Swaps Contracts'' instead of ''trades, contracts, or commodity options;'' and

(d) ''Section 4d(f) of the Act'' instead of ''section 4d(a)(2) of the Act.''

§ 22.11 Information To Be Provided Regarding Customers and Their Cleared Swaps.

(a) Each Depositing Futures Commission Merchant shall:

(1) The first time that the Depositing Futures Commission Merchant intermediates a Cleared Swap for a Cleared Swaps Customer with a Collecting Futures Commission Merchant, provide information sufficient to identify such customer to the relevant Collecting Futures Commission Merchant; and

(2) At least once each business day thereafter, provide information to the relevant Collecting Futures Commission Merchant sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that the Depositing Futures Commission Merchant intermediates for such customer.

(b) If an entity serves as both a Depositing Futures Commission Merchant and a Collecting Futures Commission Merchant, then:

(1) The information that such entity must provide to its Collecting Futures Commission Merchant pursuant to paragraph (a)(1) of this section shall also include information sufficient to identify each Cleared Swaps Customer of the Depositing Futures Commission Merchant for which such entity serves as a Collecting Futures Commission Merchant; and

(2) The information that such entity must provide to its Collecting Futures Commission Merchant pursuant to paragraph (a)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (b)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that such entity intermediates as a Collecting Futures Commission Merchant, on behalf of its Depositing Futures Commission Merchant, for such customer.

(c) Each futures commission merchant that intermediates a Cleared Swap for a Cleared Swaps Customer, on or subject to the rules of a derivatives clearing organization, directly as a Clearing Member shall:

(1) The first time that such futures commission merchant intermediates a Cleared Swap for a Cleared Swaps Customer, provide information to the relevant derivatives clearing organization sufficient to identify such customer; and

(2) At least once each business day thereafter, provide information to the relevant derivatives clearing organization sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that such futures commission merchant intermediates for such customer.

(d) If the futures commission merchant referenced in paragraph (c) of this section is a Collecting Futures Commission Merchant, then:

(1) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(1) of this section shall also include information sufficient to identify each Cleared Swaps Customer of any entity that acts as a Depositing Futures Commission Merchant in relation to the Collecting Futures Commission Merchant (including, without limitation, each Cleared Swaps Customer of any Depositing Futures Commission Merchant for which such entity also serves as a Collecting Futures Commission Merchant); and

(2) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (d)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for such customer.

(e) Each derivatives clearing organization shall:

(1) Take appropriate steps to confirm that the information it receives pursuant to paragraphs (c)(1) or (c)(2) of this section is accurate and complete, and

(2) Ensure that the futures commission merchant is providing the derivatives clearing organization the information required by paragraphs (c)(1) or (c)(2) of this section on a timely basis.

§ 22.12 Information To Be Maintained Regarding Cleared Swaps Customer Collateral.

(a) Each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Funds from an entity serving as a Depositing Futures Commission Merchant shall, no less frequently than once each business day, calculate and record:

(1) the amount of collateral required at such Collecting Futures Commission Merchant for each Cleared Swaps Customer of the entity acting as Depositing Futures Commission Merchant (including, without limitation, each Cleared Swaps Customer of any Depositing Futures Commission Merchant for which such entity also serves as a Collecting Futures Commission Merchant); and

(2) the sum of the individual collateral amounts referenced in paragraph (a)(1) of this section.

(b) Each Collecting Futures Commission Merchant shall calculate the collateral amounts referenced in paragraph (a) of this section with respect to the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for each Cleared Swaps Customer referenced in paragraph (a)(1) of this section.

(c) Each derivatives clearing organization receiving Cleared Swaps Customer Funds from a futures commission merchant shall, no less frequently than once each business day, calculate and record:

(1) the amount of collateral required at such derivatives clearing organization for each Cleared Swaps Customer of the futures commission merchant; and

(2) the sum of the individual collateral amounts referenced in paragraph (c)(1) of this section.

(d) If the futures commission merchant referenced in paragraph (c) of this section is a Collecting Futures Commission Merchant, then the derivatives clearing organization shall also perform and record the results of the calculation required in paragraph (c) of this section for each Cleared Swaps Customer of an entity acting as a Depositing Futures Commission Merchant in relation to the Collecting Futures Commission Merchant (including, without limitation, any Cleared Swaps Customer for which such entity is also acting as a Collecting Futures Commission Merchant).

(e) Each futures commission merchant shall calculate the collateral amounts referenced in paragraph (c) of this section with respect to the portfolio of rights and obligations arising from the Cleared Swaps that the futures commission merchant intermediates (including, without limitation, as a Collecting Futures Commission Merchant on behalf of a Depositing Futures Commission Merchant), for each Cleared Swaps Customer referenced in paragraphs (c)(1) and (d) of this section.

(f) The collateral requirement referenced in paragraph (a) of this

section with respect to a Collecting Futures Commission Merchant shall be no less than that imposed by the relevant derivatives clearing organization with respect to the same portfolio of rights and obligations for each relevant Cleared Swaps Customer.

§ 22.13 Additions to Cleared Swaps Customer Collateral.

(a)(1) At the election of the derivatives clearing organization or Collecting Futures Commission Merchant, the collateral requirement referred to in §§ 22.12(a), (c), and (d) of this part applicable to a particular Cleared Swaps Customer or group of Cleared Swaps Customers may be increased based on an evaluation of the credit risk posed by such customer or group, in which case the derivatives clearing organization or Collecting Futures Commission Merchant shall collect and record such higher amount as provided in § 22.12 of this part.

(2) Nothing in paragraph (a)(1) of this section is intended to interfere with the right of a futures commission merchant to increase the collateral requirements at such futures commission merchant with respect to any of its Cleared Swaps Customers or Customers.

(b) Any collateral deposited by a futures commission merchant (including a Depositing Futures Commission Merchant) pursuant to § 22.2(e)(3)(ii) of this part, which collateral is identified as such futures commission merchant's own property may be used by the derivatives clearing organization or Collecting Futures Commission Merchant, as applicable, to margin, guarantee or secure the Cleared Swaps of any or all of such Cleared Swaps Customers.

(c) A futures commission merchant may transmit to a derivatives clearing organization any collateral posted by a Cleared Swaps Customer in excess of the amount required by the derivatives clearing organization if:

(1) the rules of the derivatives clearing organization expressly permit the futures commission merchant to transmit collateral in excess of the amount required by the derivatives clearing organization; and

(2) the derivatives clearing organization provides a mechanism by which the futures commission merchant is able to, and maintains rules pursuant to which the futures commission merchant is required to, identify each Business Day, for each Cleared Swaps Customer, the amount of collateral posted in excess of the amount required by the derivatives clearing organization.

§ 22.14 Futures Commission Merchant Failure To Meet a Customer Margin Call in Full.

(a) A Depositing Futures Commission Merchant which receives a call for either initial margin or variation margin with respect to a Cleared Swaps Customer Account from a Collecting Futures Commission Merchant, which call such Depositing Futures Commission Merchant does not meet in full, shall, with respect to each Cleared Swaps Customer of such Depositing Futures Commission Merchant whose Cleared Swaps contribute to such margin call,

(1) Transmit to the Collecting Futures Commission Merchant an amount equal to the lesser of

(i) The amount called for; or

(ii) The remaining Cleared Swaps Collateral on deposit at such Depositing Futures Commission Merchant for that Cleared Swaps Customer; and

(2) Advise the Collecting Futures Commission Merchant of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such customer.

(b) If the entity acting as Depositing Futures Commission Merchant referenced in paragraph (a) of this section is also a Collecting Futures Commission Merchant, then:

(1) Such entity shall include in the transmission required in paragraph (a)(1) of this section any amount that it receives, pursuant to paragraph (a)(1) of this section, from a Depositing Futures Commission Merchant for which such entity acts as a Collecting Futures Commission Merchant; and

(2) Such entity shall present its Collecting Futures Commission Merchant with the information that it receives, pursuant to paragraph (a)(2) of this section, from a Depositing Futures Commission Merchant for which such entity acts as a Collecting Futures Commission Merchant.

(c) A futures commission merchant which receives a call for either initial or variation margin with respect to a Cleared Swaps Customer Account from a derivatives clearing organization, which call such futures commission merchant does not meet in full, shall, with respect to each Cleared Swaps Customer of such futures commission merchant whose Cleared Swaps contribute to such margin call:

(1) Transmit to the derivatives clearing organization an amount equal to the lesser of

(i) The amount called for; or

(ii) The remaining Cleared Swaps Collateral on deposit at such futures commission merchant for each such Cleared Swaps Customer; and

(2) Advise the derivatives clearing organization of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such customer.

(d) If the futures commission merchant referenced in paragraph (c) is a Collecting Futures Commission Merchant, then:

(1) Such Collecting Futures Commission Merchant shall include in the transmission required in paragraph (c)(1) of this section any amount that it receives from a Depositing Futures Commission Merchant pursuant to paragraph (a)(1) of this section; and

(2) Such Collecting Futures Commission shall present the derivatives clearing organization with the information that it receives from a Depositing Futures Commission Merchant pursuant to paragraph (a)(2) of this section.

(e) If,

(1) On the business day prior to the business day on which the Depositing Futures Commission Merchant fails to meet a margin call with respect to a Cleared Swaps Customer Account, such Collecting Futures Commission Merchant referenced in paragraph (a) of this section held, with respect to such account, Cleared Swaps Collateral of a value no less than the amount specified in § 22.12(a)(2) of this part, after the application of haircuts specified by policies applied by such Collecting Futures Commission Merchant in its relationship with the Depositing Futures Commission Merchant, and

(2) As of the close of business on the business day on which the margin call is not met, the market value of the Cleared Swaps Collateral held by the derivatives clearing organization or Collecting Futures Commission Merchant is, due to changes in such market value, less than the amount specified in § 22.12(a)(2) of this part, then the amount of such collateral attributable to each Cleared Swaps Customer pursuant to § 22.12(a)(1) of this part shall be reduced by the percentage difference between the amount specified in § 22.12(a)(2) of this part and such market value.

(f) If:

(1) On the business day prior to the business day on which the futures commission merchant fails to meet a margin call with respect to a Cleared Swaps Customer Account, the derivatives clearing organization referenced in paragraph (c) of this section held, with respect to such account, Cleared Swaps Collateral of a value no less than the amount specified in § 22.12(c)(2) of this part, after the application of haircuts specified by the

rules and procedures of such derivatives clearing organization, and

(2) As of the close of business on the business day on which the margin call is not met, the market value of the Cleared Swaps Collateral held by the derivatives clearing organization is, due to changes in such market value, less than the amount specified in § 22.12(c)(2) of this part, then the amount of collateral attributable to each Cleared Swaps Customer pursuant to § 22.12(c)(1) of this part shall be reduced by the percentage difference between the amount specified in § 22.12(c)(2) and such market value.

(g) A derivatives clearing organization or Collecting Futures Commission Merchant is entitled to reasonably rely upon any information provided by a defaulting futures commission merchant under § 22.14. If the defaulting futures commission merchant does not provide such information on the date of the futures commission merchant's default, a derivatives clearing organization or Collecting Futures Commission Merchant may rely on the information previously provided to it by the defaulting futures commission merchant.

§ 22.15 Treatment of Cleared Swaps Customer Collateral on an Individual Basis.

Subject to § 22.3(d) of this part, each derivatives clearing organization and each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from a futures commission merchant shall treat the value of collateral required with respect to the portfolio of rights and obligations arising out of the Cleared Swaps intermediated for each Cleared Swaps Customer, and collected from the futures commission merchant, as belonging to such customer, and such amount shall not be used to margin, guarantee, or secure the Cleared Swaps or other obligations of the futures commission merchant or of any other Cleared Swaps Customer or Customer. Nothing contained herein shall be construed to limit, in any way, the right of a derivatives clearing organization or Collecting Futures Commission Merchant to liquidate any or all positions in a Cleared Swaps Customer Account in the event of default of a clearing member or Depositing Futures Commission Merchant.

§ 22.16 Disclosures to Customers.

(a) A futures commission merchant shall disclose, to each of its Cleared Swaps Customers, the governing provisions, as described in paragraph (c) of this section, relating to use of Cleared Swaps Customer Collateral, transfer, neutralization of the risks, or liquidation of Cleared Swaps in the event of a default by the futures commission merchant relating to the Cleared Swaps Customer Account, as well as any change in such governing provisions.

(b) If the futures commission merchant referenced in paragraph (a) of this section is a Depositing Futures Commission Merchant, then such futures commission merchant shall disclose, to each of its Cleared Swaps Customers, the governing provisions, as described in paragraph (c) of this section, relating to use of Cleared Swaps Customer Collateral, transfer, neutralization of the risks, or liquidation of Cleared Swaps in the event of a default by:

(1) Such futures commission merchant or

(2) Any relevant Collecting Futures Commission Merchant relating to the Cleared Swaps Customer Account, as well as any change in such governing provisions.

(c) The governing provisions referred to in paragraphs (a) and (b) of this section are the rules of each derivatives clearing organization, or the provisions of the customer agreement between the Collecting Futures Commission Merchant and the Depositing Futures Commission Merchant, on or through which the Depositing Futures Commission Merchant will intermediate Cleared Swaps for such Cleared Swaps Customer.

PART 190—BANKRUPTCY

■ 2. The authority citation for part 190 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4a, 6c, 6d, 6g, 7a, 12, 19, and 24, and 11 U.S.C. 362, 546, 548, 556, and 761–766, unless otherwise noted.

§§ 190.01, 190.02, 190.03, 190.05, 190.06, 190.07, 190.10 [Amended]

■ 3. In 17 CFR part 190:

■ a. Remove the words ''commodity account'' and add, in their place, the words ''commodity contract account'' in:

■ i. Sections 190.01(w), (y), and (kk)(6);

■ ii. Sections 190.02(d)(1), (6), and (7);

■ iii. Section 190.06(g)(3); and

■ iv. Section 190.10(d)(1).

■ b. Remove the words ''commodity futures account'' and add, in their place, the words ''commodity contract account'' in:

■ i. Section 190.03(a)(2); and

■ ii. Section 190.10(h).

■ c. Remove the words ''commodity transactions'' and add, in their place, the words ''commodity contract transactions'' in § 190.02(d)(3).

■ d. Remove the words ''commodity futures contract'' and add, in their place, the words ''commodity contract'' in § 190.05(a)(1) and (b)(1).

■ e. Remove the words ''commodity accounts'' and add, in their place, the words ''commodity contract accounts'' in § 190.06(g)(1)(i) and (ii).

■ f. Remove the words ''board of trade'' and add, in their place, the words ''designated contract market'' in § 190.07(e)(1).

■ g. Remove the words ''contract market'' and add, in their place, the words ''designated contract market'' in § 190.07(e)(2)(ii)(B).

■ 4. In § 190.01,

■ a. Redesignate paragraphs (e) through (oo) as (f) through (pp);

■ b. Add a new paragraph (e); and

■ c. Revise paragraphs (a), and newly redesignated paragraphs (f), (cc), (hh), (ll)(2)(ii), (ll)(4), (ll)(5), and (pp) to read as follows:

§ 190.01 Definitions.

* * * * *

(a)(1) *Account class* means each of the following types of customer accounts which must be recognized as a separate class of account by the trustee: futures accounts, foreign futures accounts, leverage accounts, delivery accounts as defined in § 190.05(a)(2) of this part, and cleared swaps accounts.

(2)(i) To the extent that the equity balance, as defined in § 190.07 of this part, of a customer in a commodity option, as defined in § 1.3 of this chapter, may be commingled with the equity balance of such customer in any domestic commodity futures contract pursuant to regulations under the Act, the aggregate shall be treated for purposes of this part as being held in a futures account.

(ii) To the extent that such equity balance of a customer in a commodity option may be commingled with the equity balance of such customer in any cleared swaps account pursuant to regulations under this act, the aggregate shall be treated for purposes of this part as being held in a cleared swaps account.

(iii) If positions or transactions in commodity contracts that would otherwise belong to one account class (and the money, securities, or other property margining, guaranteeing, or securing such positions or transactions), are, pursuant to a Commission rule, regulation, or order (or a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter), held separately from other positions and transactions in that account class, and are commingled with positions or transactions in commodity

contracts of another account class (and the money, securities, or other property margining, guaranteeing, or securing such positions or transactions), then the former positions (and the relevant money, securities, or other property) shall be treated, for purposes of this part, as being held in an account of the latter account class.

* * * * *

(e) *Calendar day.* A calendar day includes the time from midnight to midnight.

(f) *Clearing organization* shall have the same meaning as that set forth in section 761(2) of the Bankruptcy Code.

* * * * *

(cc) *Non-public customer* means any person enumerated in the definition of *Proprietary Account* in § 1.3 or § 31.4(e) of this chapter, any person excluded from the definition of ''foreign futures or foreign options customer'' in the proviso to section 30.1(c) of this chapter, or any person enumerated in the definition of *Cleared Swaps Proprietary Account* in § 22.1 of this chapter, in each case, if such person is defined as a ''customer'' under paragraph (k) of this section.

* * * * *

(hh) *Principal contract* means a contract which is not traded on a designated contract market, and includes leverage contracts and dealer options, but does not include:

(1) Transactions executed off the floor of a designated contract market pursuant to rules approved by the Commission or rules which the designated contract market is required to enforce, or pursuant to rules of a foreign board of trade located outside the United States, its territories or possessions; or

(2) Cleared swaps contracts.

* * * * *

(ll) * * *

(2) * * *

(ii) Is a bona fide hedging position or transaction as defined in § 1.3 of this chapter or is a commodity option transaction which has been determined by the registered entity to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been approved by the Commission pursuant to section 5c(c) of the Commodity Exchange Act; and

* * * * *

(4) Any cash or other property deposited prior to the entry of the order for relief to pay for the taking of physical delivery on a long commodity contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date, which cash or other property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the strike price upon exercise, respectively, and such customer takes delivery or exercises the option in accordance with the applicable designated contract market rules.

(5) The cash price tendered for any property deposited prior to the entry of the order for relief to make physical delivery on a short commodity contract or for exercise of a long put or a short call option contract on a physical commodity, which cannot be settled in cash, to the extent it exceeds the amount necessary to margin such contract prior to the notice date or exercise date, which property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of a delivery or exercise, respectively, and such customer makes delivery or exercises the option in accordance with the applicable contract market rules.

* * * * *

(pp) *Cleared Swap.* This term shall have the same meaning as set forth in § 22.1 of this chapter.

■ 5. In § 190.02, revise paragraphs (a), (b)(1), (b)(2), (d)(11), (e), (f)(1)(i), (f)(1(ii) and (g)(2)(i) to read as follows:

§ 190.02 Operation of the debtor's estate subsequent to the filing date and prior to the primary liquidation date.

* * * * *

(a) *Notices to the Commission and Designated Self-Regulatory Organizations.*

(1) *General.* Each commodity broker which files a petition in bankruptcy shall, at or before the time of such filing, and each commodity broker against which such a petition is filed shall, as soon as possible, but no later than one calendar day after the receipt of notice of such filing, notify the Commission and such broker's designated self-regulatory organization, if any, in accordance with § 190.10(a) of the filing date, the court in which the proceeding has been filed, and the docket number assigned to that proceeding by the court.

(2) *Of transfers under section 764(b) of the Bankruptcy Code.* As soon as possible, but in no event later than the close of business on third calendar day after the order for relief, the trustee, the applicable self-regulatory organization, or the commodity broker must notify the Commission in accordance with § 190.10(a) whether such entity or organization intends to transfer or to apply to transfer open commodity contracts on behalf of the commodity broker in accordance with section 764(b) of the Bankruptcy Code and § 190.06 (e) or (f).

(b) *Notices to customers.* (1) *Specifically identifiable property other than commodity contracts.* The trustee must use its best efforts to promptly, but in no event later than two calendar days after entry of the order for relief, commence to publish in a daily newspaper or newspapers of general circulation approved by the court serving the location of each branch office of the commodity broker, for two consecutive days a notice to customers stating that all specifically identifiable property of customers other than open commodity contracts which has not otherwise been liquidated will be liquidated commencing on the sixth calendar day after the second publication date if the customer has not instructed the trustee in writing on or before the fifth calendar day after the second publication date to return such property pursuant to the terms for distribution of specifically identifiable property contained in § 190.08(d)(1) and, on the seventh calendar day after such second publication date, if such property has not been returned in accordance with such terms on or prior to that date. Such notice must describe specifically identifiable property in accordance with the definition in this part and must specify the terms upon which that property may be returned. Publication of the form of notice set forth in the appendix to this part will constitute sufficient notice for purposes of this paragraph (b)(1).

(2) *Request for instructions regarding transfer of open commodity contracts.* The trustee must use its best efforts to request promptly, but in no event later than two calendar days after entry of an order for relief, customer instructions concerning the transfer or liquidation of the specifically identifiable open commodity contracts, if any, not required to be liquidated under paragraph (f)(1) of this section. The request for customer instructions required by this paragraph (b)(2) must state that the trustee is required to liquidate any such commodity contract for which transfer instructions have not

been received on or before the seventh calendar day after entry of the order for relief, at an hour specified by the trustee, and any such commodity contract for which instructions have been received which has not been transferred in accordance with § 190.08(d)(2) on or before the seventh calendar day after entry of the order for relief. A form of notice is set forth in the appendix to this part.

* * * * *

(d) * * *

(11) Whether the claimant's positions in security futures products are held in a futures account or a securities account, as these terms are defined in § 1.3 of this chapter;

* * * * *

(e) *Transfers*—(1) *All cases.* The trustee for a commodity broker must immediately use its best efforts to effect a transfer in accordance with § 190.06 (e) and (f) no later than the seventh calendar day after the order for relief of the open commodity contracts and equity held by the commodity broker for or on behalf of its customers.

(2) *Involuntary cases.* A commodity broker against which an involuntary petition in bankruptcy is filed, or the trustee if a trustee has been appointed in such case, must use its best efforts to effect a transfer in accordance with § 190.06 (e) and (f) of all open commodity contracts and equity held by the commodity broker for or on behalf of its customers and such other property as the Commission in its discretion may authorize, on or before the seventh calendar day after the filing date, and immediately cease doing business: *Provided, however,* That the commodity broker may trade for liquidation only, unless otherwise directed by the Commission, by any applicable self-regulatory organization or by the court: And, *Provided further,* That if the commodity broker demonstrates to the Commission within such period that it was in compliance with the segregation and financial requirements of this chapter on the filing date, and the Commission determines, in its sole discretion, that such transfer or liquidation is neither appropriate nor in the public interest, the commodity broker may continue in business subject to applicable provisions of the Bankruptcy Code and of this chapter.

(f) * * *

(1) * * *

(i) Dealer option contracts, if the dealer option grantor is not the debtor, which cannot be transferred on or before the seventh calendar day after the order for relief; and

(ii) Specifically identifiable commodity contracts as defined in § 190.01(kk)(2) for which an instruction prohibiting liquidation is noted prominently in the accounting records of the debtor and timely received under paragraph (b)(2) of this section. Notwithstanding the foregoing, an open commodity contract must be offset if: such contract is a futures contract or a Cleared Swaps contract which cannot be settled in cash and which would otherwise remain open either beyond the last day of trading (if applicable), or the first day on which notice of intent to deliver may be tendered with respect thereto, whichever occurs first; such contract is a long option on a physical commodity which cannot be settled in cash and would be automatically exercised, has value and would remain open beyond the last day for exercise; such contract is a short option on a physical commodity which cannot be settled in cash; or, as otherwise specified in these rules.

* * * * *

(g) * * *

(2) * * *

(i) 100% of the maintenance margin requirements of the applicable designated contact market or swap execution facility, if any, with respect to the open commodity contracts in such account; or

* * * * *

■ 6. In § 190.03, revise paragraphs (a)(3), (b)(3), (b)(4), (b)(5), and (c) to read as follows:

§ 190.03 Operation of the debtor's estate subsequent to the primary liquidation date.

* * * * *

(a) * * *

(3) *Margin calls.* The trustee must promptly issue margin calls with respect to any account referred to under paragraph (a)(1) of this section in which the balance does not equal or exceed 100% of the maintenance margin requirements of the applicable designated contact market or swap execution facility, if any, with respect to the open commodity contracts in such account, or if there are no such maintenance margin requirements, 100% of the clearing organization's initial margin requirements applicable to the open commodity contracts in such account, or if there are no such maintenance margin requirements or clearing organization initial margin requirements, then 50% of the customer initial margin applicable to the commodity contracts in such account: *Provided,* That no margin calls need be made to restore customer initial margin.

* * * * *

(b) * * *

(3) The trustee has received no customer instructions with respect to such contract by the sixth calendar day after entry of the order for relief;

(4) The commodity contract has not been transferred in accordance with § 190.08(d)(2) on or before the seventh calendar day after entry of the order for relief; or

(5) The commodity contract would otherwise remain open (*e.g.,* because it cannot be settled in cash) beyond the last day of trading in such contract (if applicable) or the first day on which notice of delivery may be tendered with respect to such contract, whichever occurs first.

(c) *Liquidation of specifically identifiable property other than open commodity contracts.* All specifically identifiable property other than open commodity contracts which have not been liquidated prior to the primary liquidation date, and for which no customer instructions have been timely received must be liquidated, to the extent reasonably possible, no later than the sixth calendar day after final publication of the notice referred to in § 190.02(b)(1). All other specifically identifiable property must be liquidated or returned, to the extent reasonably possible, no later than the seventh calendar day after final publication of such notice.

■ 7. In § 190.04, revise paragraph (d)(1) to read as follows:

§ 190.04 Operation of the debtor's estate—general.

* * * * *

(d) *Liquidation* — (1) *Order of Liquidation.* (i) *In the Market.* Liquidation of open commodity contracts held for a house account or customer account by or on behalf of a commodity broker which is a debtor shall be accomplished pursuant to the rules of a clearing organization, a designated contract market, or a swap execution facility, as applicable. Such rules shall ensure that the process for liquidating open commodity contracts, whether for the house account or the customer account, results in competitive pricing, to the extent feasible under market conditions at the time of liquidation. Such rules must be submitted to the Commission for approval, pursuant to section 5c(c) of the Act, and be approved by the Commission. Alternatively, such rules must otherwise be submitted to and approved by the Commission (or its delegate pursuant to § 190.10(d) of this part) prior to their application.

(ii) *Book entry.* Notwithstanding paragraph (d)(1) of this section, in appropriate cases, upon application by

the trustee or the affected clearing organization, the Commission may permit open commodity contracts to be liquidated, or settlement on such contracts to be made, by book entry. Such book entry shall offset open commodity contracts, whether matched or not matched on the books of the commodity broker, using the settlement price for such commodity contracts as determined by the clearing organization. Such settlement price shall be determined by the rules of the clearing organization, which shall ensure that such settlement price is established in a competitive manner, to the extent feasible under market conditions at the time of liquidation. Such rules must be submitted to the Commission for approval pursuant to section 5c(c) of the Act, and be approved by the Commission. Alternatively, such rules must otherwise be approved by the Commission (or its delegate pursuant to § 190.10(d) of this part) prior to their application.

* * * * *

■ 8. In § 190.05, revise paragraph (b) introductory text to read as follows:

§ 190.05 Making and taking delivery on commodity contracts.

* * * * *

(b) *Rules for deliveries on behalf of a customer of a debtor.* Except in the case of a commodity contract which is settled in cash, each designated contract market, swap execution facility, or clearing organization shall adopt, maintain in effect and enforce rules which have been submitted in accordance with section 5c(c) of the Act for approval by the Commission, which:

* * * * *

■ 9. In § 190.06,
■ a. Remove paragraph (e)(1)(iv) and redesignate paragraph (e)(1)(v) as (e)(1)(iv);
■ b. Revise paragraphs (a), (e)(1)(iii), (e)(2), (f)(3)(i), (g)(2) and
■ c. Add paragraph (g)(1)(iii) to read as follows:

§ 190.06 Transfers.

(a) *Transfer rules.* No clearing organization or other self-regulatory organization may adopt, maintain in effect or enforce rules which:

(1) Are inconsistent with the provisions of this part;

(2) Interfere with the acceptance by its members of open commodity contracts and the equity margining or securing such contracts from futures commission merchants, or persons which are required to be registered as futures commission merchants, which are required to transfer accounts pursuant to § 1.17(a)(4) of this chapter; or

(3) Prevent the acceptance by its members of transfers of open commodity contracts and the equity margining or securing such contracts from futures commission merchants with respect to which a petition in bankruptcy has been filed, if such transfers have been approved by the Commission. *Provided, however,* that this paragraph shall not limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate open commodity contracts.

* * * * *

(e) * * *

(1) * * *

(iii) Dealer option accounts, if the debtor is the dealer option grantor with respect to such accounts; or

* * * * *

(2) *Amount of equity which may be transferred.* In no case may money, securities or property be transferred in respect of any eligible account if the value of such money, securities or property would exceed the funded balance of such account based on available information as of the calendar day immediately preceding transfer less the value on the date of return or transfer of any property previously returned or transferred with respect thereto.

(f) * * *

(3) * * *

(i) *Of the customer estate.* If all eligible customer accounts held by a debtor cannot be transferred under this section, a partial transfer may nonetheless be made. The Commission will not disapprove such a transfer for the sole reason that it was a partial transfer if it would prefer the transfer of accounts, the liquidation of which could adversely affect the market or the bankrupt estate. Any dealer option contract held by or for the account of a debtor which is a futures commission merchant from or for the account of a customer which has not previously been transferred, and is eligible for transfer, must be transferred on or before the seventh calendar day after entry of the order for relief.

* * * * *

(g) * * *

(1) * * *

(iii) The transfer prior to the order for relief by a clearing organization of one or more accounts held for or on behalf of customers of the debtor, provided that (I) the money, securities, or other property accompanying such transfer did not exceed the funded balance of each account based on available information as of the close of business on the business day immediately preceding such transfer less the value on the date of return or transfer of any property previously returned or transferred thereto, and (II) the transfer is not disapproved by the Commission.

(2) *Post-relief transfers.* On or after the entry of the order for relief, the following transfers to one or more transferees may not be avoided by the trustee:

(i) The transfer of a customer account eligible to be transferred under paragraph (e) or (f) of this section made by the trustee of the commodity broker or by any self-regulatory organization of the commodity broker:

(A) On or before the seventh calendar day after the entry of the order for relief; and

(B) The Commission is notified in accordance with § 190.02(a)(2) prior to the transfer and does not disapprove the transfer; or

(ii) The transfer of a customer account at the direction of the Commission on or before the seventh calendar day after the order for relief upon such terms and conditions as the Commission may deem appropriate and in the public interest.

* * * * *

■ 10. In § 190.07,
■ a. Redesignate paragraph (b)(2)(xiii) as paragraph (b)(2)(xiv);
■ b. Add a new paragraph (b)(2)(xiii); and
■ c. Revise paragraphs (b)(2)(viii), (b)(2)(ix), (b)(3)(v), (c)(1)(i), (e) introductory text, (e)(1) and (e)(4) to read as follows:

§ 190.07 Calculation of allowed net equity.

* * * * *

(b) * * *

(2) * * *

(viii) Subject to paragraph (b)(2)(ix) of this section, the futures accounts, leverage accounts, options accounts, foreign futures accounts, delivery accounts (as defined in § 190.05(a)(2)), and cleared swaps accounts of the same person shall not be deemed to be held in separate capacities: *Provided, however,* that such accounts may be aggregated only in accordance with paragraph (b)(3) of this section.

(ix) An omnibus customer account of a futures commission merchant maintained with a debtor shall be deemed to be held in a separate capacity from the house account and any other omnibus customer account of such futures commission merchant.

* * * * *

(xiii) With respect to the cleared swaps account class, each individual customer account within each omnibus customer account referred to in

paragraph (ix) of this section shall be deemed to be held in a separate capacity from each other such individual customer account; subject to the provisions of paragraphs (b)(2)(i) through (xii) of this paragraph (b)(2).

* * * * *

(3) * * *

(v) The rules pertaining to separate capacities and permitted setoffs contained in this section must be applied subsequent to the entry of an order for relief; prior to the filing date, the provisions of § 1.22 of this chapter and of sections 4d(a)(2) and 4d(f) of the Act (and, in each case, the regulations promulgated thereunder) shall govern what setoffs are permitted.

* * * * *

(c) * * *

(1) * * *

(i) Multiplying the ratio of the amount of the net equity claim less the amounts referred to in paragraph (c)(1)(ii) of this section of such customer for any account class bears to the sum of the net equity claims less the amounts referred to in paragraph (c)(1)(ii) of this section of all customers for accounts of that class by the sum of:

(A) The value of the money, securities or property segregated on behalf of all accounts of the same class less the amounts referred to in paragraph (c)(1)(ii) of this section;

(B) The value of any money, securities or property which must be allocated under § 190.08 to customer accounts of the same class; and

(C) The amount of any add-back required under paragraph (b)(4) of this section; and

* * * * *

(e) *Valuation.* In computing net equity, commodity contracts and other property held by or for a commodity broker must be valued as provided in this paragraph (e): *Provided, however,* that for all commodity contracts other than those listed in paragraph (e)(1) of this section, if identical commodity contracts, securities, or other property are liquidated on the same date, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer holding such contracts, securities, or property.

(1) *Commodity Contracts.* Unless otherwise specified in this paragraph (e), the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules: *Provided,* that such rules must either be submitted to the Commission, pursuant to section 5c(c)(4) of the Act and be approved by the Commission, or such rules must be otherwise approved by the Commission (or its delegate pursuant to § 190.10(d) of this part) prior to their application; *Provided, further,* that if such contract is transferred its value shall be determined as of the end of the settlement cycle in which it is transferred; and *Provided, finally,* that if such contract is liquidated, its value shall be equal to the net proceeds of liquidation.

* * * * *

(4) *Securities.* The value of a listed security shall be equal to the closing price for such security on the exchange upon which it is traded. The value of all securities not traded on an exchange shall be equal in the case of a long position, to the average of the bid prices for long positions, and in the case of a short position, to the average of the asking prices for the short positions. If liquidated prior to the primary liquidation date, the value of such security shall be equal to the net proceeds of its liquidation. Securities which are not publicly traded shall be valued by the trustee, subject to approval of the court, using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances.

* * * * *

■ 11. In § 190.09, revise paragraph (b) to read as follows:

§ 190.09 Member property.

* * * * *

(b) *Scope of Member Property.* Member property shall include all money, securities and property received, acquired, or held by a clearing organization to margin, guarantee or secure, on behalf of a clearing member, the proprietary account, as defined in § 1.3 of this chapter, any account not belonging to a foreign futures or foreign options customer pursuant to the proviso in § 30.1(c), and any Cleared Swaps Proprietary Account, as defined in § 22.1: *Provided, however,* that any guaranty deposit or similar payment or deposit made by such member and any capital stock, or membership of such member in the clearing organization shall also be included in member property after payment in full of that portion of the net equity claim of the member based on its customer account and of any obligations due to the clearing organization which may be paid therefrom in accordance with the by-laws or rules of the clearing organization, including obligations due from the clearing organization to customers or other members.

■ 12. In § 190.10, revise paragraph (a) to read as follows:

§ 190.10 General.

(a) *Notices.* Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this part shall be directed by electronic mail to *bankruptcyfilings@cftc.gov*, with a copy sent by overnight mail to Director, Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. For purposes of this part, notice to the Commission shall be deemed to be given only upon actual receipt.

* * * * *

■ 13. Revise appendix A to part 190 to read as follows:

Appendix A to Part 190—Bankruptcy Forms

Bankruptcy Appendix Form 1—Operation of the Debtor's Estate—Schedule of Trustee's Duties

For the convenience of a prospective trustee, the Commission has constructed an approximate schedule of important duties which the trustee should perform during the early stages of a commodity broker bankruptcy proceeding. The schedule includes duties required by this part, subchapter IV of chapter 7 of the Bankruptcy Code as well as certain practical suggestions, but it is only intended to highlight the more significant duties and is not an exhaustive description of all the trustee's responsibilities. It also assumes that the commodity broker being liquidated is an FCM. Moreover, it is important to note that the operating facts in a particular bankruptcy proceeding may vary the schedule or obviate the need for any of the particular activities.

All Cases

Date of Order for Relief

1. Assure that the commodity broker has notified the Commission, its designated self-regulatory organization (''DSRO'') (if any), and all applicable clearing organizations of which it is a member that a petition or order for relief has been filed (§ 190.02(a)(1)).

2. Attempt to effectuate the transfer of entire customer accounts wherein the commodity contracts are transferred together with the money, securities, or other property margining, guaranteeing, or securing the commodity contracts (hereinafter the ''transfer'').

3. Attempt to estimate shortfall of customer funds segregated pursuant to sections 4d(a) and (b) of the Act; customer funds segregated pursuant to section 4f of the Act; and the foreign futures or foreign options secured amount, as defined in § 1.3 of this chapter.

a. The trustee should:

i. Contact the DSRO (if any) and the clearing organizations and attempt to effectuate a transfer with such shortfall under section 764(b) of the Code; notify the Commission for assistance (§ 190.02(a)(2) and

(e)(1), § 190.06(b)(2), (e), (f)(3), (g)(2), and (h)) but recognize that if there is a substantial shortfall, a transfer of such funds or amounts is highly unlikely.

ii. If a transfer cannot be effectuated, liquidate all customer commodity contracts that are margined, guaranteed, or secured by funds or amounts with such shortfall, except dealer options and specifically identifiable commodity contracts which are bona fide hedging positions (as defined in § 190.01(kk)(2)) with instructions not to be liquidated. (See §§ 190.02(f) and 190.06(d)(1)). (In this connection, depending upon the size of the debtor and other complications of liquidation, the trustee should be aware of special liquidation rules, and in particular the availability under certain circumstances of book-entry liquidation (§ 190.04(d)(1)(ii)).

b. If there is a small shortfall in any of the funds or amounts listed in paragraph 2, negotiate with the clearing organization to effect a transfer; notify the Commission (§§ 190.02(a)(2) and (e)(1), 190.06(b)(2), (e), (f)(3), (g)(2), and (h)).

4. Whether or not a transfer has occurred, liquidate or offset open commodity contracts not eligible for transfer (*e.g.,* deficit accounts) (§ 190.06(e)(1)).

5. Offset all futures contracts and Cleared Swaps contracts which cannot be settled in cash and which would otherwise remain open either beyond the last day of trading (if applicable) or the first day on which notice of intent to deliver may be tendered with respect thereto, whichever occurs first; offset all long options on a physical commodity which cannot be settled in cash, have value and would be automatically exercised or would remain open beyond the last day of exercise; and offset all short options on a physical commodity which cannot be settled in cash (§ 190.02(f)(1)).

6. Compute estimated funded balance for each customer commodity contract account containing open commodity contracts (§ 190.04(b)) (daily thereafter).

7. Make margin calls if necessary (§ 190.02(g)(1)) (daily thereafter).

8. Liquidate or offset any open commodity contact account for which a customer has failed to meet a margin call (§ 190.02(f)(1)) (daily thereafter).

9. Commence liquidation or offset of specifically identifiable property described in § 190.02(f)(2)(i) (property which has lost 10% or more of value) (and as appropriate thereafter).

10. Commence liquidation or offset of property described in § 190.02(f)(3) (''all other property'').

11. Be aware of any contracts in delivery position and rules pertaining to such contracts (§ 190.05).

First Calendar Day After the Entry of an Order for Relief

1. If a transfer occurred on the date of entry of the order for relief:

a. Liquidate any remaining open commodity contracts, except any dealer option or specifically identifiable commodity contract [hedge] (See § 190.01(kk)(2) and § 190.02(f)(1)), and not otherwise transferred in the transfer.

b. Primary liquidation date for transferred or liquidated commodity contracts (§ 190.01(ff)).

2. If no transfer has yet been effected, continue attempt to negotiate transfer of open commodity contracts and dealer options (§ 190.02(c)(1)).

3. Provide the clearing organization or Collecting Futures Commission Merchant (as such term is defined in § 22.1) with assurances to prevent liquidation of open commodity contract accounts available for transfer at the customer's instruction or liquidate all open commodity contracts except those available for transfer at a customer's instruction and dealer options.

Second Calendar Day After the Entry of an Order for Relief

If no transfer has yet been effected, request directly customer instructions regarding transfer of open commodity contracts and publish notice for customer instructions regarding the return of specifically identifiable property other than commodity contracts (§§ 190.02(b) (1) and (2)).

Third Calendar Day After the Entry of an Order for Relief

1. Second publication date for customer instructions (§ 190.02(b)(1)) (publication is to be made on two consecutive days, whether or not the second day is a business day).

2. Last day on which to notify the Commission with regard to whether a transfer in accordance with section 764(b) of the Bankruptcy Code will take place (§ 190.02(a)(2) and § 190.06(e)).

Sixth Calendar Day After the Entry of an Order for Relief

Last day for customers to instruct the trustee concerning open commodity contracts (§ 190.02(b)(2)).

Seventh Calendar Day After the Entry of an Order for Relief

1. If not previously concluded, conclude transfers under § *190.06(e)* and (f). (See § 190.02(e)(1) and § 190.06(g)(2)(i)(A)).

2. Transfer all open dealer option contracts which have not previously been transferred (§ 190.06(f)(3)(i)).

3. Primary liquidation date (§ 190.01(ff)) (assuming no transfers and liquidation effected for all open commodity contracts for which no customer instructions were received by the sixth calendar day).

4. Establishment of transfer accounts (§ 190.03(a)(1)) (assuming this is the primary liquidation date); mark such accounts to market (§ 190.03(a)(2)) (daily thereafter until closed).

5. Liquidate or offset all remaining open commodity contracts (§ 190.02(b)(2)).

6. If not done previously, notify customers of bankruptcy and request customer proof of claim (§ 190.02(b)(4)).

Eighth Calendar Day After the Entry of an Order for Relief

Customer instructions due to trustee concerning specifically identifiable property (§ 190.02(b)(1)).

Ninth Calendar Day After the Entry of an Order for Relief

Commence liquidation of specifically identifiable property for which no arrangements for return have been made in accordance with customer instructions (§§ 190.02(b)(1), 190.03(c)).

Tenth Calendar Day After the Entry of an Order for Relief

Complete liquidation to the extent reasonably possible of specifically identifiable property which has yet to be liquidated and for which no customer instructions have been received (§ 190.03(c)).

Separate Procedures for Involuntary Petitions for Bankruptcy

1. Within one calendar day after notice of receipt of filing of the petition in bankruptcy, the trustee should assure that proper notification has been given to the Commission, the commodity broker's designated self-regulatory organization (*§ 190.02(a)(1)*) (if any), and all applicable clearing organizations; margin calls should be issued if necessary (*§ 190.02(g)(2)*).

2. On or before the seventh calendar day after the filing of a petition in bankruptcy, the trustee should use his best efforts to effect a transfer in accordance with *§ 190.06(e)* and (*f*) of all open commodity contracts and equity held for or on behalf of customers of the commodity broker (*§ 190.02(e)(2)*) unless the debtor can provide certain assurances to the trustee.

Bankruptcy Appendix Form 2— Request for Instructions Concerning Non-Cash Property Deposited With (Commodity Broker)

Please take notice: On (date), a petition in bankruptcy was filed by [against] (commodity broker). Those customers of (commodity broker) who deposited certain kinds of non-cash property (see below) with (commodity broker) may instruct the trustee of the estate to return their property to them as provided below.

As no customer may obtain more than his or her proportionate share of the property available to satisfy customer claims, if you instruct the trustee to return your property to you, you will be required to pay the estate, as a condition to the return of your property, an amount determined by the trustee. If your property is not margining an open contract, this amount will approximate the difference between the market value of your property and your *pro rata* share of the estate, as estimated by the trustee. If your property is margining an open commodity contract, this amount will be approximately the full fair market value of the property on the date of its return.

Kinds of Property to Which This Notice Applies

1. Any security deposited as margin which, as of (date petition was filed), was securing an open commodity contract and is:

—registered in your name,
—not transferrable by delivery, and
—not a short-term obligation.

2. Any fully-paid, non-exempt security held for your account in which there were no open commodity contracts as of (date

petition was filed). (Rather than the return, at this time, of the specific securities you deposited with (commodity broker), you may instead request now, or at any later time, that the trustee purchase ''like-kind'' securities of a fair market value which does not exceed your proportionate share of the estate).

3. Any warehouse receipt, bill of lading or other document of title deposited as margin which, as of (date petition was filed), was securing an open commodity contract and—can be identified in (commodity broker)'s records as being held for your account, and—is neither in bearer form nor otherwise transferable by delivery.

4. Any warehouse receipt bill of lading or other document of title, or any commodity received, acquired or held by (commodity broker) to make or take delivery or exercise from or for your account and which—can be identified in (commodity broker)'s records as received from or for your account as held specifically for the purpose of delivery or exercise.

5. Any cash or other property deposited to make or take delivery on a commodity contract may be eligible to be returned. The trustee should be contacted directly for further information if you have deposited such property with (commodity broker) and desire its return.

Instructions must be received by (the 5th calendar day after 2d publication date) or the trustee will liquidate your property. (If you own such property but fail to provide the trustee with instructions, you will still have a claim against (commodity broker) but you will not be able to have your specific property returned to you).

Note: Prior to receipt of your instructions, circumstances may require the trustee to liquidate your property, or transfer your property to another broker if it is margining open commodity contracts. If your property is transferred and your instructions were received within the required time, your instructions will be forwarded to the new broker.

Instructions should be directed to: (Trustee's name, address, and/or telephone).

Even if you request the return of your property, you must also pay the trustee the amount he specifies and provide the trustee with proof of your claim before (the 7th calendar day after 2d publication date) or your property will be liquidated. (Upon receipt of customer instructions to return property, the trustee will mail the sender a form which describes the information he must provide to substantiate his claim).

Note: The trustee is required to liquidate your property despite the timely receipt of your instructions, money, and proof of claim if, for any reason, your property cannot be returned by (close of business on the 7th calendar day after 2d publication date).

Bankruptcy Appendix Form 3—Request for Instructions Concerning Transfer of Your Hedge Contracts Held by (Commodity Broker)

United States Bankruptcy Court ____District of ____In re ____, Debtor, No. ____.

Please take notice: On (date), a petition in bankruptcy was filed by [against] (commodity broker).

You indicated when your hedge account was opened that the commodity contracts in your hedge account should not be liquidated automatically in the event of the bankruptcy of (commodity broker), and that you wished to provide instructions at this time concerning their disposition.

Instructions to transfer your commodity contracts and a cash deposit (as described below) must be received by the trustee by (the 6th calendar day after entry of order for relief) or your commodity contracts will be liquidated.

If you request the transfer of your commodity contracts, prior to their transfer, you must pay the trustee in cash an amount determined by the trustee which will approximate the difference between the value of the equity margining your commodity contracts and your *pro rata* share of the estate plus an amount constituting security for the nonrecovery of any overpayments. In your instructions, you should specify the broker to which you wish your commodity contracts transferred.

Be further advised that prior to receipt of your instructions, circumstances may, in any event, require the trustee to liquidate or transfer your commodity contracts. If your commodity contracts are so transferred and your instructions are received, your instructions will be forwarded to the new broker.

Note also that the trustee is required to liquidate your positions despite the timely receipt of your instructions and money if, for any reason, you have not made arrangements to transfer and/or your contracts are not transferred by (7 calendar days after entry of order for relief).

Instructions should be sent to: (Trustee's or designee's name, address, and/or telephone). [Instructions may also be provided by phone].

Bankruptcy Appendix Form 4—Proof of Claim

[Note to trustee: As indicated in § 190.02(d), this form is provided as a guide to the trustee and should be modified as necessary depending upon the information which the trustee needs at the time a proof of claim is requested and the time provided for a response.]

Proof of Claim

United States Bankruptcy Court ____District of ____In re ____, Debtor, No. ____.

Return this form by ____ or your claim will be barred (unless extended, for good cause only).

I. [If claimant is an individual claiming for himself] The undersigned, who is the claimant herein, resides at ____.

[If claimant is a partnership claiming through a member] The undersigned, who resides at ____, is a member of ____, a partnership, composed of the undersigned and ____, of ____, and doing business at ____, and is duly authorized to make this proof of claim on behalf of the partnership.

[If claimant is a corporation claiming though a duly authorized officer] The undersigned, who resides at ____ is the ____ of ____, a corporation organized under the laws of ____ and doing business at ____, and is duly authorized to make this proof of claim on behalf of the corporation.

[If claim is made by agent] The undersigned, who resides at ____, is the agent of ____, and is duly authorized to make this proof of claim on behalf of the claimant.

II. The debtor was, at the time of the filing of the petition initiating this case, and still is, indebted to this claimant for the total sum of $ ____.

III. List EACH account on behalf of which a claim is being made by number and name of account holder[s], and for EACH account, specify the following information:

a. Whether the account is a futures, foreign futures, leverage, option (if an option account, specify whether exchange-traded, dealer or cleared swap), ''delivery'' account, or a cleared swaps account. A ''delivery'' account is one which contains only documents of title, commodities, cash, or other property identified to the claimant and deposited for the purposes of making or taking delivery on a commodity underlying a commodity contract or for payment of the strike price upon exercise of an option.

b. The capacity in which the account is held, as follows (and if more than one is applicable, so state):

1. [The account is held in the name of the undersigned in his individual capacity];

2. [The account is held by the undersigned as guardian, custodian, or conservator for the benefit of a ward or a minor under the Uniform Gift to Minors Act];

3. [The account is held by the undersigned as executor or administrator of an estate];

4. [The account is held by the undersigned as trustee for the trust beneficiary];

5. [The account is held by the undersigned in the name of a corporation, partnership, or unincorporated association];

6. [The account is held as an omnibus customer account of the undersigned futures commission merchant];

7. [The account is held by the undersigned as part owner of a joint account];

8. [The account is held by the undersigned in the name of a plan which, on the date the petition in bankruptcy was filed, had in effect a registration statement in accordance with the requirements of § 1031 of the Employee Retirement Income Security Act of 1974 and the regulations thereunder]; or

9. [The account is held by the undersigned as agent or nominee for a principal or beneficial owner (and not described above in items 1–8 of this II, b)].

10. [The account is held in any other capacity not described above in items 1–9 of this II, b. Specify the capacity].

c. The equity, as of the date the petition in bankruptcy was filed, based on the commodity contracts in the account.

d. Whether the person[s] (including a general partnership, limited partnership, corporation, or other type of association) on whose behalf the account is held is one of the following persons OR whether one of the following persons, alone or jointly, owns 10% or more of the account:

1. [If the debtor is an individual—

A. Such individual;

B. Relative (as defined below in item 8 of this III.d) of the debtor or of a general partner of the debtor;

C. Partnership in which the debtor is a general partner;

D. General partner of the debtor; or

E. Corporation of which the debtor is a director, officer, or person in control];

2. [If the debtor is a partnership—

A. Such partnership;

B. General partner in the debtor;

C. Relative (as defined in item 8 of this III.d) of a general partner in, general partner of, or person in control of the debtor;

D. Partnership in which the debtor is a general partner;

E. General partner of the debtor; or

F. Person in control of the debtor];

3. [If the debtor is a limited partnership—

A. Such limited partnership;

B. A limited or special partner in such partnership whose duties include:

i. The management of the partnership business or any part thereof;

ii. The handling of the trades or customer funds of customers of such partnership;

iii. The keeping of records pertaining to the trades or customer funds of customers of such partnership; or

iv. The signing or co-signing of checks or drafts on behalf of such partnership];

4. [If the debtor is a corporation or association (except a debtor which is a futures commission merchant and is also a cooperative association of producers)—

A. Such corporation or association;

B. Director of the debtor;

C. Officer of the debtor;

D. Person in control of the debtor;

E. Partnership in which the debtor is a general partner;

F. General partner of the debtor;

G. Relative (as defined in item 8 of this III.d) of a general partner, director, officer, or person in control of the debtor;

H. An officer, director or owner of ten percent or more of the capital stock of such organization];

5. [If the debtor is a futures commission merchant which is a cooperative association of producers—

Shareholder or member of the debtor which is an officer, director or manager];

6. [An employee of such individual, partnership, limited partnership, corporation or association whose duties include:

A. The management of the business of such individual, partnership, limited partnership, corporation or association or any part thereof;

B. The handling of the trades or customer funds of customers of such individual, partnership, limited partnership, corporation or association;

C. The keeping of records pertaining to the trades or funds of customers of such individual, partnership, limited partnership, corporation or association; or

D. The signing or co-signing of checks or drafts on behalf of such individual, partnership, limited partnership, corporation or association];

7. [Managing agent of the debtor];

8. [A spouse or minor dependent living in the same household of ANY OF THE FOREGOING PERSONS, or any other relative, regardless of residency, (unless previously described in items 1–B, 2–C, or 4–G of this III.d) defined as an individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such degree];

9. [''Affiliate'' of the debtor, defined as:

A. Entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the out-standing voting securities of the debtor, other than an entity that holds such securities—

i. In a fiduciary or agency capacity without sole discretionary power to vote such securities; or

ii. Solely to secure a debt, if such entity has not in fact exercised such power to vote;

B. Corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, con-trolled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

i. In a fiduciary or agency capacity without sole discretionary power to vote such securities; or

ii. Solely to secure a debt, if such entity has not in fact exercised such power to vote;

C. Person whose business is operated under a lease or operating agreement by the debtor, or person substantially all of whose property is operated under an operating agreement with the debtor;

D. Entity that otherwise, directly or indirectly, is controlled by or is under common control with the debtor];

E. Entity that operates the business or all or substantially all of the property of the debtor under a lease or operating agreement; or

F. Entity that otherwise, directly or indirectly, controls the debtor; or

10. [Any of the persons listed in items 1–7 above of this III.d if such person is associated with an affiliate (see item 9 above) of the debtor as if the affiliate were the debtor].

e. Whether the account is a discretionary account. (If it is, the name in which the ''attorney in fact'' is held).

f. If the account is a joint account, the amount of the claimant's percentage interest in the account. (Also specify whether participants in a joint account are claiming separately or jointly).

g. Whether the claimant's positions in security futures products are held in a futures account or securities account, as those terms are defined in § 1.3 of this chapter.

IV. Describe all claims against the debtor not based upon a commodity contract account of the claimant (*e.g.,* if landlord, for rent; if customer, for misrepresentation or fraud).

V. Describe all claims of the DEBTOR against the CLAIMANT not already included in the equity of a commodity contract account[s] of the claimant (see III.c above).

VI. Describe any deposits of money, securities or other property held by or for the debtor from or for the claimant, and indicate if any of this property was included in your answer to III.c above.

VII. Of the money, securities, or other property described in VI above, identify any which consists of the following:

a. With respect to property received, acquired, or held by or for the account of the debtor from or for the account of the claimant to margin, guarantee or secure an open commodity contract, the following:

1. Any security which as of the filing date is:

A. Held for the claimant's account;

B. Registered in the claimant's name;

C. Not transferable by delivery; and

D. Not a short term obligation; or

2. Any warehouse receipt, bill of lading or other document of title which as of the filing date:

A. Can be identified on the books and records of the debtor as held for the account of the claimant; and

B. Is not in bearer form and is not otherwise transferable by delivery.

b. With respect to open commodity contracts, and except as otherwise provided below in item g of this VII, any such contract which:

1. As of the date the petition in bankruptcy was filed, is identified on the books and records of the debtor as held for the account of the claimant;

2. Is a bona fide hedging position or transaction as defined in Rule 1.3 of the Commodity Futures Trading Commission (''CFTC'') or is a commodity option transaction which has been determined by a registered entity to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been approved by the CFTC pursuant to section 5c(c) of the Commodity Exchange Act;

3. Is in an account designated in the accounting records of the debtor as a hedging account.

c. With respect to warehouse receipts, bills of lading or other documents of title, or physical commodities received, acquired, or held by or for the account of the debtor for the purpose of making or taking delivery or exercise from or for the claimant's account, any such document of title or commodity which as of the filing date can be identified on the books and records of the debtor as received from or for the account of the claimant specifically for the purpose of delivery or exercise.

d. Any cash or other property deposited prior to bankruptcy to pay for the taking of physical delivery on a long commodity contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date which cash or other property is identified on the books and records of the debtor as received from or for the account of the claimant within three or less days of the notice date or three or less days of the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the strike price upon exercise.

e. The cash price tendered for any property deposited prior to bankruptcy to make physical delivery on a short commodity contract or for exercise of a long put or a short call option contract on a physical commodity, which cannot be settled in cash,

to the extent it exceeds the amount necessary to margin such contract prior to the notice exercise date which property is identified on the books and records of the debtor as received from or for the account of the claimant within three or less days of the notice date or of the exercise date specifically for the purpose of a delivery or exercise.

f. Fully paid, non-exempt securities identified on the books and records of the debtor as held by the debtor for or on behalf of the commodity contract account of the claimant for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity.

g. Open commodity contracts transferred to another futures commission merchant by the trustee.

VIII. Specify whether the claimant wishes to receive payment in kind, to the extent possible, for any claim for securities.

IX. Attach copies of any documents which support the information provided in this proof of claim, including but not limited to customer confirmations, account statements, and statements of purchase or sale.

This proof of claim must be filed with the trustee no later than __, or your claim will be barred unless an extension has been granted, available only for good cause.

Return this form to:
(Trustee's name (or designee's) and address)

_____

Dated: _____
(Signed) _____

Penalty for Presenting Fraudulent Claim.
Fine of not more than $5,000 or imprisonment for not more than five years or both—Title 18, U.S.C. 152.

(Approved by the Office of Management and Budget under control number 3038–0021)

■ 14. Revise appendix B to part 190 to read as follows:

Appendix B to Part 190—Special Bankruptcy Distributions

Framework 1—Special Distribution of Customer Funds for Futures Contracts When FCM Participated in Cross-Margining

The Commission has established the following distributional convention with respect to ''customer funds'' (as § 1.3 of this chapter defines such term) for futures contracts held by a futures commission merchant (FCM) that participated in a cross-margining (XM) program which shall apply if participating market professionals sign an agreement that makes reference to this distributional rule and the form of such agreement has been approved by the Commission by rule, regulation or order:

All customer funds for futures contracts held in respect of XM accounts, regardless of the product that customers holding such accounts are trading, are required by Commission order to be segregated separately from all other customer segregated funds. For purposes of this distributional rule, XM accounts will be deemed to be commodity interest accounts and securities held in XM accounts will be deemed to be received by the FCM to margin, guarantee or secure commodity interest contracts. The maintenance of property in an XM account will result in subordination of the claim for such property to certain non-XM customer claims and thereby will operate to cause such XM claim not to be treated as a customer claim for purposes of the Securities Investors Protection Act and the XM securities to be excluded from the securities estate. This creates subclasses of futures customer accounts, an XM account and a non-XM account (a person could hold each type of account), and results in two pools of segregated funds belonging to futures customers: An XM pool and a non-XM pool. In the event that there is a shortfall in the non-XM pool of customer class segregated funds and there is no shortfall in the XM pool of customer segregated funds, all futures customer net equity claims, whether or not they arise out of the XM subclass of accounts, will be combined and will be paid *pro rata* out of the total pool of available XM and non-XM customer funds for futures contracts. In the event that there is a shortfall in the XM pool of customer segregated funds and there is no shortfall in the non-XM pool of customer segregated funds, then futures customer net equity claims arising from the XM subclass of accounts shall be satisfied first from the XM pool of customer segregated funds, and futures customer net equity claims arising from the non-XM subclass of accounts shall be satisfied first from the non-XM customer segregated funds. Furthermore, in the event that there is a shortfall in both the non-XM and XM pools of customer segregated funds: (1) If the non-XM shortfall as a percentage of the segregation requirement in the non-XM pool is greater than or equal to the XM shortfall as a percentage of the segregation requirement in the XM pool, all futures customer net equity claims will be paid *pro rata;* and (2) if the XM shortfall as a percentage of the segregation requirement in the XM pool is greater than the non-XM shortfall as a percentage of the segregation requirement of the non-XM pool, non-XM futures customer net equity claims will be paid *pro rata* out of the available non-XM segregated funds, and XM futures customer net equity claims will be paid *pro rata* out of the available XM segregated funds. In this way, non-XM customers will never be adversely affected by an XM shortfall.

The following examples illustrate the operation of this convention. The examples assume that the FCM has two customers, one with exclusively XM accounts and one with exclusively non-XM accounts. However, the examples would apply equally if there were only one customer, with both an XM account and a non-XM account.

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1. Sufficient Funds to Meet Non-XM and XM Customer Claims:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	150	300
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	0	
Shortfall (percent)	0	0	
Distribution	150	150	300

There are adequate funds available and both the non-XM and the XM customer claims will be paid in full.

2. Shortfall in Non-XM Only:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	150	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	0	
Shortfall (percent)	50/150=33.3	0	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	125	125	
Distribution	125	125	250

Due to the non-XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Each customer will receive his pro rata share of the funds available, or 50% of the $250 available, or $125.

3. Shortfall in XM Only:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	100	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	50	
Shortfall (percent)	0	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	125	125	
Distribution	150	100	250

Due to the XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Accordingly, the XM funds and non-XM funds are treated as separate pools, and the non-XM customer will be paid in full, receiving $150 while the XM customer will receive the remaining $100.

4. Shortfall in Both, With XM Shortfall Exceeding Non-XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	125	100	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	25	50	
Shortfall (percent)	25/150=16.7	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	112.50	112.50	
Distribution	125	100	225

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the XM shortfall exceeds the non-XM shortfall. The non-XM

customer will receive the $125 available with respect to non-XM claims while the XM customer will receive the $100 available with respect to XM claims.

5. Shortfall in Both, With Non-XM Shortfall Exceeding XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	125	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	25	
Shortfall (percent)	50/150=33.3	25/150=16.7	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	112.50	112.50	
Distribution	112.50	112.50	225

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall exceeds the XM shortfall. Each customer will receive 50% of the $225 available, or $112.50.

6. Shortfall in Both, Non-XM Shortfall = XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	100	200
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	50	
Shortfall (percent)	50/150=33.3	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	100	100	
Distribution	100	100	200

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall equals the XM shortfall. Each customer will receive 50% of the $200 available, or $100.

These examples illustrate the principle that pro rata distribution across both accounts is the preferable approach except when a shortfall in the XM account could harm non-XM customers. Thus, pro rata distribution occurs in Examples 1, 2, 5 and 6. Separate treatment of the XM and non-XM accounts occurs in Examples 3 and 4.

FRAMEWORK 2 —SPECIAL ALLOCATION OF SHORTFALL TO CUSTOMER CLAIMS WHEN CUSTOMER FUNDS FOR FUTURES CONTRACTS AND CLEARED SWAPS CUSTOMER COLLATERAL ARE HELD IN A DEPOSITORY OUTSIDE OF THE UNITED STATES OR IN A FOREIGN CURRENCY

The Commission has established the following allocation convention with respect to customer funds (as §1.3 of this chapter defines such term) for futures contracts and Cleared Swaps Customer Collateral (as §22.1 of this chapter defines such term) segregated pursuant to the Act and Commission rules thereunder held by a futures commission merchant ("FCM") or derivatives clearing organization ("DCO") in a depository outside the United States ("U.S.") or in a foreign currency. The maintenance of customer funds for futures contracts or Cleared Swaps Customer Collateral in a depository outside the U.S. or denominated in a foreign currency will result, in certain circumstances, in the reduction of customer claims for such funds. For purposes of this proposed bankruptcy convention, sovereign action of a foreign government or court would include, but not be limited to, the application or enforcement of statutes, rules,

regulations, interpretations, advisories, decisions, or orders, formal or informal, by a federal, state, or provincial executive, legislature, judiciary, or government agency. If an FCM enters into bankruptcy and maintains customer funds for futures contracts or Cleared Swaps Customer Collateral in a depository located in the U.S. in a currency other than U.S. dollars or in a depository outside the U.S., the following allocation procedures shall be used to calculate the claim of each futures customer or Cleared Swaps Customer (as §22.1 of this chapter defines such term). The allocation procedures should be performed separately with respect to each futures customer or Cleared Swaps Customer.

I. Reduction in Claims for General Shortfall

A. Determination of losses not attributable to sovereign action

1. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars at the exchange rate in effect on the Final Net Equity Determination Date, as defined in §190.01(s) (the "Exchange Rate").

2. Determine the amount of assets available for distribution to futures customers or Cleared Swaps Customers. In making this calculation, include customer funds for futures contracts and Cleared Swaps Customer Collateral that would be available for distribution but for the sovereign action.

3. Convert the amount of customer funds for futures contracts and Cleared Swaps Customer Collateral available for distribution to U.S. Dollars at the Exchange Rate.

4. Determine the Shortfall Percentage that is not attributable to sovereign action, as follows:

$$\textit{Shortfall}\ \text{Percentage} = \left(1 - \left[\frac{\textit{Total}\ \text{Customer Assets}}{\textit{Total}\ \text{Customer Claims}}\right]\right)$$

B. Allocation of Losses Not Attributable to Sovereign Action

1. Reduce the claim of each futures customer or Cleared Swaps Customer by the Shortfall Percentage.

II. Reduction in Claims for Sovereign Loss

A. Determination of Losses Attributable to Sovereign Action ("Sovereign Loss")

1. If any portion of the claim of a futures customer or Cleared Swaps Customer is required to be kept in U.S. dollars in the U.S., that portion of the claim is not exposed to Sovereign Loss.

2. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one location and that location is:

a. The U.S. or a location in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A location in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

3. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one currency and that currency is:

a. U.S. dollars or a currency in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A currency in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

4. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one location and:

a. There is no Sovereign Loss in any of those locations, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those locations, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those locations, then an equal share of that portion of the claim will be exposed to Sovereign Loss in each such location.

5. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one currency and:

a. There is no Sovereign Loss in any of those currencies, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those currencies, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those currencies, then an equal share of that portion of the claim will be exposed to Sovereign Loss.

B. Calculation of Sovereign Loss

1. The total Sovereign Loss for each location is the difference between:

a. The total customer funds for futures contracts or Cleared Swaps Customer Collateral deposited in depositories in that location and

b. The amount of customer funds for futures contracts or Cleared Swaps Customer Collateral in that location that is available to be distributed to futures customers or Cleared Swaps Customers, after taking into account any sovereign action.

2. The total Sovereign Loss for each currency is the difference between:

a. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the day before the sovereign action took place and

b. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the Final Net Equity Determination Date.

C. Allocation of Sovereign Loss

1. Each portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location will be reduced by:

$$\textit{Total}\ \text{Sovereign Loss} \times \frac{\text{Portion of the customer's claim exposed to loss in that location}}{\textit{All}\ \text{portions of customer claims exposed to loss in that location}}$$

2. Each portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a currency will be reduced by:

$$\textit{Total}\ \text{Sovereign Loss} \times \frac{\text{Portion of the customer's claim exposed to loss in that currency}}{\textit{All}\ \text{portions of customer claims exposed to loss in that currency}}$$

3. A portion of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location or currency will not be reduced below zero. (The above calculations might yield a result below zero where the FCM kept more customer funds for futures contracts or Cleared Swaps Customer Funds in a location or currency than it was authorized to keep.)

4. Any amount of Sovereign Loss from a location or currency in excess of the total amount of customer funds for futures contracts or Cleared Swaps Customer Funds authorized to be kept in that location or currency (calculated in accord with section II.1 above) ("Total Excess Sovereign Loss") will be divided among all futures customers or Cleared Swaps Customer who have authorized funds to be kept outside the U.S., or in currencies other than U.S. dollars, with each such futures customer or Cleared Swaps Customer claim reduced by the following amount:

$$\textit{Total}\ \text{Excess Sovereign Loss} \times \left[\frac{\left(\begin{array}{c}\text{This customer's total claim} - \text{The portion of this Customer's claim} \\ \text{required to be kept in U.S. dollars, in the U.S.}\end{array}\right)}{\begin{array}{c}\textit{Total}\ \text{customer claims} - \text{Total of all customer claims} \\ \text{required to be kept in U.S. dollars, in the U.S.}\end{array}}\right]$$

The following examples illustrate the operation of this convention.

Example 1. No shortfall in any location.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	€50	U.K.
C	€50	Germany
D	£300	U.K.

Location	Actual asset balance
U.S.	$50
U.K.	£300
U.K.	€50
Germany	€50

Note: Conversion Rates: £1 = $1; £1=$1.5.

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in U.S. dollars
A	$50	1.0	$50
B	€50	1.0	50
C	€50	1.0	50
D	£300	1.5	450
Total			$600.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$50	1.0	$50			$50
U.K.	£300	1.5	450			450
U.K.	€50	1.0	50			50
Germany	€50	1.0	50			50
Total			$600.00		0	$600.00

There are no shortfalls in funds held in any location. Accordingly, there will be no reduction of futures customer or Cleared Swaps Customer claims.

Claims:

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action	Claim after all reductions
A	$50	$0	$50
B	50	0	50
C	50	0	50
D	450	0	450
Total	600.00	0.00	600.00

Example 2. Shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	$100	U.S.
B	€50	U.K.
C	€100	U.K., Germany, or Japan

Location	Actual asset balance
U.S.	$50
U.K.	€100
Germany	€50

Note: Conversion Rates: €1=$1.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

There is a shortfall in the funds held in the U.S. such that only1/2 of the funds are available. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Convert each customer's claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$100	1.0	$100
B	€50	1.0	50
C	€100	1.0	100
Total			250.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$50	1.0	$50.00			$50
U.K.	€100	1.0	100			100
Germany	€50	1.0	50			$50
Total			200.00			200.00

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1−(200/250)) = (1−80%) = 20%.

Reduce each futures customer or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$100	$20.00	$80.00
B	50	10.00	40.00
C	100	20.00	80.00
Total	250.00	50.00	200.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, the futures customer or Cleared Swaps Customer claims will not be further reduced.

CLAIMS AFTER REDUCTIONS

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action	Claim after all reductions
A	$80		$80.00
B	40		40.00
C	80		80.00
Total	200.00	0	200.00

Example 3. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action.

Customer	Claim	Location(s) customer has consented to having funds held
A	$150	U.S.
B	€100	U.K.
C	€50	Germany
D	$100	U.S.
D	€100	U.K. or Germany

Location	Actual asset balance
U.S.	$250
U.K.	€50
Germany	€100

Note: Conversion Rates: €1=$1.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$150	1.0	$150
B	€100	1.0	100
C	€50	1.0	50
D	$100	1.0	100
D	€100	1.0	100
Total			500.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$250	1.0	$250			$250
U.K.	€50	1.0	50			50
Germany	€100	1.0	100			100
Total			400.00		0	400.00

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1−400/500) = (1−80%) = 20%.

Reduce each futures customer or Cleared Swaps Customer by the shortfall percentage:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$150	$30.00	120.00
B	100	20.00	80.00
C	50	10.00	40.00
D	200	40.00	160.00
Total	500.00	100.00	400.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, the claims will not be further reduced.

CLAIMS AFTER REDUCTIONS

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action	Claim after all reductions
A	$120.00		$120
B	80.00		80
C	40.00		40
D	160.00	0	160
Total	400.00	0	400

Example 4. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action.

Customer	Claim	Location(s) where customer has consented to have funds held
A	$50	U.S.
B	€50	U.K.
C	€50	Germany
D	$100.	U.S.
D	€100	U.K. or Germany

Location	Actual asset balance
U.S.	$150
U.K.	100
Germany	100

Notice: Conversion Rates: €1 = $1; ¥1= $0.01, £1= $1.5.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$50	1.0	$50
B	€50	1.0	50
C	€50	1.0	50
D	$100	1.0	100
D	€100	1.0	100
Total			350.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$150	1.0	$150			$150
U.K.	€100	1.0	100			100
Germany	€100	1.0	100	50%	50	50
Total			350.00		50.00	300.00

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1−350/350) = (1−100%) = 0%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$50	0	$50.00
B	50	0	50.00
C	50	0	50.00
D	200	0	200.00
Total	350.00	0.00	350.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, only1/2of the funds in Germany are available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$50		
B		$50	
C			$50
D	100		100
Total	150.00	50.00	150.00

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

Customer	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
C	$50/$150	33.3% of $50	$16.67
D	$100/$150	66.7% of $50	33.33
Total			50.00

CLAIMS AFTER REDUCTIONS:

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Claim after all reductions
A	$50		$50
B	50		50
C	50	$16.67	33.33
D	200	33.33	166.67
Total	350.00	50.00	300.00

Example 5. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action and a shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	$100	U.S.
B	€50	U.K.
C	€150	Germany
D	$100	U.S.
D	£300	U.K.
D	€150	U.K. or Germany

Location	Actual asset balance
U.S.	$100
U.K.	£300
U.K.	€200
Germany	€150

Conversion Rates: €1=$1; £1=$1.5.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$100	1.0	$100
B	€50	1.0	50
C	€150	1.0	150
D	$100	1.0	100
D	£300	1.5	450
D	€150	1.0	150
Total			1000.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$100	1.0	$100			$100
U.K.	£300	1.5	450			450
U.K.	€200	1.0	200			200
Germany	€150	1.0	150	100%	$150	0
Total			900.00		150.00	750.00

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1 − 900 / 1000) = (1 − 90%) = 10%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$100	$10.00	$90.00
B	50	5.00	45.00
C	150	15.00	135.00
D	700	70.00	63.00
Total	1000.00	100.00	900.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$100		
B		$50	
C			$150
D	100	450	150
Total	200.00	500.00	300.00

Calculation of the allocation of the shortfall due to sovereign action Germany ($150 shortfall to be allocated):

Customer	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
C	$150/$300	50% of $150	$75
D	150/$300	50% of $150	75
Total			150.00

CLAIMS AFTER REDUCTIONS

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Claim after all reductions
A	$90		$90
B	45		45
C	135	$75	60
D	630	75	555
Total	900.00	150.00	750.00

Example 6. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action, and a shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	€50	U.K.
C	$20	U.S.
C	€50	Germany
D	$100.	U.S.
D	£300	U.K.
D	€100	U.K., Germany, or Japan
E	$80	U.S.
E	¥10,000	Japan

Location	Actual asset balance
U.S.	$200
U.K.	£200
U.K.	€100
Germany	€50
Japan	¥10,000

Conversion Rates: £1 = $1; ¥1=$0.01, £1=$1.5.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$50	1.0	$50
B	€50	1.0	50
C	$20	1.0	20
C	€50	1.0	50
D	$100.	1.0	100
D	€300	1.5	450
D	£100	1.0	100
E	$80	1.0	80
E	¥10,000	0.01	100
Total			1000.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$200	1.0	$200			$200
U.K.	£200	1.5	300			300
U.K.	€100	1.0	100			100
Germany	€50	1.0	50	100%	$50	0
Japan	¥10,000	0.01	100	50%	50	50
Total			750		100.00	650.00

Determine the percentage of shortfall that is not attributable to sovereign action: Shortfall Percentage = (1–750/1000) = (1–75%) = 25%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

Customer	Claim in U.S.$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$50	$12.50	$37.50
B	50	12.50	37.50
C	70	17.50	52.50
D	650	162.50	487.50
E	180	45.00	135.00
Total	1000.00	250.00	750.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany and only1/2of the funds in Japan are available.

Customer	Presumed location of funds			
	U.S.	U.K.	Germany	Japan
A	$50			
B		$50		
C	20		$50	
D	100	450	50	$50
E	80			100
Total	250.00	500.00	100.00	150.00

Calculation of the allocation of the shortfall due to sovereign action—Germany ($50 shortfall to be allocated):

Customer allocation	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
C	$50/$100	50% of $50	$25
D	50/100	50% of 50	25
Total			50

Japan ($50 shortfall to be allocated):

Customer	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
D	$50/$150	33.3% of $50	$16.67
E	100/150	66.6% of 50	33.33
Total			50.00

CLAIMS AFTER REDUCTIONS

Customer	Claim in US dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Allocation of shortfall due to sovereign action from Japan	Claim after all reductions
A	$37.50			37.50
B	37.50			37.50
C	52.50	$25		27.50
D	487.50	25	16.67	445.83
E	135.00		33.33	101.67
Total	750.00	50.00	50.00	650.00

Example 7. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, where the FCM kept more funds than permitted in such location or currency.

Customer	Claim	Location(s) customer has consented to having funds held
A	$50	U.S.
B	50	U.S.
B	€50	U.K.
C	€50	Germany.
D	100.	U.S.
D	€100	U.K. or Germany.
E	50	U.S.
E	€50	U.K.

Location	Actual asset balance
U.S.	$250
U.K.	€50
Germany	€200

Conversion Rates: 1 = $1.

REDUCTION IN CLAIMS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US$
A	$50	1.0	$50
B	50	1.0	50
B	€50	1.0	50
C	€50	1.0	50
D	€100.	1.0	100
D	€100	1.0	100
E	50	1.0	50
E	€50	1.0	50
Total			500.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	$250	1.0	$250			$250
U.K.	€50	1.0	50			50
Germany	€200	1.0	200	100%	200	0
Total			500.00		200	300.00

Determine the percentage of shortfall that is not attributable to sovereign

Shortfall Percentage = (1–500/500) = (1–100%) = 0%.

Reduce each futures customer or Cleared Swaps Customer claim by the shortfall percentage:

Customer	Claim in US$	Allocated shortfall (non-sovereign)	Claim in U.S. dollars after allocated shortfall
A	$50	$0	$50.00
B	100	0	100.00
C	50	0	50.00
D	200	0	200.00
E	100	0	100.00
Total	500.00	0.00	500.00

REDUCTION IN CLAIMS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	$50		
B	50	50	
C			50
D	100		100
E	50	50	
Total	250.00	100.00	150.00

Calculation of the allocation of the shortfall due to sovereign action—Germany ($200 shortfall to be allocated):

Customer	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
C	$50/$150	33.3% of $200	$66.67
D	$100/$150	66.7% of $200	$133.33
Total			$200.000

This would result in the claims of customers C and D being reduced below zero.

Accordingly, the claims of customer C and D will only be reduced to zero, or $50 for C and $100 for D. This results in a Total Excess Shortfall of $50.

Actual shortfall	Allocation of shortfall for customer C	Allocation of shortfall for customer D	Total excess shortfall
$200	$50	$100	$50

This shortfall will be divided among the remaining futures customers or Cleared Swaps Customers who have authorized funds to be held outside the U.S. or in a currency other than U.S. dollars.

Customer	Total claims of customers permitting funds to be held outside the U.S.	Portion of claim required to be in the U.S.	Allocation share (column B-C/column B Total—all customer claims in U.S.)	Allocation share of actual total excess shortfall	Actual total excess shortfall allocated
B	$100	$50	$50/$200	25% of $50	$12.50
C	50	0	[1]		0
D	200	100	$100/200	50% of $50	25
E	100	50	50/100	25% of $50	12.50
Total	450.00				50.00

[1] Claim already reduced to $0.

CLAIMS AFTER REDUCTIONS

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action Germany	Allocation of total excess shortfall	Claim after all reductions
A	$50			$50.00
B	100		12.50	87.50
C	50	50		0
D	200	100	25	75.00
E	100		12.50	87.50
Total	500.00	150.00	50.00	300.00

Issued in Washington, DC on January 11, 2012, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton, O'Malia and Wetjen voted in the affirmative; Commissioner Sommers voted in the negative

Appendix 2—Statement of Chairman Gary Gensler

I support the final rules on segregation of customer funds for cleared swaps. These rules are an important step forward in protecting customers and reducing the risk of swaps trading. The rules carry out the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) mandate that futures commission merchants (FCMs) and derivatives clearing organizations (DCOs) segregate customer collateral supporting cleared swaps. FCMs and DCOs must hold customer collateral in a separate account from that belonging to the FCM or DCO. It prohibits clearing organizations from using the collateral of non-defaulting, innocent customers to protect themselves and their clearing members. For the first time, customer money must be protected individually all the way to the clearinghouse.

We received a tremendous amount of public input on this rule, including through two roundtables, as well as through comments on an advanced notice of proposed rulemaking and a proposal. This rule builds on customer protections included in the clearinghouse core principles rule we finalized in October requiring DCOs to collect initial margin on a gross basis for their clearing members' customer accounts.

Appendix 3—Statement of Commissioner Scott D. O'Malia

Today, the Commodity Futures Trading Commission (the ''Commission'') is voting to finalize a rulemaking on protection of cleared swaps customer collateral.[307] Whereas I support this rulemaking, I believe that it is important to detail its limitations, so that we do not offer market participants a misleading sense of comfort in light of the collapse of MF Global, Inc. (''MF Global''). As I will explain further, the Commission has much more work to do to increase confidence in the customer protections that our regulations offer.

This rulemaking does not address MF Global.

First, this rulemaking does not address MF Global. The rulemaking is entitled, in part, *Protection of Cleared Swaps Customer Contracts and Collateral.* Therefore, it benefits cleared swaps customers, and not futures customers (who are bearing the brunt of MF Global). This rulemaking would not have prevented a shortfall in the customer funds of the ranchers and farmers that transact daily in the futures market. Nor would it have expedited the transfer of positions and collateral belonging to such customers in the event of a collapse similar to that of MF Global.

This rulemaking may expose swaps customers to more risk.

Second, this rulemaking only addresses one of three categories of risk that an intermediary—like MF Global—can pose to its customers. The three categories of risk are (i) ''fellow-customer'' risk, (ii) operational risk, and (iii) investment risk. By its own admission, this rulemaking only protects against ''fellow-customer'' risk. It does not protect against operational risk—namely, the risk that an intermediary improperly segregates cleared swaps customer collateral.[308] Moreover, it does not protect against investment risk—namely, the risk that an intermediary experiences losses on its investment of cleared swaps customer collateral, which it cannot cover using its capital.[309] To be plain, I support limiting intermediaries from investing customer collateral in risky instruments—regardless of whether such collateral margins futures or swaps contracts.[310] However, I am not naïve enough to believe that such limitations—without additional Commission oversight or action—would be sufficient. I have warned against complacency in the past.[311] I reiterate such warning here.

Under this rulemaking, what happens if an intermediary—like MF Global—becomes insolvent as operational or investment irregularities are revealed? Basically, under the Bankruptcy Code,[312] cleared swaps customers would share *pro rata* in any shortfall. A shortfall would complicate the porting of cleared swaps customer contracts and associated collateral, notwithstanding the enhanced recordkeeping and reporting requirements of this rulemaking.

By not protecting against operational and investment risk, this rulemaking may have the effect of exposing some swaps customers to more risk than they currently bear in the over-the-counter markets. Since December 2, 2011, we have received eight comment letters from end-users, many of which explicitly asked the Commission to not finalize this rulemaking until it explores other alternatives that may provide greater protection.[313] These end-users include Fidelity Investments, the Committee on Investment of Employee Benefit Assets (''CIEBA''), and the Federal Home Loan Banks. According to many of these comment letters, swaps customers in the over-the-counter markets currently have the option to enter into tri-party custody agreements. In general, these agreements may provide superior protection to this rulemaking against not only fellow-customer risk, but also operational and investment risk.[314]

I understand that staff has been directed to ''carefully analyze'' various proposals that commenters have advanced ''with the goal of developing proposed rules that provide additional protection for collateral belonging to market participants.'' [315] This is a laudable goal. I only hope that we achieve this goal before mandatory clearing becomes effective.[316] Otherwise, we may be subjecting

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[307] Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions (to be codified at 17 CFR parts 22 and 190) (referenced herein as the ''rulemaking''), available at: *http://www.cftc.gov/PressRoom/Events/opaevent_cftcdoddfrank011112.*

[308] *See* section I(D)(2) of the preamble to this rulemaking.

[309] *Id.*

[310] *See* sections 22.2(e)(1) and 22.3(d) of the rule text to this rulemaking (to be codified at 17 CFR 22.2(e)(1) and 22.3(d)) (limiting an FCM and a DCO to investing cleared swaps customer collateral in instruments enumerated in regulation 1.25).

[311] *See* ''Opening Statement of Commissioner Scott D. O'Malia'', dated December 5, 2011, available at: *http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement120511.*

[312] *See* section 766(h) of the Bankruptcy Code, 11 U.S.C. 766(h).

[313] *See* comment letters from (i) Managed Funds Association, dated December 2, 2011; (ii) Fidelity Investments, dated December 8, 2011; (iii) Och-Ziff Capital Management Group, dated circa December 12, 2011; (iv) State Street Corporation, dated December 14, 2011; (v) the Committee on Investment of Employee Benefit Assets, dated December 22, 2011; (vi) the European Federation for Retirement Provision (''EFRP'') and APG Algemene Pensioen Groep, N.V. (''APG''), dated December 23, 2011; (vii) the Federal Home Loan Banks, dated January 9, 2012; and (viii) BlueMountain Capital Management, LLC, Elliot Management Corporation, Moore Capital Management, LP, Paulson & Co. Inc., and Tudor Investment Corporation, dated January 9, 2012 (the ''Moore *et. al.* letter''). In each case, the comment letters were filed in answer to the notice of proposed rulemaking on the Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 76 FR 33818, Jun. 9, 2011. All comment letters to such notice are available at: *http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-10737a.pdf.*

[314] *See, e.g.,* comment letters from (i) Fidelity Investments, dated December 8, 2011; (ii) Och-Ziff Capital Management Group, dated circa December 12, 2011; and (iii) CIEBA, dated December 22, 2011.

[315] Section I(F) of the preamble to this rulemaking.

[316] *See* comment letter from CIEBA, dated December 22, 2011 (stating that ''* * * *the Commission should not permit mandatory clearing of swaps to become effective until a physical segregation option, such as the individual settlement account * * * or another satisfactory structure, has been made available to swaps customers.''* [emphasis original]).

This rulemaking does attempt to resolve one request repeated in the comment letters filed since December 2, 2011. In section I(F) of the preamble, the rulemaking makes clear that the Commission's 2005 Amendment to Financial and Segregation Interpretation No. 10, 70 FR 24768, May 11, 2005 (''Segregation Interpretation 10–1''), does not apply to cleared swaps. Therefore, Segregation Interpretation 10–1 would not prohibit an intermediary from entering into a tri-party custody agreement with a cleared swaps customer. However, this rulemaking similarly makes clear that Segregation Interpretation No. 10, which the Commission issued in 1984, would continue to

Continued

a substantial portion of cleared swaps customer collateral to operational risk and investment risk. To provide some context, such collateral—in the aggregate—may amount to anywhere from $500 billion to $833 billion.[317] As one commenter stated, ''[i]t would seem to be a perverse result that, because of rulemaking promulgated under the Dodd-Frank * * * Act, which was * * * meant to enhance the safety of the over-the-counter markets by reducing systemic and counterparty risks, market participants were to be placed [in] [*sic*] a worse position with regard to risk than they are currently.'' [318] Other commenters supported this statement.[319]

This rulemaking may imperfectly address fellow-customer risk.

Let me now say a few words on ''fellow-customer'' risk. Preliminarily, what is it? According to this rulemaking, it is the risk that a derivatives clearing organization (''DCO'') will access the collateral of non-defaulting cleared swaps customers to cure the default of an intermediary.[320] Under what circumstances could a DCO access such collateral? Under this rulemaking, there are two circumstances and they have to occur simultaneously. First, a swaps customer would need to default to an intermediary. Second, as a result of such default, the intermediary must be unable to meet its DCO obligations. In short, swaps customer losses must exceed the capitalization of the intermediary.[321] As this rulemaking acknowledges, ''fellow-customer'' risk is rare.[322] In comparison, according to notices received by the Commission, operational risk is far more prevalent.[323]

Of course, just because a risk is rare does not mean that the Commission should not protect against it. But let us take a closer look at the protection that this rulemaking is offering. First, although it is close to 230 pages, with nearly 100 pages in rule text, only a couple of the provisions of this rulemaking address ''fellow-customer'' risk. They are regulations 22.11 to 22.16.[324] The remainder of regulation Part 22, as well as the majority of changes to regulation Part 190 (*Bankruptcy*), simply aligns the cleared swaps segregation regime with the existing futures segregation regime.[325] As MF Global reveals, the futures segregation regime may have some vulnerabilities. In this rulemaking, the Commission is unthinkingly replicating these vulnerabilities.

Second, this rulemaking only offers protection to a portion of the cleared swaps customer collateral that an intermediary holds. In general, cleared swaps customer collateral may fall within two categories: (i) collateral needed to support contracts; and (ii) collateral in excess of that needed to support contracts (''Excess Collateral''). The Commission, in its final rulemaking on *Derivatives Clearing Organization General Provisions and Core Principles,* states that a DCO must require its clearing members to collect Excess Collateral.[326] However, as certain commenters have astutely observed, and as this rulemaking readily admits, this rulemaking does not protect Excess Collateral deposited outside of the DCO.[327] So, the Commission has required cleared swaps customers to provide collateral that it then does not protect.

Third, this rulemaking cites, as a major benefit, the possibility of enhanced portability of cleared swaps customer contracts, as well as associated collateral, after an intermediary defaults due to ''fellow-customer'' risk.[328] The rulemaking sets forth more stringent recordkeeping and reporting requirements as a foundation for enhanced portability. As commenters have identified, these requirements have two significant weaknesses.

Preliminarily, to maximize portability, each intermediary must (i) keep complete and accurate records and (ii) comply with reporting requirements. As MF Global and earlier intermediary collapses have demonstrated, a distressed intermediary may not prioritize recordkeeping and reporting.[329]

Secondarily, despite requests from various commenters (including the Association of Institutional Investors and Vanguard), this rulemaking does not provide guidance on the concrete steps that a DCO should take to ensure that an intermediary is providing accurate and complete information. Instead, the rulemaking states: ''* * * the DCO should take the steps appropriate, in the professional judgment of its staff, to verify that [intermediaries] have and are using systems and appropriate procedures to track accurately, and to provide to the DCO accurately, the positions of each customer.'' [330] In light of MF Global, the Commission should give this provision—and the requests of commenters—more thought.

Finally, this rulemaking is silent on one important factor that may affect the portability of cleared swaps customer contracts, as well as associated collateral—namely, whether the intermediary is both a futures commission merchant and a securities broker-dealer. I am touching on this issue in the interest of full disclosure.

A comprehensive solution is needed.

Despite its limitations, I ultimately support this rulemaking. As I have stated previously, the Commission must immediately take action to renew public confidence in our customer protection regime.[331] Although this rulemaking largely replicates futures segregation, this rulemaking—if it works as promised in an intermediary bankruptcy—may enhance portability for cleared swaps customers in the event of ''fellow-customer'' risk. Even the possibility of such enhancement is non-negligible—especially in the volatile economic environment that exists today.

However, this rulemaking also vividly illustrates some of my concerns regarding our Dodd-Frank rulemaking process. First, the Commission has a duty to regulate the swaps market. It also owes a duty to futures customers. Right now, it is unclear from this rulemaking how the Commission means to address futures customer concerns. I understand that the investigation into the MF Global collapse is ongoing. However, the Commission could examine the manner in

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apply to collateral segregated according to a tri-party custody agreement. In other words, cleared swaps customers could not avoid the *pro rata* distribution provisions of the Bankruptcy Code (as well as regulation Part 190). Therefore, the resolution in this rulemaking may provide commenters with cold comfort.

[317] Section VII(B)(2) of the preamble to this rulemaking (citing estimates provided by CME Group, Inc. and the International Swaps and Derivatives Association, Inc.).

[318] Comment letter from Och-Ziff Capital Management Group, dated circa December 12, 2011.

[319] *See* the Moore *et. al.* letter (stating ''[g]iven the crucial role that central clearing will play in reducing systemic risk in the swaps market, we see no valid argument to suggest that customers to cleared swaps should be subject to weaker regulatory protections than those afforded counterparties to uncleared swaps.''); and comment letter from EFRP and APG, dated December 23, 2011 (stating ''EFRP and APG support the CFTC's efforts to reduce risk, enhance transparency, and promote market integrity, as the U.S. Congress intended by enacting Title VII of the Dodd-Frank * * * Act. It should be clear though that such reform will only improve financial stability, if it is prudent from the perspective of end users, such as pension funds. However, as currently framed the Proposed Rules subject us to increased risks.'').

[320] Section I(B)(6) of the preamble to this rulemaking.

[321] *Id.*

[322] Section VII(B)(2) of the preamble to this rulemaking (stating that ''double defaults are rare events.'').

[323] Regulation 1.12(h) requires an intermediary that knows or should know that it is under-segregated to report to the Commission and its designated self-regulatory organization. Usually, under-segregation results from minor operational failure, and does not lead to the collapse of an intermediary. However, a pattern of operational failure would draw greater attention and inquiry.

[324] Sections 22.11 to 22.16 of the rule text to this rulemaking (to be codified at 17 CFR 22.11 (*Information to be Provided Regarding Customers and Their Cleared Swaps*), 22.12 (*Information to be Maintained Regarding Cleared Swaps Customer Collateral*), 22.13 (*Additions to Cleared Swaps Customer Collateral*), 22.14 (*Futures Commission Merchant Failure to Meet a Customer Margin Call in Full*), 22.15 (*Treatment of Cleared Swaps Collateral on an Individual Basis*), 22.16 (*Disclosures to Customers*)).

[325] *See, e.g.,* section 22.10 to the rule text of this rulemaking (to be codified at 17 CFR 22.10 Application of other Regulatory Provisions).

[326] *See* Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334, 69438, Nov. 8, 2011 (to be codified at 17 CFR 39.13(g)(8)).

[327] *See* section III(B) of the preamble to this rulemaking (stating ''CME notes that a portion of the Cleared Swaps Customer Collateral will be held at the FCM, not the DCO, and that this collateral will not be protected by Complete Legal Segregation in the event that an FCM becomes insolvent. This proposition is true but is of little or no relevance to the comparison of Complete Legal Segregation with the Futures Model favored by these commenters.'').

[328] Section I(D)(2) of the preamble to this rulemaking. To be fair, this rulemaking does make the point that enhanced recordkeeping and reporting requirements may also foster portability in the event of operational or investment risk.

[329] *See, e.g.,* comment letters from (i) the Federal Home Loan Banks, dated January 9, 2012 and (ii) CIEBA, dated December 22, 2011. *See also* the Moore *et. al.* letter.

[330] Section IV(K) of the preamble to this rulemaking.

[331] *See Statement on MF Global: Next Steps,* dated November 16, 2011, available at: *http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement111611.*

which operational and investment risks contribute to undersegregation. Our undersegregation reports would help us with such an examination, as well as the detection of potential causal patterns for undersegregation.[332]

Second, instead of rushing to complete this rulemaking, I would have preferred that the Commission focus on providing a more comprehensive solution to operational, investment, and ''fellow-customer'' risk. Moreover, I would have preferred that the Commission more fully explore the alternatives that various commenters have advanced, which may provide greater protection for futures, as well as cleared swaps customer, collateral. Further, it would have been helpful for the Commission to have weighed, in one analysis, the benefits and costs of offering a combination of (i) this rulemaking and (ii) one or more alternatives.

Finally, the Commission needs to contemplate whether any alternative would be workable in light of the *pro rata* distribution provisions of the Bankruptcy Code. If not, the Commission should contemplate recommending to Congress changes to the Bankruptcy Code.

After MF Global, the Commission needs to provide market participants with real, fully developed reforms. I look forward to the Commission taking such action.

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[332] *See supra note* 17.



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Part IV

Department of Transportation

Federal Railroad Administration

49 CFR Parts 214, 232, and 243
Training, Qualification, and Oversight for Safety-Related Railroad Employees; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 214, 232, and 243

[Docket No. FRA–2009–0033, Notice No. 1]

RIN 2130–AC06

Training, Qualification, and Oversight for Safety-Related Railroad Employees

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes regulations establishing minimum training standards for each category and subcategory of safety-related railroad employee, as required by the Rail Safety Improvement Act of 2008. The proposed rule would require each railroad or contractor that employs one or more safety-related railroad employee to develop and submit a training program to FRA for approval and to designate the qualification of each such employee. As part of that program, most employers would need to conduct periodic oversight of their own employees to determine compliance with Federal railroad safety laws, regulations, and orders applicable to those employees. The proposal would also require most railroads to conduct annual written reviews of their training programs to close performance gaps. Furthermore, FRA proposes specific training and qualification requirements for operators of roadway maintenance machines that can hoist, lower, and horizontally move a suspended load. Finally, FRA proposes minor clarifying amendments to the existing training requirements for railroad and contractor employees that perform brake system inspections, tests, or maintenance.

DATES: *Written Comments:* Written comments on the proposed rule must be received by April 9, 2012. Comments received after that date will be considered to the extent possible without incurring additional expense or delay. FRA anticipates being able to determine these matters without a public hearing. However, if prior to March 8, 2012, FRA receives a specific request for a public hearing accompanied by a showing that the party is unable to adequately present his or her position by written statement, a hearing will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: You may submit comments identified by the docket number FRA–2009–0033 by any one of the following methods:

- *Fax:* 1–202–493–2251;
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590;
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, 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; or
- Electronically through the Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130–AC06). Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael Logue, Deputy Associate Administrator for Safety Compliance and Program Implementation, U.S. Department of Transportation, Federal Railroad Administration, Mail Stop 25, West Building 3rd Floor West, Room W38–340, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493–6301); Robert J. Castiglione, Staff Director—Technical Training, U.S. Department of Transportation, Federal Railroad Administration, 4100 International Plaza, Suite 450, Fort Worth, TX 76109–4820 (telephone: (817) 447–2715); or Alan H. Nagler, Senior Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–309, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493–6038).

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

FRA is proposing that FRA's training experts review training programs that will be used to train safety-related railroad employees. All programs will have to be approved by FRA prior to their implementation. FRA's expectation is that the programs submitted for approval will reflect the insights of training models that are recognized and generally accepted by the academic and training communities for formal initial training, on-the-job training, and refresher training. Furthermore, FRA expects that these training programs will use ''hands-on'' or engaging training methods where practicable and appropriate. These programs will include: Initial, ongoing, and on-the-job training criteria; testing and skills evaluation measures designed to ensure continual compliance with Federal standards; and the identification of critical safety defects and plans for immediate remedial actions to correct them.

The scientific literature on training in general and FRA's own experience with training in the railroad industry show a clear link between the quality of training programs—including whether training is engaging or ''hands-on''—and safety. Even though rail transportation in the United States is generally an extremely safe mode of transportation, and rail safety has been improving, well-designed training programs have the potential to further reduce risk in the railroad environment. FRA believes that better designed training can reduce the number of accidents caused by human factors.

FRA has estimated the costs of this proposed rule, evaluated over a 20-year

period and using discount rates of 3 and 7 percent. The total cost of the proposed rule is estimated to be about $81.6 million, discounted at a 3 percent rate, and about $64.1 million, discounted at a 7 percent rate. Table 1 below lists specific costs elements and each element's estimated cost over the first twenty years following promulgation of the proposed rule, as well as the total cost estimates.

TABLE 1—COSTS OF THE PROPOSED RULE, EVALUATED OVER 20-YEAR PERIOD

Cost element	Twenty-year total (3% discount rate)	Twenty-year total (7% discount rate)
Creating and revising training programs and performing annual reviews, original program users	$1,999,728	$1,564,484
Creating and revising training programs and performing annual reviews, model program users	179,116	129,245
Creating and revising training programs, model program users with <400k annual labor hours	4,751,465	3,428,505
Customizing model programs	910,245	842,919
Designating employees by class or craft	771,316	709,480
Additional time in initial training	16,539,877	12,235,174
Additional time in refresher training	25,456,709	18,831,293
Periodic oversight tests and inspections	15,242,583	11,275,517
Additional qualification testing	15,741,416	15,075,836
Total	81,592,455	64,092,452

Additionally, FRA has performed a breakeven analysis of the proposed rule, estimating the reduction in human factors-caused accidents that would be required in order for the benefits of the proposed rule to at least offset the costs. FRA believes the proposed rule would reduce human factors-caused accidents primarily through requiring that training programs include ''hand-on'' training components. Reductions in human factors-caused accidents will result in fatalities avoided, injuries avoided, and property damage avoided. Table 2 below shows the total present discounted annual costs of human factors accidents that would be incurred over the next 20 years without this proposed rule, where injuries and fatalities have been monetized according to DOT policies. Table 2 also shows the percent reduction in human factors-caused accidents that would be necessary for the monetized reduction in fatalities, injuries, and property damages caused by these accidents to justify implementation of the proposal. This calculation takes into account various recent and concurrent initiatives to address human factor-caused accidents, including implementation of positive train control systems, revisions to hours of service regulations, development of conductor certification standards, and implementation of programs to address fatigue and electronic device distraction among others.

Total present discounted cost of HF accidents (3% discount rate)	Total present discounted costs (3% discount rate)	Percent reduction for breakeven (3% discount rate)	Total present discounted cost of HF accidents (7% discount rate)	Total present discounted costs (7% discount rate)	Percent reduction for breakeven (7% discount rate)
$1,246,926,928	$81,592,455	7.3	$1,020,012,541	$64,092,452	7.1

FRA estimates that this proposed rule will break even if it results in a twenty-year total reduction in human factors-caused accidents of 7.3 percent using a 3 percent discount rate, and a reduction of 7.1 percent using a 7 percent discount rate. Given the role and prevalence of human factor-caused accidents in the railroad industry and the relationship between quality training and safety, FRA believes it is not unreasonable to expect that improvements in training as proposed in this rule would yield safety benefits that will exceed the costs.

II. Statutory Background

Pursuant to the Rail Safety Improvement Act of 2008 § 401(a), Public Law 110–432, 122 Stat. 4883, (Oct. 16, 2008) (codified at 49 U.S.C. 20162) (hereinafter ''RSIA'') Congress required the Secretary of Transportation (Secretary) to establish minimum training standards for safety-related railroad employees and the submission of training plans from railroad carriers, contractors, and subcontractors for the Secretary's approval. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.49(oo).

Section 20162 of 49 U.S.C. (Section 401(a) of the RSIA) provides that:

''(a) In general.—The Secretary of Transportation shall * * * establish—

(1) minimum training standards for each class and craft of safety-related railroad employee (as defined in section 20102) and equivalent railroad carrier contractor and subcontractor employees, which shall require railroad carriers, contractors, and subcontractors to qualify or otherwise document the proficiency of such employees in each such class and craft regarding their knowledge of, and ability to comply with, Federal railroad safety laws and regulations and railroad carrier rules and procedures promulgated to implement those Federal railroad safety laws and regulations;

(2) a requirement that railroad carriers, contractors, and subcontractors develop and submit training and qualification plans to the Secretary for approval, including training programs and information deemed necessary by the Secretary to ensure that all safety-related railroad employees receive appropriate training in a timely manner; and

(3) a minimum training curriculum, and ongoing training criteria, testing, and skills evaluation measures to ensure that safety-related railroad employees, and contractor and subcontractor employees, charged with the inspection of track or railroad equipment are qualified to assess railroad compliance with Federal standards to identify defective conditions and initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries, and, in implementing the requirements of this paragraph, take into consideration existing training programs of railroad carriers.

(b) Approval.—The Secretary shall review and approve the plans required under subsection (a)(2) utilizing an approval process required for programs to certify the

qualification of locomotive engineers pursuant to part 240 of title 49, Code of Federal Regulations.

(c) Exemption.—The Secretary may exempt railroad carriers and railroad carrier contractors and subcontractors from submitting training plans for which the Secretary has issued training regulations before the date of enactment of the Rail Safety Improvement Act of 2008.''

Section 20162(a)(1) contains a citation to the statutory definition of ''safety-related railroad employee.'' That definition, found in section 20102 of 49 U.S.C. provides that:

(4) ''safety-related railroad employee'' means—

(A) a railroad employee who is subject to chapter 211;

(B) another operating railroad employee who is not subject to chapter 211;

(C) an employee who maintains the right of way of a railroad;

(D) an employee of a railroad carrier who is a hazmat employee as defined in section 5102(3) of this title;

(E) an employee who inspects, repairs, or maintains locomotives, passenger cars, or freight cars; and

(F) any other employee of a railroad carrier who directly affects railroad safety, as determined by the Secretary.

III. RSAC Overview

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of RSAC members follows:

American Association of Private Railroad Car Owners (AARPCO);
American Association of State Highway & Transportation Officials (AASHTO);
American Chemistry Council;
American Petroleum Institute;
American Public Transportation Association (APTA);
American Short Line and Regional Railroad Association (ASLRRA);
American Train Dispatchers Association (ATDA);
Association of American Railroads (AAR);
Association of Railway Museums (ARM);
Association of State Rail Safety Managers (ASRSM);
Brotherhood of Locomotive Engineers and Trainmen (BLET);
Brotherhood of Maintenance of Way Employes Division (BMWED);
Brotherhood of Railroad Signalmen (BRS);
Chlorine Institute;
Federal Transit Administration (FTA); *
Fertilizer Institute;
High Speed Ground Transportation Association (HSGTA);
Institute of Makers of Explosives;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Electrical Workers (IBEW);
Labor Council for Latin American Advancement (LCLAA);*
League of Railway Industry Women;*
National Association of Railroad Passengers (NARP);
National Association of Railway Business Women;*
National Conference of Firemen & Oilers;
National Railroad Construction and Maintenance Association (NRC);
National Railroad Passenger Corporation (Amtrak);
National Transportation Safety Board (NTSB);*
Railway Supply Institute (RSI);
Safe Travel America (STA);
Secretaria de Comunicaciones y Transporte;*
Sheet Metal Workers International Association (SMWIA);
Tourist Railway Association Inc.;
Transport Canada;*
Transport Workers Union of America (TWU);
Transportation Communications International Union/BRC (TCIU/BRC);
Transportation Security Administration (TSA); and
United Transportation Union (UTU).
*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force, or other subgroup, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA resolves the issue(s) through traditional rulemaking proceedings or other action.

IV. RSAC Training Standards and Plans Working Group

On February 11, 2010, the RSAC accepted a task (No. 10–01) entitled ''Minimum Training Standards and Plans.'' The purpose of this task was defined as follows: ''To establish minimum training standards for each class and craft of safety-related railroad employee and their railroad contractor and subcontractor equivalents, as required by the Rail Safety Improvement Act of 2008 (Act).'' The task called for the RSAC Training Standards and Plans Working Group (Working Group) to perform the following:

- Assist FRA in developing regulations responsive to the legislative mandate.
- Determine a reasonable method for submission and FRA review of training plans.
- Establish reasonable oversight criteria to ensure training plans are effective.

The task also listed issues requiring specific report:

- What criteria should be used to determine which, if any, FRA-required training programs may be exempted from the new minimum standards?
- What training methodologies should be employed to ensure that current employees understand which tasks are covered by Federal laws, regulations, and orders, as well as the railroad rules and procedures which implement them?
- What criteria can be developed for the regulated community to determine whether there are safety-related tasks that require training for new employees?
- Should annual proficiency checks be established for all safety-related railroad employees, similar to those required for locomotive engineers and conductors? Should periodic training intervals be extended if such checks were used?
- Which employees should be covered by this regulation?

The Working Group was formed from interested organizations that are members of the RSAC. In addition to FRA, the following organizations contributed members:

AAR, including members from BNSF Railway Company (BNSF), Canadian

National Railway (CN), Canadian Pacific Railway (CP), CSX Transportation, Inc. (CSX), Kansas City Southern Railway (KCS), National Railroad Passenger Corporation (Amtrak), Northeast Illinois Regional Commuter Railroad Corporation (METRA), Norfolk Southern Railway Company (NS), Rail America, Inc. and Union Pacific Railroad (UP);
APTA, including members from Bombardier Transportation, Greater Cleveland Regional Transit Authority (GCRTA), Long Island Rail Road (LIRR), Maryland Transit Administration (MTA), Metro-North Railroad (MNCW), Mid-Region Council of Governments/New Mexico Rail Runner Express (MRCOG), Northern Indiana Commuter Transportation District (NICTD), Port Authority Transit Corporation (PATCO), Southeastern Pennsylvania Transportation Authority (SEPTA), and Southern California Regional Rail Authority (Metrolink);
ASLRRA, including members from Anacostia Rail Holdings (ARH), Genesee & Wyoming Inc. (GNWR), Omnitrax Inc.(Omnitrax), Rio Grande Pacific Corporation (RGP), and WATCO Companies, Inc. (WATCO);
ASRSM, including members from California Public Utilities Commission (CPUC) and Public Utilities Commission of Ohio (PUCO);
ATDA;
BLET;
BMWED;
BRS;
IBEW;
NRC, including members from Balfour Beatty Rail Inc. (BBRI), Delta Railroad Construction Inc., Herzog Transit Services (Herzog), RailWorks Track Systems, and Track Guy Consultants;
RSI, including members from GE Transportation;
SMWIA;
Tourist Railway Association Inc.;
TWU; and
UTU.

In addition to the Working Group members, visitors to the meetings included The Railway Education Bureau and The Transportation Learning Center.

The Working Group convened 6 times on the following dates and locations:

- April 13–14, 2010 in Philadelphia, PA;
- June 2–3, 2010 in Savannah, GA;
- August 17–18, 2010 in Baltimore, MD;
- September 21–22, 2010 in Baltimore, MD;
- October 19–20, 2010 in Atlanta, GA; and
- November 15–16, and 23, 2010 in Washington, DC and via conference call.

To aid the Working Group in its development of recommendations for minimum training standards and plans, FRA prepared draft regulatory text, which it distributed prior to the April meeting. Portions of the draft text were modeled after existing regulations. For example, the training requirements closely followed 49 CFR § 232.203, which are the general training requirements for railroad and contractor personnel used to perform freight and passenger train brake inspections and tests. As statutorily mandated in 49 U.S.C. 20162(b), the program filing requirements followed the review and approval process required under the qualification and certification of locomotive engineers regulation (49 CFR part 240), but with suggested improvements from the conductor certification RSAC working group. Similarly, the oversight and recordkeeping requirements were modeled after the programs of operational tests and inspections found in 49 CFR 217.9 of the railroad operating rules regulation.

During each meeting, Working Group members made recommendations regarding changes and additions to the draft text. Following each meeting, FRA considered all of the recommendations and revised the draft text accordingly. Minutes of each of these meetings are part of the docket in this proceeding and are available for public inspection.

Having worked closely with the RSAC in developing its recommendations, FRA believes that the RSAC has effectively addressed concerns with regard to requiring minimum training standards and plans. FRA has greatly benefited from the open, informed exchange of information during the meetings. The Working Group reached consensus on all of its recommended regulatory provisions. On December 14, 2010, the Working Group presented its recommendations to the full RSAC for concurrence. All of the members of the full RSAC in attendance at the December meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group's recommendations became the full RSAC's recommendations to FRA.

V. Employees Charged With Inspection of Track or Railroad Equipment

The ''Statutory Background'' section of this preamble cited 49 U.S.C. 20162(a)(3), which requires that the regulation establishing minimum training standards and plans ensure that those employees charged with the inspection of track or railroad equipment are qualified to assess railroad compliance with Federal standards to identify defective conditions and initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries.

FRA is addressing this statutory mandate in this rulemaking by proposing that each employer of one or more safety-related railroad employee, whether the employer is a railroad, contractor, or subcontractor, be required to train and qualify each such employee on the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. See proposed §§ 243.1(a) and 243.201. Employees charged with the inspection of track or railroad equipment are considered safety-related railroad employees that each employer must train and qualify. Proposed § 243.5 defines *safety-related railroad employee* to specifically include an individual who is engaged or compensated by an employer to ''(3) In the application of parts 213 and 214 of this chapter, inspect * * * track; (4) Inspect * * * locomotives, passenger cars or freight cars; (5) Inspect * * * other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter; [and] (6) Determine that an on-track roadway maintenance machine or hi-rail vehicle may be used in accordance with part 214, subpart D of this chapter, without repair of a non-complying condition.''

The proposal would also require that the training program developed by each employer be submitted to FRA for approval. § 243.109. Thus, the proposal places the burden on each employer to address in its program how it will train those employees charged with the inspection of track or railroad equipment to identify defective conditions and initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries. Furthermore, FRA would reject a program that fails to adequately address training for those employees charged with the inspection of track or railroad equipment.

The proposed formal training for employees responsible for inspecting track and railroad equipment is expected to cover all aspects of their duties related to complying with the Federal standards. FRA would expect that the training programs and courses for such employees would include techniques for identifying defective conditions and would address what sort of immediate remedial actions need to be initiated to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries. FRA would also expect that the

proposed required refresher training address these issues and satisfactorily address Congress's concern for ''ongoing training.'' Because this is a specific statutory requirement, FRA would expect that each employer would pay particular attention to address this issue in its training program.

Although FRA believes this proposed rule adequately covers the specific statutory requirement related to employees charged with the inspection of track or railroad equipment found at 49 U.S.C. 20162(a)(3), FRA seeks comments from interested parties as to whether the proposed regulatory text needs to be more explicit in the final rule. For instance, FRA is considering whether language that mirrors the statutory requirement related to employees charged with the inspection of track or railroad equipment should be added as paragraph (c)(6) to proposed § 243.101 so that it would be one of the specific requirements necessary for each employer's training program. Separately, FRA is also considering whether the proposed regulatory language requiring periodic oversight and annual review should be expanded to directly address those employees inspecting track and railroad equipment. Currently, the oversight and review provisions are only applicable to determine if safety-related railroad employees are complying with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. FRA invites comments on these two specific items under consideration. We also invite comments regarding other options to consider in addressing the specific statutory requirement related to employees charged with the inspection of track or railroad equipment, or any other concern a commenter may have over whether the proposed regulation adequately covers each of the statutory requirements.

VI. Incentives for Early Filing of Program

Throughout the RSAC process, FRA expressed its concern that the agency's program review process could be time consuming and resource intensive. As the proposed submission and approval process is statutorily mandated (*see* 49 U.S.C. 20162(a)(2)), FRA views the program filing requirements as necessary to ensure that all safety-related railroad employees receive appropriate training in a timely manner. However, FRA is willing to consider methods or approaches for meeting the statutory review and approval obligations that would lead to a quicker and more efficient review process.

The proposed rule contains two provisions that are expected to reduce FRA's review process burden. In § 243.105, FRA proposes an option for any organization, business, or association to develop one or more model training programs that can be used by multiple employers. Under this approach, once FRA has reviewed and approved a model training program, FRA would only need to look at the aspects of an employer's submission that differ from the model program. For example, if most short line railroads were to use the same, previously approved model program, FRA would likely conserve agency resources and would be able to approve most of those programs in a relatively short period of time. Likewise, in § 243.111, FRA proposes an option for programs to be filed by training organizations and learning institutions. Under this approach, once FRA approves a training organization's or learning institution's training program, FRA would be able to more quickly approve any employer's training program that explained that the employer's training would be provided in accordance with a training organization's or learning institution's previously approved program.

For these reasons, FRA encourages early filing of model programs and programs that could be referenced by multiple employers. FRA is also interested in receiving comments from interested parties on potential ideas for adding other incentives in the final rule to encourage the early filing of these types of programs. One option FRA is considering is pushing back the deadline for an employer submission by at least one year after the submission deadline for an existing training organization or learning institution under § 243.111(b). This potential option would provide associations and other organizations that may be drafting or developing model programs with the incentive to get their optional submissions into and approved by FRA before employers wishing to use those model programs are rushed to file a required employer program.

Another approach FRA is considering is to include an optional deadline for model programs and programs that could be referenced by multiple employers that would include a condition that FRA will issue its approval or disapproval of the program within 180 days, or other date certain, of the date of submission. This condition could also include a provision that if FRA fails to explicitly approve or disapprove the program within that time frame, the program will be deemed approved. FRA believes that an association or organization with multiple members will have an incentive to produce one or more model programs in order to provide a meaningful product to its members. Likewise, a training organization or learning institution that has developed a training program may garner more clients, and thus have an incentive to file early, if it knows that FRA will expedite its review of the program. Early filing would provide FRA with the benefit of a significant amount of time to dedicate to the review of model programs and programs that could be referenced by multiple employers. It could also give those entities producing such programs sufficient time to market those programs to potential clients or current members/users.

FRA is also considering the approach it followed when requiring training and testing of employees that perform brake system inspections, tests, or maintenance under part 232. In that regulation, FRA provided employers with an extra year to complete refresher training as long as the initial training was completed by a specified date. FRA would similarly consider granting some form of leniency on refresher training, periodic oversight, or the annual review if an employer's program is submitted by an early submission deadline.

Another option might be to extend the date for designating existing employees in accordance with § 243.201(a) as long as the employer's program is submitted by an early submission deadline.

FRA seeks comments on any or all of these proposals and is willing to consider other incentives or approaches that are intended to encourage early submission and improve the efficiency and effectiveness of the review process.

VII. Section-by-Section Analysis

Part 214—[Amended]

On August 9, 2010, the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) published a final rule regarding ''Cranes and Derricks in Construction'' (Final Crane Rule). 75 FR 47906. The Final Crane Rule sets forth requirements that are designed to improve safety for employees who work with or around cranes and derricks in the construction industry. In issuing this Final Crane Rule, one of OSHA's provisions established qualification and certification requirements for operators of ''power-operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load.'' See 29 CFR 1926.1400 and 1926.1427. The qualification and certification requirements for crane

operators are applicable to cranes used in the railroad industry, and would include operators of both on-track and off-track equipment.

Historically, FRA and OSHA have coordinated with each other to ensure that each agency's rules are not in conflict, as there is some potential for overlap of each agency's jurisdiction. In 1978, FRA explained how both agencies have jurisdiction to promulgate rules concerned with assuring safe working conditions for railroad employees in a policy statement titled ''Railroad Occupational Safety and Health Standards'' (Policy Statement). 43 FR 10583. The Policy Statement recognized the ''potential [for] dual regulation'' and set out FRA's rationale for terminating a rulemaking addressing railroad occupational safety and health standards. *Id.* at 10584. In terminating that rulemaking, FRA recognized that ''it would not be in the best interests of the public and of railroad safety for [FRA] to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace.'' *Id.* at 10585. As part of this rule, FRA is proposing crane operator training and qualification requirements that are tailored to the unique aspects of crane operations in a railroad environment. FRA is not proposing similar requirements to those of the OSHA standards, as many of the concerns of working in a railroad environment are dissimilar to those of most industrial workplaces.

Although the Policy Statement clarifies that FRA ''is vested with broad authority in all areas of railroad safety, including those of an occupational nature,'' the agency's policy is to limit itself to involvement in those areas where it could be most effective in providing a ''coherent overall railroad safety program.'' *Id.* at 10584. Because FRA's strengths are found in its developed expertise ''assur[ing] safe employment and places of employment for railroad employees engaged in activities related to railroad operations,'' FRA has generally limited itself to regulating those issues that are of an occupational nature and that have a significant impact on railroad operations. *Id.* at 10585. The term ''railroad operations'' is not limited to revenue train operations or even on-track operations; instead, it also includes ''the conditions and procedures necessary to achieve the safe movement of equipment over the rails.'' *Id.* For example, roadway workers affect the safety of railroad operations when they are engaged in laying or repairing rail as they are required to observe certain procedures that impact the final condition of the track and to assure that geometric and other standards are met. *Id.* Likewise, roadway worker protection is also part of the safety of railroad operations as it is used to prevent an employee who is fouling a track from being struck by trains and any other on-track equipment, including cranes. *Id.*

Although the railroad industry uses many different types of cranes, nearly all of the cranes utilized by railroads are used to support railroad operations and would fall within what FRA refers to as ''roadway maintenance machines.'' FRA's ''Railroad Workplace Safety'' regulation, found at 49 CFR part 214, defines roadway maintenance machine as ''a device powered by any means of energy other than hand power which is being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary.'' 49 CFR 214.7. FRA already requires some training for crane operators that is related to roadway worker safety, although FRA does not currently require operator certification. *See* 49 CFR 214.341 and 214.355.

The railroad industry's use of cranes is unique compared to general construction use, and therefore it may be very difficult or unnecessarily burdensome for the railroad industry to meet any of the four certification options provided for in OSHA's regulation. For example, OSHA's first option for crane operator certification would permit an operator to be certified by an accredited crane operator testing organization. 29 CFR 1926.1427(b). As many types of cranes used by railroads in roadway maintenance work are adapted specifically for railroad use, there may not be any accredited crane operator testing organization suitable for certification of operators on every type of machine. OSHA's second option is also premised on using written or practical tests developed or approved by either an accredited crane operator testing organization or an auditor who has been certified by an accredited crane operator testing organization, among other conditions. 29 CFR 1926.1427(c). Obviously, this second option poses some of the same obstacles as the first option for the railroad industry. OSHA's third option is only available to an operator who is an employee of the U.S. military and is thus not available to private companies. 29 CFR 1926.1427(d). Finally, OSHA's fourth option for crane operator certification is not especially useful to employees of railroads or contractors to railroads as it permits the licensing of such operators by a government entity. 29 CFR 1926.1427(e). A government entity, such as a State or local government, would only have the authority to license an operator for work within the entity's jurisdiction. As crane operators in the railroad industry that are engaged in roadway maintenance work may be dispatched to work on and off-track for hundreds of miles that cross through multiple states and jurisdictions, it would be logistically difficult to ensure that each crane operator is certified to operate in each jurisdiction along the railroad right-of-way. Consequently, OSHA's certification options are not viable options for the vast majority of the railroad industry's crane operators. The lack of logistically feasible options for many crane operators in the railroad industry to become certified under OSHA's Final Crane Rule could cause a shortage in the availability of such operators to conduct vital roadway maintenance work, which could have a significant detrimental effect on the safety of rail operations.

As FRA is proposing the creation of a new part 243 in this notice to address training standards for all safety-related railroad employees, FRA is solidly situated to propose a viable training alternative to OSHA's certification options for certain crane operators in the railroad industry. In particular, FRA believes it is especially well-suited to address the training and qualification requirement for operators of roadway maintenance machines equipped with a crane. FRA is proposing various requirements in part 243 that would require each employer of a safety-related railroad employee, which would include employers of one or more operators of roadway maintenance machines that are equipped with a crane, to submit a training program that explains in detail how each type of employee will be trained and qualified. However, part 243 is only intended to cover training of Federal standards and those railroad rules and procedures promulgated to implement the Federal standards. Consequently, FRA is proposing the addition of § 214.357 to those Federal standards which will include training and qualification requirements for operators of roadway maintenance machines equipped with a crane. The details of those proposed requirements are addressed below in the analysis for that particular section.

Foremost in FRA's decision to propose replacing OSHA's crane operator qualification and certification regulation found at 29 CFR 1926.1427 with respect to operators of roadway maintenance machines equipped with a crane is the premise that FRA's regulation must provide at least an equivalent level of safety of that provided by OSHA's existing requirements. FRA has various personnel that have significant experience operating an assortment of cranes for the railroad industry. In addition, OSHA has offered to permit FRA personnel to attend joint training sessions with OSHA personnel. FRA intends to utilize its experienced personnel to review employer training programs. The review would focus on ensuring that each employer's program covers the subjects necessary to qualify each crane operator. Furthermore, FRA has the personnel available to make regular inspections at places of railroad or contractor employment to ensure that training records for employees are being properly maintained, thereby ensuring that the crane operators addressed in FRA's regulations are appropriately trained and qualified.

Prior to November 8, 2010, the date OSHA's Final Crane Rule became effective, there were no Federal certification requirements for crane operators. FRA has reviewed its reportable injury data for calendar years 2001 through 2010. In reviewing the data, it is possible that some incidents may not have involved railroad operations; however, it would be difficult to make that determination without doing a resource intensive investigation of each incident. Certainly, the data shows a significant number of injuries each year and many of those accidents would fall into the category of railroad operations that could be addressed by this proposed rulemaking. Between 2001 and 2009, the number of reportable injuries involving cranes consistently totaled between 43 and 60 per year. In 2010, there was a significant drop in reportable injuries down to a total of 27. During the last decade, there were 7 fatalities attributed to accidents involving cranes; however, FRA emphasizes that it is not possible for FRA to determine how many of those accidents would fall into the category of railroad operations that could be addressed by this proposed rulemaking. FRA believes that the number of reportable injuries and fatalities could be reduced even further by implementing the proposed changes to parts 214 and 243. The proposed changes would institute more structure and accountability to those employers' programs that are merely based on unstructured on-the-job training. FRA also believes that while OSHA's rule will work well for the general construction industry, FRA's proposal will have a greater impact on the railroad industry because it can be implemented by railroads on a system-wide basis.

FRA identified a fatality that occurred in 2003 that potentially could have been avoided with better training as required under OSHA's Final Crane Rule or as proposed for part 243. On January 14, 2003, a bridge mechanic had his hand crushed when he and other maintenance-of-way (MOW) workers were attempting to dismantle a crane's rear counter weight and boom. The crane operator working with that bridge mechanic could not recall the proper procedure for removing the crane's counter weight. Although the bridge mechanic had successful hand surgery, he died after being taken from the operating room. FRA produced a summary of this incident, which is available on FRA's Web site in a document summarizing fatalities that occurred in 2003. *http://www.fra.dot.gov/rrs/pages/fp_1662.shtml;* (summarizing FE–01–03). In the report, FRA identified three possible contributing factors: (1) The MOW crew failed to use proper procedures for the safe dismantling of the crane's rear counter weight and boom; (2) crane manuals, which were available to the crew, lacked instructions on the proper removal of the crane's counter weight; and (3) the crew received inadequate training in the maintenance and safe operation of the crane. Adequate training and appropriate training manuals are both subjects of this proposed rule and would directly address the possible contributing factors of this incident.

In reviewing the available alternatives, FRA has been mindful of the recent Executive Order (EO) 13563, ''Improving Regulation and Regulatory Review,'' which requires ''[g]reater coordination across agencies'' to produce simplification and harmonization of rules so as to reduce burdens, redundancy, and conflict, whenever possible, while promoting predictability, certainty, and innovation. To that end, EO 13563 demands better coordination among agencies to reduce regulatory requirements that are redundant, inconsistent, or overlapping. In accordance with this EO, FRA is coordinating with OSHA to maintain an equivalent level of safety in replacing OSHA's training and certification requirements for operators of roadway maintenance machines equipped with a crane who work in the railroad environment. OSHA has been supportive of FRA's actions.

Section 214.7 Definitions

The proposed rule would add a definition for *roadway maintenance machines equipped with a crane* in order to address a term used in proposed § 214.357. The definition of this term would mean any roadway maintenance machine equipped with a crane or boom that can hoist, lower, and horizontally move a suspended load.

Section 214.341 Roadway Maintenance Machines

FRA is proposing to amend paragraph (b)(2) to address two issues. First, FRA proposes to delete the requirement that the operator of a roadway maintenance machine have ''complete'' knowledge of the safety instructions applicable to that machine. Based on informal feedback received from the regulated community, FRA has been informed that requiring that the knowledge be ''complete'' suggests that a roadway worker operator have instant recall of every instruction contained in the manual. This reading of the rule is not FRA's intention. FRA intends each operator to have sufficient knowledge of the safety instructions so that the operator would be able to safely operate the machine without reference to the manual under routine conditions, and know where in the manual to look for guidance when operation of the machine is not routine.

The second proposed change to paragraph (b)(2) is intended to address what is meant by ''knowledge of the safety instructions applicable to that machine.'' FRA's intent is that this term means the manufacturer's instruction manual for that machine. However, it has come to FRA's attention that some portion(s) of a manufacturer's instruction manual may not be applicable to a particular machine if the machine has been adapted for a specific railroad use. In that case, FRA proposes that the employer have a duty to ensure that such instructions be amended or supplemented so that they shall address all aspects of the safe operation of the crane and be as comprehensive as the manufacturer's safety instructions they replace. The purpose of this requirement is to ensure that the safety instructions provided address all known safety concerns related to the operation of the machine. If some type of functionality is added to the machine through adaption, the safety instructions would need to address the known safety concerns and proper operation of that additional function. On the other hand,

if the adaption removes an operational functionality, the safety instructions would no longer need to address the function that was removed, although it could be possible that the removal of a device could create other safety hazards that may need to be addressed in the safety instructions in order to be considered comprehensive. In order to ensure that the safety instructions for a machine are comprehensive, some employers may choose to provide a completely new safety instruction manual for adapted equipment; however, other employers may choose to simply void certain pages or chapters of the manufacturer's manual, and provide a supplemental manual to address the safety instructions related to the adapted functions of the equipment.

§ 214.357 Training and Qualification for Operators of Roadway Maintenance Machines Equipped With a Crane

As mentioned in the introductory discussion of this proposed part, FRA is proposing the addition of this section in order to ensure that each railroad or contractor (or subcontractor) to a railroad ensures that operators of roadway maintenance machines equipped with a crane are adequately trained to ensure their vehicles are safely operated. The training requirements are intended to address both safe movement of the vehicles and safe operation of the cranes. If this section is adopted in a final rule, FRA regulations would then apply to operators of roadway maintenance machines equipped with a crane, rather than OSHA's regulation related to crane operator qualification and certification found at 29 CFR 1926.1427.

Paragraph (a) clarifies that this section proposes new training requirements in addition to the existing requirements already contained in this subpart. Paragraph (a) also proposes a requirement that each employer adopt and comply with a training and qualification program for operators of roadway maintenance machines equipped with a crane to ensure the safe operation of such machines. If proposed part 243 is finalized, the requirement in proposed paragraph (a) to ''adopt'' and ''comply'' with a training and qualification program may seem redundant; however, these requirements are intended to remind each employer that it will need to both ''adopt'' such a program and ''comply'' with its own program. Failure to adopt or comply with a program required by this section will be considered a failure to comply with this section.

Paragraph (b) proposes that each employer's training and qualification program address initial and periodic qualification for each operator of a roadway maintenance machine equipped with a crane. Both initial training and periodic refresher training must, at a minimum, include certain procedures for addressing critical safety areas. Paragraph (b)(1) proposes that each employer develop procedures for determining that the operator has the skills to safely operate each machine the person is authorized to operate. FRA would expect that those procedures would include demonstrated proficiency as observed by a qualified instructor or supervisor. Paragraph (b)(2) proposes that each employer develop procedures for determining that the operator has the knowledge to safely operate each machine the person is authorized to operate. As explained in the analysis to the proposed amendments to § 214.341(b)(2), an operator must have knowledge of the safety instructions applicable to that machine, regardless of whether the machine has been adapted for a particular railroad use. Implicit in this proposal is the requirement that the employer must supply the safety instructions for the crane. If the crane has been adapted for a specific use, the employer must ensure that the safety instructions are also adapted. FRA would expect the employer to employ or contract out for a qualified person to adapt the safety instructions, but in any case the employer is responsible for ensuring that the instructions address all aspects of the safe operation of the crane. When equipment has been adapted, the employer has a duty to provide revised safety instructions that comprehensively address each adapted feature as well as any feature supplied by the manufacturer that was not removed during the adaptation.

Paragraph (c) proposes that each employer maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs. If proposed part 243 is finalized, this requirement would repeat the requirement in § 243.203 to maintain records. However, it is useful to repeat the requirement as a reminder to employers. In repeating this requirement, FRA does not intend the proposed requirement to cause an employer to duplicate records kept in accordance with proposed part 243. Similarly, paragraph (d) proposes that each employer is required to make all records available for inspection and copying/photocopying to representatives of FRA, upon request during normal business hours, as is also proposed in part 243.

In paragraph (e), FRA proposes that training conducted by an employer in accordance with operator qualification and certification required by the Department of Labor (29 CFR 1926.1427) may be used to satisfy the training and qualification requirements of this section. The purpose of this paragraph is to allow an employer to choose to train and certify an employee in accordance with OSHA's Final Crane Rule and opt out of the other proposed requirements of this section for that employee. As explained in the introductory analysis to part 214, if the crane equipment is modified for railroad operations there may not be an accredited crane operator testing organization that could certify the operator in accordance with OSHA's Final Crane Rule. 29 CFR 1926.1427(b). However, there are some roadway maintenance machines equipped with a crane that are considered standard construction equipment and thus it would be possible to certify operators of that equipment through such an accredited organization. For this reason, FRA does not want to preclude the option for a person to be trained by the accredited organization and meet OSHA's requirements in lieu of FRA's requirements. Similarly, FRA envisions that some railroads or employers may employ some operators on roadway maintenance machines equipped with a crane who could be used exclusively within State or local jurisdictions in which the operators are licensed. Under those circumstances, the operator would be in compliance with OSHA's fourth option for certifying crane operators as it permits the licensing of such operators by a government entity. 29 CFR 1926.1427(e). FRA has no objection to the use of crane operators who meet OSHA's requirements and does not intend, by the addition of this section, to impose any additional regulatory requirements on such operators. Although the purpose of this section is to provide an alternative method of training and qualification that is tailored to the unique circumstances faced by most operators of roadway maintenance machines equipped with a crane working for the railroad industry, the purpose of paragraph (e) is to permit an employer to opt out of the alternative FRA requirements as long as the operator has met OSHA's training and certification requirements.

Part 232—[Amended]

Section 232.203 Training Requirements

FRA modeled some aspects of proposed part 243 after the training requirements found in this section. Meanwhile, when reviewing this section, FRA discovered that several minor corrections to the section are necessary.

It is proposed that existing paragraph (b)(6)(iv) be revised to provide some context to the paragraph and to reiterate FRA's intent. The proposed revision would add a phrase to the end of the current provision. The proposed phrase explains that any combination of the training or testing contained in paragraphs (b)(6)(i) through (b)(6)(iii) of this section and paragraphs (b)(3) through (b)(5) of this section ''may be used to satisfy the training and testing requirements for an employee in accordance with this paragraph.'' Without the addition of the proposed quoted language, the requirement appears incomplete.

FRA proposes clarifying amendments to paragraphs (e)(6) through (e)(8). The proposed revisions relocate a misplaced ''and'' at the end of paragraph (e)(6) to the end of paragraph (e)(7), and correct two incorrect citations to paragraph (e)(7) when the correct citations should be to paragraph (e)(6).

Part 243—[Proposed]

Subpart A—General

Section 243.1 Purpose and Scope

As previously explained in the supplementary information, FRA is required by RSIA to address minimum training standards for safety-related railroad employees. Paragraph (a) is consistent with the specific statutory language and captures Congress' intent to ensure that any person doing work covered by the Federal railroad safety laws, regulations, and orders, regardless of whether the person is employed by a railroad or a contractor, is properly trained and qualified. This proposed regulation meets the statutory requirement as it intends to cover each employee that does work required by a Federal mandate, regardless of the employer.

Paragraph (a) provides the scope of the training required by this proposed regulation. FRA is only requiring training for an employee to the extent that the employee is required to comply with a Federal mandate. Furthermore, the training that would be required by this proposed part would be limited to any training necessary to ensure that the employee is qualified to comply with all Federal railroad safety laws, regulations, and orders that would be applicable to the work the employee would be expected to perform. Thus, it is proposed that an employer that chooses to train employees on issues other than those covered by Federal railroad safety laws, regulations, and orders would not need to submit such training to FRA for review and approval in accordance with this part.

Given the limited scope of this proposed rule, not every person that works on a railroad's property should expect that this proposed rule will require that an employer provide that person with training. Some employees of a railroad or a contractor of a railroad may do work that has a safety nexus but is not required by any Federal railroad safety laws, regulations, or orders. For example, a person may be hired to clean passenger rail cars by a railroad's maintenance division for other than safety purposes. However, as there are no Federal requirements related to the cleaning of passenger rail cars, this proposed rule would not require an employer to ensure that this person is trained to clean passenger rail cars. On the other hand, if the person is expected to perform any of the inspections, tests, or maintenance required by 49 CFR part 238, it is proposed that the person would be required to be trained in accordance with all applicable Federal requirements. *See e.g.,* §§ 238.107 and 238.109.

If the employer's rules mirror the Federal requirements, or are even more restrictive than the Federal requirements, the employer may train to the employer's own rules and would not be required to provide separate training on the Federal requirements. During the RSAC process, some employers raised the concern that it would be confusing for employees if FRA required that training be made directly on the Federal requirements as that would pose potential conflicts whenever an employer's rule was stricter than the Federal requirement. FRA agrees with this concern, and this NPRM does not require that employers provide separate training on both the Federal requirements and on employer's rules. As long as the employer's rules satisfy the minimum Federal requirements, an employer's training on its own rules will suffice.

Although FRA does not want to confuse employees, FRA encourages employers to emphasize when compliance with the employer's rules is based on a Federal requirement so that employees can learn which duties are being imposed by the Federal government. When an employee is put on notice that an employer's rule is based on a Federal requirement, the notice that the Federal government deems the issue important enough to regulate may provide further incentive for the employee to comply with the rule at every opportunity. Additionally, in response to concerns raised by RSAC members during the Working Group meetings, FRA wants to be clear that the requirements in this proposed part would not require an employee to be able to cite the volume, chapter, and section of each Federal railroad safety law, regulation, or order that is relevant to the employee's qualification. FRA will not take enforcement action against individual safety-related railroad employees who cannot correctly quote Federal rules that govern the employee's safety-related work.

Often, a railroad or contractor will train employees on the employer's own safety-related rules, without referencing any particular Federal requirement. There may also be instances where the Federal requirement is generally stated with the expectation that the employer will create procedures or plans that will implement the conceptual requirement of the Federal requirement. Proposed paragraph (a) makes clear that this part covers both types of training; i.e., training that either directly or indirectly is used to qualify safety-related railroad employees on the Federal railroad safety laws, regulations, and orders the person is required to comply with to do his or her job. As an introductory matter, FRA also wishes to make clear that not all training is task-based. Some Federal requirements include prohibitions and the relevant training must impart that information so that employees know how they can comply. For example, employees need to know when they may use cell phones and when they are prohibited from using them.

Proposed paragraph (b) explains that this part contains the general minimum training and qualification requirements for each type of safety-related railroad employee. As these are minimum requirements, it is presumed that an employer may implement additional or more stringent requirements for its employees. Consistent with the statutory mandate, FRA makes clear that the proposed regulation is intended to cover employees performing safety-related tasks regardless of whether they are employed by a railroad or a contractor. Covering employees of both railroads and contractors is consistent with other FRA regulations and the general trend in the railroad industry. In many instances, employees doing safety-related tasks for a railroad may be employed by a company other than the

railroad upon which the person is working. On a large scale track maintenance project, it may be possible for the railroad's employees to be working side-by-side with workers employed by multiple contractors; in such situations, it is vital that all the workers doing safety-related work are properly trained and qualified.

Proposed paragraph (b) also stresses that each contractor will have a duty to comply with the training requirements of this proposed regulation, including any aspect of training that may be specific to the contracting railroad's rules and procedures. For example, the contractor may arrange universally necessary training for an employee who is a roadway maintenance machine operator so that the person understands how to safely operate the equipment and the Federal requirements associated with its operation on any railroad. In addition, the contractor will need to arrange with each railroad it works for so that any railroad specific training is properly arranged, completed, and recorded. For example, both the railroad and contractor are responsible for knowing how the operator will be trained on the specific railroad rules that govern the operation of on-track roadway maintenance machines, to and from a work site. Depending on a variety of factors, including the ability of the contractor to replicate the railroad's training, the contractor and railroad will need to decide which company will handle this training. For example, a railroad could train one or more of the contractor's supervisors who could then train those contractor employees who need the training. In other instances, the contractor may be too small or inexperienced to conduct such training and the railroad will offer to have its instructors train and qualify the contractor's employees. Such training details would likely be part of a work order or contract between these private parties.

Proposed paragraph (c) states that the requirements in this part do not exempt any other requirement in this chapter. The purpose of this statement is to acknowledge that there are other training and qualification requirements in this chapter and that FRA is not intending to nullify any of those other requirements by implementing this proposed part. FRA has previously promulgated well-established regulations by subject matter and it would be confusing to the regulated community if FRA were to move all of the training and qualification requirements located in this chapter into this proposed regulation. Consequently, FRA is adding this statement to the purpose and scope section to notify any relevant person who is required to comply with training and qualification requirements contained elsewhere in this chapter that the person will need to continue to comply with those existing requirements.

Similar to paragraph (c), proposed paragraph (d) acknowledges that there are other training and qualification requirements in this chapter and that this part augments those other training and qualification requirements, unless otherwise noted. FRA has training and qualification requirements scattered throughout the existing regulations. Many of these regulations do not contain a requirement that an employer submit a plan or program to FRA for review. Others may lack a requirement for a structured on-the-job training (OJT) component. This proposed regulation would leave the existing requirements intact, but would require that the existing training requirements be incorporated in a program required under this proposed part—as well as comply with any additional requirements imposed by this part. Similarly, FRA may add other training and qualification requirements elsewhere in this chapter after this proposed rule is made final; in those instances, the requirements in this proposed part would also augment regulations promulgated at a later date.

Section 243.3 Application and Responsibility for Compliance

The extent of FRA's jurisdiction, and the agency's exercise of that jurisdiction, is well-established. *See* 49 CFR part 209, app. A. The proposed application and responsibility for compliance section is consistent with FRA's published policy for how it will enforce the Federal railroad safety laws. The proposed rule is intended to apply to all railroads (except those types of railroads that are specifically listed as exceptions), contractors of railroads, and training organizations or learning institutions that train safety-related railroad employees.

In paragraph (a)(1), FRA has exempted plant railroads as defined in this proposed regulation. In other regulations, FRA did not define plant railroad because it was assumed that FRA's jurisdictional policy statement provided sufficient clarification. In 2010, FRA became aware of certain operations that called themselves plant railroads but that were exceeding the limitations required to maintain plant railroad status in accordance with FRA's policy statement. FRA would like to avoid any confusion as to what it means to be a plant railroad by defining it in the proposed rule, thereby saving interested persons the effort necessary to cross-reference FRA's jurisdictional policy statement. A further discussion of what is meant by the term ''plant railroad'' is offered in the section-by-section analysis for section 243.5.

In paragraph (a)(2), FRA proposes to exclude ''tourist, scenic, historic, and excursion operations that are not part of the general railroad system of transportation'' (as defined in § 243.5) from compliance with this rule. In section 243.5, FRA defined these operations as ''a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track).'' Excluding these types of operations from this proposed rule is consistent with FRA's jurisdictional policy that already excludes these operations from all but a limited number of Federal safety laws, regulations, and orders.

In paragraph (a)(2), FRA is excluding tourist, scenic, historic, or excursion operations that are not part of the general system. These would include such operations regardless of whether they are ''insular'' or ''non-insular.'' FRA decided to exclude each of these generally small operations from the burden of producing training programs for relatively few employees on the limited number of Federal requirements that are applicable to these operations.

Proposed paragraph (a)(3) captures FRA's long held view that its jurisdiction does not extend to self-contained urban rapid transit systems that are not connected to the general railroad system of transportation. *See* 49 CFR part 209, app. A.

Proposed paragraph (b) contains a statement clarifying that each person who performs the duties of this part is responsible for compliance, even if that duty is expressed in terms of the duty of a railroad.

Section 243.5 Definitions

This section defines a number of terms that have specific meaning in this proposed part. A few of these terms have definitions that are similar to, but may not exactly mirror, definitions used elsewhere in this chapter. Definitions may differ from other parts of this chapter because a particular word or phrase used in the definition in another chapter does not have context within this proposed part.

The definitions of *Administrator* and *Associate Administrator* are standard definitions used in other parts of this

chapter. In this part, the term *Associate Administrator* means the Associate Administrator for Railroad Safety/Chief Safety Officer. When the RSAC Committee voted for certain recommendations, the recommendations did not address the role of the Associate Administrator for Railroad Safety/Chief Safety Officer. FRA decided to add this definition and change some of the proposed program review processes so that it is clear that these functions will be delegated to the Associate Administrator. The agency's expertise in reviewing training programs lies within its Office of Railroad Safety, and the decision-making on these issues will routinely be decided by the Associate Administrator. If a person were to have a material dispute with a decision of the Associate Administrator, it would be expected that the person could bring that dispute to the Administrator's attention and request final agency action. FRA is considering whether the final regulation should refer to FRA or the Administrator, instead of the Associate Administrator. Although the issue of the Associate Administrator's role is an internal procedure or practice, FRA invites comments regarding this issue.

FRA is proposing to define the term *calendar year.* FRA does not believe the term is confusing but has defined it as ''the period of time beginning on January 1 and ending on December 31 of each year.'' FRA is defining the term to distinguish it from terms used in other regulations that have been considered vague. For example, if FRA required that a person complete a particular type of training ''annually,'' some people might interpret that to mean ''once each calendar year'' and others might interpret it to mean ''within one year of the last training.'' By using the more descriptive term and defining it, FRA intends to avoid ambiguity.

FRA is proposing a definition of *contractor* in order to clarify the standard definition. A contractor is typically considered one who contracts to do work or provide supplies for another. In FRA's definition, the agency is specifically only concerned with ''a person under contract with a railroad.'' Furthermore, the definition states that it includes, but is not limited to, a prime contractor or a subcontractor. A prime contractor, sometimes referred to as a general contractor, is a person who contracts for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all work. A subcontractor is a person who is awarded a portion of an existing contract, typically by a prime contractor but potentially also by a subcontractor. Thus, regardless of how many times a contract is subcontracted, the term ''contractor,'' as used in this part, is intended to include the prime contractor and all subcontractors responsible for performance of the contract.

FRA is defining *designated instructor* for essentially two purposes. First, when this term is used in the proposed rule, FRA expects that a person doing the work of an instructor would specifically be designated. That means the employer, training organization, or learning institution that employs the person must have a record reflecting that the person has been designated as an instructor for certain courses, subject matters, or tasks involving particular occupational categories or subcategories of employees. Second, FRA expects only qualified instructors will be designated, which explains why FRA is including in the definition that each designated person must have ''demonstrated, pursuant to the training program submitted by the employer, training organization, or learning institution, an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training.'' By proposing to require that employers designate instructors, FRA intends to ensure that only qualified individuals instruct safety-related railroad employees.

FRA is defining the term *employer* to mean ''a railroad or a contractor that employs at least one safety-related railroad employee.'' In this proposed rule, each employer is responsible for filing a training program and deciding how it will train its own employees. FRA is expecting all safety-related railroad employees to be trained, regardless of whether employed by a railroad or a contractor of such a railroad. The term ''contractor'' is defined in this proposed rule and includes subcontractors.

The proposed rule defines the term *formal training* mainly to distinguish it from informal, less structured training that may be offered by employers. Generally, a briefing during a ''safety blitz,'' in which an employer quickly tries to raise awareness of a safety issue following an accident or close call incident, would not be considered formal training. Formal training would typically be more structured than a safety blitz briefing and be planned on a periodic basis so that all eligible employees would continuously get opportunities to take the training. Formal training should contain a defined curriculum, as it is not the type of training that can be hastily prepared and improvised.

Formal training may be delivered in several different ways. Many people first think of classroom training as synonymous with formal training, and certainly that is one acceptable way of delivering formal training. However, the proposed definition explains that ''[i]n the context of this part, formal training may include, but is not limited to, classroom, computer-based, on-the-job, simulator, or laboratory training.'' During the RSAC process, some labor organizations explained that their members expressed a preference for classroom training over computer-based training. One valid concern expressed was that computer-based training is often performed without a qualified instructor present to answer questions. It can be frustrating to a training participant if the person finds a subject confusing and cannot get immediate clarification. Meanwhile, the RSAC members recognized an equally valid concern that there could be circumstances when a qualified instructor cannot immediately answer a substantive question during classroom training—so mandating classroom training is not necessarily the remedy for addressing this problem. RSAC recommended, and FRA has agreed to propose, that formal training include an opportunity for training participants ''to have questions timely answered during the training or at a later date.'' An employer, or other entity providing training, will need to establish procedures for providing participants the opportunity to have questions timely answered. For example, some course offerors may provide training participants with an email address to send questions and promise to respond within 5 business days. Certainly, there are a wide-variety of reasonable procedures that could be established by course offerors that could include registering a question by telephone, written form made available at the time of the training, or even instant-messaging (IM) during the training itself. However, in all such instances, procedures must be clear and provide the training participant an opportunity to have questions answered in a timely fashion.

In the proposed definition of formal training, FRA did not adopt the RSAC's recommendation entirely as the NPRM proposes using the term ''training participants'' rather than ''employees.'' However, FRA believes the change more closely matches the intent behind the RSAC's recommendation. The basis for making the change is that a learning

institution may offer a course to someone who is not currently employed by a railroad or contractor. By making this change from the RSAC's recommendation, the proposed rule ensures that anybody taking a course covered by this NPRM would have the opportunity to have questions timely answered during the training or at a later date. The term ''training participants'' covers employees, trainees, learners and students.

The proposed rule defines the term *knowledge-based training* as a type of formal training. Knowledge-based training is clearly distinguishable from ''task-based training'' because, by definition, it is not task-based. For purposes of this part, the knowledge component is limited to any knowledge ''intended to convey information required for a safety-related railroad employee to comply with Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.'' Thus, knowledge-based training would include any formal training imparted to employees on complying with Federal hours of service laws. Another example would be training on Federal alcohol and drug prohibitions, or those railroad rules and procedures used to implement the Federal alcohol and drug prohibitions.

FRA has defined the phrase *on-the-job training (OJT)* to mean ''job training that occurs in the workplace, *i.e.,* the employee learns the job while doing the job.'' This is the common meaning of this phrase. For purposes of this proposed rule, OJT is specifically identified as a type of ''formal training.'' That means that, like other types of formal training, OJT must have a structured and defined curriculum that provides an opportunity for training participants to have questions timely answered during the training or at a later date. OJT is an essential component of most training curriculums and should add significant value for each employee participant. In FRA's experience, OJT is often the weakest aspect of current training programs because the OJT portion often is unstructured, without a defined curriculum, and its value is therefore difficult to assess. Because of these weaknesses, OJT requirements are proposed in § 243.101(d), and OJT training components must be identified in each program under § 243.103(a)(3) and (b). Under § 243.103(d), FRA considers OJT an essential program component of most task-based training and may require modifications to any programs that do not contain or have an inadequate OJT component. FRA also proposes a requirement in § 243.201(f) that employees designated to provide OJT instruction to other employees must be qualified. Additionally, under § 243.203(b)(7), it is proposed that adequate records of OJT be maintained.

In this proposed part, *person* takes on the same meaning as it does in FRA's other safety rules. The definition makes clear that it is expansive and does not apply merely to individual persons. Instead, the term ''means an entity of any type covered under 1 U.S.C. 1'' and the definition goes into detail regarding the types of people and entities that are covered.

FRA proposes a definition of *plant railroad* to aid in the understanding of the application of this part pursuant to § 243.3(a)(1). The definition coincides with FRA's longstanding explanation of how the agency will not exercise its jurisdiction over a plant railroad that does not operate on the general system and does not move cars for other entities. *See* 49 CFR 209, app. A.

A proposed definition of *qualified* reflects RSAC's recommendation and FRA's expectations of what is expected of a qualified person under this part. The definition reflects that a person cannot be deemed qualified unless the ''person has successfully completed all instruction, training, and examination programs required by both the employer and this part.'' Obviously, if a person fails to complete any of those aspects of the requirements in the employer's program, the person could not be reasonably expected ''to proficiently perform his or her duties in compliance with all Federal railroad safety laws, regulations, and orders.''

For purposes of this proposed part, FRA has defined *safety-related duty* to mean ''either a safety-related task or a knowledge-based prohibition that a person meeting the definition of a safety-related railroad employee is required to comply with, when such duty is covered by any Federal railroad safety law, regulation, or order.'' The proposed term is used when referring to legally mandated responsibilities. It refers to both task-based duties and prohibitions unrelated to specific tasks.

The proposed definition of *safety-related railroad employee* is mainly derived from the statutory definition of the same term found in 49 U.S.C. 20102, which was cross-referenced in the statute requiring this rulemaking. *See* 49 U.S.C. 20162(a)(1). The proposed definition makes clear in the introductory phrase that it applies to employees of both railroads and contractors by stating that the term ''means an individual who is engaged or compensated by an employer.'' However, for a person to be a safety-related railroad employee the person must be more than merely employed by a railroad or contractor; that is, the person must also meet at least one of the eight listed items. Item (1) includes an employee who performs work covered under the hours of service laws, which is also the first item in the statutory definition. Item (2) includes an employee who performs work as an operating railroad employee who is not subject to the hours of service laws, which is also the second item in the statutory definition. Item (2) most often refers to railroad officers who are not typically called to duty to perform work under the hours of service but during a tour of duty end up doing work covered by the hours of service laws.

Item (3) is also derived from the statutory definition of safety-related railroad employee, but has been refined to more closely describe the types of employees that the industry recognizes as responsible for ''maintain[ing] the right of way of a railroad.'' 49 U.S.C. 20102(4)(C). The description in item (3) is intended to cover any person that would be included in the definitions of ''roadway worker'' and ''railroad bridge worker'' found in 49 CFR 214.7. Included within the definitions would be a person who is engaged or compensated by an employer to inspect, install, repair, or maintain track, roadbed, and signal and communication systems of a railroad. By referencing ''[i]n application of parts 213 and 214 of this chapter,'' RSAC recommended, and FRA agreed, to clarify that the proposed rule is intended to cover those workers, whether employed by a railroad or contractor, who have responsibilities for compliance with Federal regulations applicable to railroad workplace safety and track safety standards. If a person does not have responsibilities for compliance with 49 CFR parts 213 and 214, the person would not be covered by item (3) within the definition of safety-related railroad employee.

Item (4) includes an individual who is engaged or compensated by an employer to inspect, repair, or maintain locomotives, passenger cars or freight cars. The inclusion of this proposed item is intended to mirror the statutory item in the definition of safety-related railroad employee. It is essential that individuals doing such safety-sensitive work are trained to comply with those laws or rules mandated by the Federal government for keeping those locomotives and cars in safe order.

Item (5) includes an individual who is engaged or compensated by an employer

to inspect, repair, or maintain other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter. RSAC recommended that FRA include such on-track equipment because such equipment poses the same sorts of danger that locomotives and cars do. FRA agrees with the RSAC consensus that, although the statutory definition does not include employees who do such safety-sensitive work to the on-track equipment, the proposed training rule would be deficient without including such employees in training plans. The RSAC members do not believe that Congress intentionally left these workers out of the statutory definition so that they would be excluded from training even though they need to comply with certain Federal requirements.

In the statutory definition of safety-related railroad employee, paragraph (F) is a ''catch-all'' phrase that allows the Secretary of Transportation to include ''any other employee of a railroad carrier who directly affects railroad safety.'' FRA has identified three items within the proposed regulatory definition that flow from this catch-all provision. Item (6) of the proposed definition includes an individual who is engaged or compensated by an employer to determine that an on-track roadway maintenance machine or hi-rail vehicle may be used in accordance with part 214, subpart D of this chapter, without repair of a non-complying condition. The issue identified in item (6) is that sometimes a supervisor or other person who is not a roadway worker [and therefore, not otherwise included in the definition of ''safety-related railroad employee''] makes the decision that an on-track roadway maintenance machine or hi-rail vehicle is safe to use and may continue to be operated in accordance with the requirements for scheduling repairs of such vehicles. *See* 49 CFR §§ 214.531 and 214.533. The person may learn about the condition of the equipment from a roadway worker making a good faith challenge that the equipment is unsafe to operate or otherwise does not comply with the safety requirements for that equipment. *See* 49 CFR 214.503. A person cannot make such a decision without having been trained and therefore having the knowledge necessary to know the roadway worker's rights, whether the equipment is in compliance or safe to use, and how quickly the equipment must be repaired.

Item (7) also flows from the statutory catch-all provision. It covers railroad and contractor employees who directly instruct, mentor, inspect, or test, as a primary duty, any person while that other person is engaged in a safety-related task. The bottom line here is that even though an instructor, mentor, supervisor, or other manager may not be directly performing a safety-related task, that person performing an oversight role must be qualified to perform that oversight role. By including those who perform oversight in the definition of safety-related railroad employee, the proposed rule is requiring that railroads and contractors include these types of individuals within the scope of the training programs required under this part.

Regarding item (7), RSAC recommended that the definition make clear that it was only including those who ''directly instruct, mentor, inspect, or test, as a primary duty.'' For example, many supervisors are expected to perform operational monitoring or efficiency testing as part of their regular duties; those supervisors would clearly be covered by item (7). Conversely, other supervisors or managers may have the authority to instruct employees if unsafe or non-complying actions are observed, but instructing employees is not part of that person's ''primary duty.'' For instance, suppose a System Road Foreman of Engines is visiting one of many of the railroad's yards and observes one or more employees failing to establish proper point protection in accordance with 49 CFR 218.99 and the corresponding railroad operating rules, and so instructs the employee(s) on the appropriate action. Although the System Road Foreman of Engines would normally be expected to know those rules and be able to instruct employees on them, instructing employees in this manner would not typically be considered one of the person's primary duties. Thus, although FRA would hope that each System Road Foreman of Engines would continuously keep current on all the applicable requirements, this proposed rule does not intend to cover those supervisors or managers who happen to instruct, mentor, inspect, or test on rare occasions, such as when they happen upon a situation that needs to be addressed, but the person's involvement is not a primary duty of the job.

Item (8) also flows from the statutory catch-all provision. It covers railroad and contractor employees who directly supervise the performance of safety-related duties in connection with periodic oversight in accordance with proposed 243.205. It will likely be rare that a person is not covered by item (7) of the definition but is covered by item (8). However, FRA wants to ensure that if a person is performing an oversight function under this proposed part, that person is considered a safety-related railroad employee who must be included in the employer's training program required under this part.

Furthermore, although the statutory definition of safety-related railroad employee covers a hazmat employee of a railroad carrier as defined in 49 U.S.C. 5102(3), RSAC recommended that the proposed rule not address the training of hazmat employees. FRA concurs. The training of hazmat employees is already extensively covered by DOT regulations promulgated by the Pipeline and Hazardous Materials Safety Administration (PHMSA). *See e.g.,* 49 CFR part 172, subpart H. FRA is satisfied that the training requirements are sufficiently addressed by PHMSA and does not believe that Congress intended for FRA to overcomplicate the existing rules governing hazmat training.

The rule proposes a definition for *safety-related task* because a significant portion of the training given to most safety-related railroad employees involves learning to perform tasks that are required by a Federal railroad safety law, regulation, or order. By defining this term, the proposed regulation does not have to explain each time that a safety-related task has a specific connotation tied to other Federal requirements. Meanwhile, if there is no Federal requirement that applies to a specific task, the task would not be considered a ''safety-related task'' pursuant to this proposed rule even if the task arguably has a safety nexus.

As previously described, *task-based training* is distinguishable from knowledge-based training. Task-based training means a type of formal training with a primary focus on teaching the skills necessary to perform specific tasks that require some degree of neuromuscular coordination. While OJT is nearly always task-based training, other types of formal training may also be task-based. For example, mechanics can work on several different types of locomotive engines in classroom or laboratory training. Similarly, signal and grade crossing workers can also learn their craft in the classroom with training that allows the training participants to work on models of signal systems, as well as actual signal and grade crossing warning systems and components. Other task-based training may occur for employees at training facilities that have mock yards in which to practice the tasks. Apprentice welders may be required to perform practice welds in a facility that allows a trainer to monitor the work of multiple training participants. Again, FRA has chosen to

define task-based training in order to distinguish it in the proposed rule from that training which teaches concepts unrelated to learning a specific task.

The proposed rule offers a definition for the phrase *tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation* in order to explain the plain meaning of that phrase in the proposed applicability section. *See* § 243.5. The phrase means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (i.e., there is no freight, intercity passenger, or commuter passenger railroad operation on the track). If there was any freight, intercity passenger, or commuter passenger railroad operation on the track, the track would be considered part of the general system. *See* 49 CFR part 209, app. A. In the analysis for the applicability section, there is an explanation for why FRA is proposing not to exercise its jurisdiction over these types of railroad operations.

Section 243.7 Waivers

This section provides the proposed requirements for a person seeking a waiver of any requirement of this rule. After review, however, FRA believes this section may be unnecessary because 49 CFR part 211 sufficiently addresses the waiver process. FRA welcomes comments as to whether this proposed section should be removed.

Section 243.9 Penalties and Consequences for Non-compliance

This section provides minimum and maximum civil penalty amounts determined in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Public Law 104–134, April 26, 1996, and the RSIA.

Section 243.11 Information Collection Requirements

This section lists the sections of the proposed rule which contain information collection requirements.

Section 243.101 Employer Program Required

Proposed paragraph (a) contains the general requirement for each ''employer,'' as that term is defined in this part, which is conducting operations subject to this part as of one year and 120 days after the effective date of the final rule to submit, adopt, and comply with a training program for its safety-related railroad employees. An employer's program must be submitted and approved by FRA in accordance with the process set forth in proposed §§ 243.107, 243.109, and 243.113. However, an employer's duty is not complete upon submission of a program to FRA. The employer will also be required to adopt and comply with its program. By using the term ''adopt,'' FRA is expecting each employer to implement its training program. Furthermore, FRA approval of a program comes with the expectation that an employer will comply with its program. Potentially, FRA could take enforcement action if an employer failed to comply with its approved training program. As with any potential enforcement action, FRA will use its discretion regarding whether to issue a warning, a civil monetary penalty, or other enforcement action. *See* 49 CFR part 209, app. A.

Paragraph (b) contains the proposed general requirement that an employer commencing operations subject to this part more than one year and 120 days after the effective date of the final rule shall submit its training program and request for approval at least 90 days prior to commencing operations. FRA anticipates using the proposed 90-day period to evaluate the completeness of the program and approve it prior to the employer commencing any operation that requires a safety-related railroad employee. After FRA approves the training program in accordance with the proposed submission, review, and approval process, the employer is required to adopt and comply with the training program for the same reasons as explained in the analysis for paragraph (a).

Paragraph (c) proposes a list of over-arching organizational requirements for each employer's training program. For example, paragraph (c)(1) proposes a requirement that the employer classify its safety-related railroad employees in occupational categories or subcategories by craft, class, task, or other suitable terminology. This requirement is derived from the statutory requirement in 49 U.S.C. 20162(a)(1) which states in part that ''[t]he Secretary of Transportation shall * * * establish minimum training standards for each class and craft of safety-related railroad employee.'' Although FRA agrees with Congress that most railroads could identify safety-related railroad employees by craft or class, there could be problems if FRA were to define those categories because the same class or craft identifier could have different meanings based on different collective bargaining agreements or usage by the employer. For example, in the RSAC working group meetings, FRA learned that some railroads may have only one type of ''carmen'' and others may have 10 different types of carmen. By requiring that each railroad define its employees in occupational categories or subcategories, FRA is giving each railroad the maximum flexibility it needs to shape the structure of its training program by what it wants each type of employee to do. In that way, employers will not be required to train some employees on subjects or tasks that exceed what the employee will actually be required to do. Similarly, some railroads may wish to categorize employees by occupational categories that do not easily fall into an established craft or class. Thus, FRA proposes to also allow for an employer to classify its safety-related railroad employees in occupational categories or subcategories by task or any other terminology the employer deems suitable.

During the RSAC process, the working group considered including a list of potential occupational categories or subcategories. After adding and amending that list, the RSAC decided that having the list in the regulatory text might be confusing. The list was never intended to include every conceivable category of employee, but instead was aimed at providing employers with a list of suggested categories that could be used or modified as necessary to describe each type of employee. Thus, in order to provide some ideas of the types of categories FRA is referring to in this paragraph, the following is a list of possible categories of employees that an employer may choose to use: brakeman; bridge tender; carman; conductor; communication worker; electrician; fireman; hostler; hump operator; laborer; locomotive servicing engineer; machinist; pipe fitter; roadmaster; roadway worker; sheet metal worker; signalman; switch tender; ticket taker; tower operator; track inspector; track worker; track welder; train dispatcher; train, yard, and engine (TY&E) employees; train service locomotive engineer; utility worker; yardmaster; any person who performs certain railroad inspection, maintenance, and construction activities while fouling a track; and any person who directly performs safety-related task supervision, instruction, or OJT coaching of railroad or contractor employees (*i.e.,* including railroad officers and employee colleagues, potentially categorized by department or by the person's authority to supervise, instruct, or OJT coach specific occupational categories or subcategories of safety-related railroad employees).

Proposed paragraph (c)(2) relates to paragraph (c)(1), as once the categories

of employees are identified, the categories will also need to be defined. In this case, the definition of each category is based on the Federal requirements that the category of employee will need to comply with. The proposed paragraph explains the amount of detail necessary to adequately describe each Federal requirement.

Paragraph (c)(3) proposes that each employer create a table summarizing the information required by paragraphs (c)(1) and (c)(2) of this section, segregated by major railroad department (e.g., Operations, Maintenance of Way, Maintenance of Equipment, Signal and Communications). Although each employer should find such a summary document useful, such a compilation document will aid FRA in its review of the program and likely lead to speedier approvals. While FRA strongly suggests that tables be used, some RSAC members suggested that some employers might want to use other formats and the regulation should not be so particular about the format being used. FRA agrees with this feedback and proposes to accept other suitable formats.

Paragraph (c)(4) proposes a requirement for each employer to submit, as part of its training program, a description of procedures used to design and develop key learning points for any task-based or knowledge-based training. The purpose of submitting this description is to allow FRA to understand how the employer identifies key learning points for any type of training. FRA personnel that will be reviewing these programs have received specialty training in how to be a trainer and how people learn. FRA is concerned that without this proposed requirement, FRA will not have enough insight into whether an employer is going through all the necessary thought processes to develop comprehensive learning points for any particular task or knowledge-based training.

Proposed paragraph (c)(5) addresses two different concerns. First, FRA is not proposing to dictate how training shall be structured, developed, and delivered; instead, the proposed rule requires that each employer make that determination. This proposed requirement correlates to § 243.103(a)(2)(iv), which requires that each course outline include the method of course delivery. FRA expects that an employer will use an appropriate combination of classroom, simulator, computer-based, correspondence, OJT, or other formal training. As explained in the analysis for the definition of ''formal training,'' classroom training is not the only effective method of course delivery. However, during the approval process, FRA may be particularly critical of task-based training that fails to contain an OJT, laboratory, or other hands-on type component. Second, FRA proposes that the curriculum be designed to impart knowledge of, and ability to comply with, applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders. During the RSAC process, many employers argued that it would be confusing for employees to be trained to both Federal standards and the railroad's rules. The proposed rule is written so that employers may design training on the railroad's rules that implement the Federal standards without teaching to the Federal standards directly. However, there should be no doubt that the training should cover all the Federal standards applicable, or the equivalent or more stringent railroad rules and procedures that were promulgated to implement those Federal standards. This proposed rule does not require training beyond what is required by the relevant Federal standards.

Paragraph (d) contains proposed OJT training requirements that are essential to ensuring that OJT successfully concludes in learning transfer. As FRA alluded to in the analysis for the definition of OJT, too much OJT is currently unstructured and does not lead to learning transfer. OJT should not vary so much that one person can have a good mentor who is able to give the employee all the hands-on instruction the employee will need while another mentor makes the person simply watch the mentor do the job without any feedback, instruction, or quality hands-on experience.

Paragraph (d)(1) contains the three key proposed components of any OJT training that must be included in an employer's program. One, those individuals designing the training must give some thought as to the tasks and related steps the employee learning the job must be able to perform by the time the OJT is concluded and capture those thoughts in a brief statement. Two, the training program designers must provide a statement, or list, of the conditions necessary to ensure that learning can be successfully accomplished. For example, a person may need to be taught the theory behind the practice prior to attempting any tasks. Additionally, OJT needs to be planned so that the training participant is provided with all the equipment needed to successfully complete the task. One of the conditions in such a statement could be that the mentor/instructor must demonstrate the proper way to do the task, including all related steps, prior to requiring that the participant attempt to complete the task. Three, each OJT training portion of an employer's program must contain a statement of the standards by which proficiency will be measured through a combination of task/step accuracy, completeness, and repetition. This proposed provision would require an employer to determine, for example, how many times the mentor/instructor must observe the training participant successfully complete the task before learning transfer is considered complete. There may be issues of a participant successfully completing some, but not all of, the steps necessary on each attempt. There may also be issues of whether the participant was aided by the mentor/instructor and whether the help received indicates that the participant did not fully learn how to complete the task. It is proposed that each OJT portion of a training program address these issues so that proficiency can be objectively measured.

Paragraph (d)(2) proposes a requirement that employers make any relevant information or reference materials available to the employees involved in OJT prior to beginning the initial safety-related tasks associated with OJT exercises. Such reference materials would include, but are not limited to, any relevant operating rules and safety rules. An employer's rules are subject to changes and updates, and each employee participating in OJT needs to be provided with the employer's currently applicable rules before attempting a task in OJT. Of course, it is unrealistic for employers to expect an employee to comply with one of the employer's rules if the employer has not provided the employee with a copy of the rule. FRA is not suggesting that all relevant rule books must be brought to the worksite where OJT will take place. However, it is proposed that an employee who is learning a new task must have the rule books made available for referencing with the expectation that the employee will be trained on the applicable rules and how to use the reference materials prior to beginning the OJT exercise.

Paragraph (d)(3) proposes another key component of any OJT portion of a training program. FRA proposes that an employer must compile all of the tasks and related steps associated with OJT exercises for a particular category or subcategory of employee in one manual, checklist, or other similar document. Such a manual or checklist is useful for employees and instructors in reviewing

what an employee is expected to learn. Although not proposed, FRA or an employer may want to require that each employee prove a certain level of familiarity with these documents as a prerequisite to OJT. The manual or checklist also has the potential to be used after completing OJT, to review whether all the required tasks and related steps were properly completed. Regardless of the form of the document, this additional requirement for OJT should not be difficult to produce as any compliant training course would have already identified the tasks and related steps necessary for successful task completion.

A checklist potentially could have more utility than a manual if an employer expects employees to carry the document into the field and reference it during OJT. In order to properly use a checklist, the learners and instructors must be able to understand the underlying conditions for the series of tasks given the abbreviated description of each item. For that reason, some employers may choose to produce a manual and a checklist, with the manual viewed as the long version of the checklist.

The reference to ''other similar document'' is based on an RSAC recommendation and is intended to provide employer's with the discretion to satisfy this requirement with a document that may be something other than a manual or checklist. However, when FRA reviews that similar document, the issue to be addressed will be whether that similar document maintains the tasks and related steps associated with OJT exercises for a particular category or subcategory of employee. Additionally, employees, whether they are learners, mentors, or instructors, would benefit from having such a document made available to them so that everyone involved in a particular OJT program will have an understanding of what the expectations will be for that program.

With regard to paragraph (d)(3), FRA is only proposing that one document be required. Because a manual and a checklist provide similar, but not identical purposes, RSAC recommended that FRA only require one or the other, or another similar document. By requiring only one document, the proposed requirement is less burdensome. However, FRA seeks comment on the distinctions between these types of documents and whether both a manual and a checklist should be required.

FRA intends to make clear that with regard to the proposed requirements in paragraphs (d)(2) and (d)(3), the materials that are required to be made available could be made available electronically. For example, rather than providing printed copies of all the materials, some employers could choose to put some or all of the materials on a CD or DVD, which potentially would make the materials easier to transport and potentially less expensive to duplicate. Another option is that an employer could make all of the relevant materials accessible at one internet or company intranet location. Of course, if electronic materials are the only ones offered, employees and trainers of OJT would need access to computers at convenient and suitable locations. Thus, employers considering compliance with these proposed requirements through electronic medium should consider whether the electronically provided materials would be as accessible as printed materials.

Paragraphs (e) and (f) contain corresponding proposed requirements for contractors and railroads to ensure that each party understands who is responsible for training. Paragraph (e) places the burden on each contractor that trains its own employees to notify each railroad in writing that its safety-related employees are trained according to an FRA-approved program. The contractor may provide the document in writing or electronically. The contractor may need to indicate that some of the contractor's employees are fully trained while some need additional training that must be provided by the railroad. FRA would consider a contractor's written misrepresentation of approved training as a serious violation of the proposed rule that would likely result in the agency taking enforcement action. Paragraph (f) requires that each railroad that relies on the training performed by a contractor must retain the contractor's document notifying the railroad that the contractor's training program was approved by FRA. It is important that a railroad retain the contractor's document in order to verify that the railroad did not need to provide training directly to the contractor's employees.

Section 243.103 Training Components Identified in Program

Unlike § 243.101, which focused on the general requirements for an employer's training program, this section details the proposed component requirements for each program. The main purpose for this proposed section is to ensure that an employer provides sufficient detail so that FRA would be able to understand how the program works when the agency reviews the program for approval. It is expected that a failure to include one or more component requirements would result in disapproval of the program. In § 243.111 FRA also proposes that training organizations and learning institutions must include all information required for an employer's program in accordance with this part, and this mainly means the information required in this section. Thus, each program submitter should ensure that each component requirement proposed in this section is addressed.

Paragraph (a) lists the five proposed training components. The first component is the requirement that the program contain a unique name and identifier for each formal course of study. The unique name and identifier would thus make up the course title. It is expected that these unique names and identifiers would be sufficiently descriptive so that the course title alone would provide a good idea of what subjects the course would cover. For example, the unique name could be ''Introduction to Operating Rules for Operating Employees'' and the unique identifier could be ''OP RULES 101 BCE.'' In this example, ''BCE'' refers to the occupational categories of employees that would be suitable to take this course; *i.e.,* brakemen (''B''), conductor (''C''), and locomotive engineer (''E''). While it is not a proposed requirement that each course title identify the names of the occupational categories and subcategories of employees that would be required to take the course, it is one method for creating meaningful unique identifiers. FRA is aware that many employers with existing training programs will already have a unique name and identifier for each course and FRA is not suggesting that all of those course titles will need to be amended in order to comply with this rule.

Paragraph (a)(2) contains the proposed requirement for a course outline. The rule delineates specific requirements for that course outline. Each specific requirement is not intended to place a heavy burden on the person developing the program as the proposed requirements would be expected to be developed as part of formal training. To reiterate a previous point made in this analysis, formal training, by definition, is structured training that differs from an informal briefing. By addressing the items required in this paragraph, the person developing the training would be answering the fundamental questions necessary to decide the purpose and scope of that training.

Within paragraph (a)(2), FRA has listed two requirements that may need to be differentiated from one another.

Paragraph (a)(2)(ii), which proposes that the course outline include a brief description of the course, including the terminal learning objectives, is written with the expectation that FRA would receive information akin to a course catalog. Paragraph (a)(2)(vi), which proposes that the course outline include a syllabus of the course to include any applicable Federal laws, regulations, and orders covered in the training, is written with the expectation that FRA would receive information akin to a syllabus. The syllabus is normally specific to and written by the instructor; the course description in the course catalog is more generic and would describe the course regardless of the specific methods of teaching that the instructor might choose. Meanwhile, for both proposed requirements, FRA does not want the submission of actual lesson plans or any supplemental lesson plan materials such as rule books, handouts, or other job aids; if FRA needs those types of information in making a program approval determination or during an audit or investigation, FRA will make a specific request for those additional materials.

Paragraph (a)(3) contains the proposed requirement that the employer's program include a document for each OJT program component. As previously discussed in this analysis, one of FRA's objectives in this rulemaking is to improve OJT. The OJT document for each program component would contain three subparts. The first subpart, in paragraph (a)(3)(i), proposes that the document contain certain types of background information that would provide a roadmap for understanding how the OJT program is intended to be administered. It is essential that this subpart of the document contain a description of the roles and responsibilities of each category of person involved in the administration and implementation of the OJT program. The roles and responsibilities subpart would explain the duties and expectations of each type of trainer, senior manager, first-level supervisor, mentor, trainee, or any other category of person involved in administering the OJT. It is proposed that the document contain implementation guidelines that address how the program will be coordinated. Program coordination must include a complete description of the minimum requirements necessary in connection with performance and repetition, and recording the successful completion of performance and repetition. Additionally, it is proposed that the document satisfactorily describe whether there will be a specific order of task learning for employees to progress through in order to advance through the OJT program for a particular occupational category or subcategory of employee (i.e., the progression of the OJT). Finally, it is proposed that the document satisfactorily describe the level of proficiency expected of a trainee before the trainee is considered successful in any given task (*i.e.,* the application of the OJT).

The second proposed subpart, paragraph (a)(3)(ii), requirement in the OJT document for each program component is a listing of the occupational categories and subcategories of employees for which the OJT program applies. One OJT program component may apply only to conductors and another only to carmen. Some OJT components may apply to a broader range of employees, such as all those employees designated to throw switches.

The third proposed subpart, paragraph (a)(3)(iii), required in the OJT document for each program component requires details of the safety-related tasks and subtasks, conditions, and standards covered by the program components. This last subpart will provide the scope of the particular OJT component, the conditions under which the OJT must be performed, and the standards for measuring whether an employee has successfully completed any particular OJT requirement.

Paragraph (a)(4) proposes a requirement that the course outline for each course include the job title and telephone number of the employer's primary training point(s) of contact, listed separately by major department or employee occupational category if applicable. The purpose of this requirement is to provide general contact info so that FRA has a point of contact in case any questions or concerns arise. As long as the responsible person's job title and telephone number are provided, it is unnecessary to list the person's name as individuals often move in and out of particular job positions on a regular basis and this information can get stale quickly. FRA requests comment on whether an email address should be required, or listed as optional.

Paragraph (a)(5) proposes additional requirements for employers that utilize training organizations or learning institutions to develop or deliver any portion of the training required by this part. FRA needs some basic information from the employer so that the agency may properly evaluate the program under the review and approval process. Thus, the program must indicate the scope of the training that will be contracted out, the name of the contracted organization that developed the training (and the name of the organization that will deliver the training, if different), and basic contact information for the contracted organization so FRA can follow-up with questions or concerns. FRA acknowledges that when RSAC discussed this issue, it was assumed that a training organization or learning institution would both develop and deliver the training. Upon further review, some training organizations or learning institutions may only develop training or deliver training, but not both. In those instances, FRA believes it will still need the information required by this paragraph.

Paragraph (b) provides an option for an employer to avoid submitting one or more similar training programs or plans when the employer has a separate requirement, found elsewhere in this chapter, to submit that similar program or plan to FRA. In order to take advantage of this option, an employer must choose to cross-reference any program or plan that it wishes not to submit in the program required by this proposed part. Although some employers may choose to incorporate a training program previously submitted to FRA under a different rule, this provision permits the option to reduce redundancy. This proposed option is based on the statutory provision allowing the agency to ''exempt railroad carriers and railroad carrier contractors and subcontractors from submitting training plans for which [FRA] has issued training regulations before the date of enactment of the Rail Safety Improvement Act of 2008.'' 49 U.S.C. 20162(c). However, FRA notes that this proposed exemption does not go as far as the statutory authority allows. FRA is only exempting an employer from submitting a program or plan if the existing training regulation requires submission of that program or plan. For purposes of this proposed requirement, FRA considers ''submission'' to have the broader meaning of including those programs or plans that are required to be maintained on an employer's property for review and inspection by FRA representatives. FRA is reluctant to consider exempting employers from submitting training programs or plans required by existing training regulations that lack some kind of ''submission'' requirement as doing so could compromise the quality of submissions under this proposed rule. Additionally, some of those programs or plans that were previously submitted may be missing an OJT component. If so, this proposal specifies that ''[w]hen any such similar program or plan did not include the OJT components specified in paragraph (a)(3) of this section, the employer shall supplement its program in accordance with this part by providing that additional information.'' As mentioned earlier, OJT is one of the

weakest parts of most training programs, and FRA will focus its review of training programs to ensure that the OJT components are well-thought out and structured. Examples of other FRA training requirements that an employer may choose not to resubmit are those located in §§ 214.307, 217.9, 217.11, 218.95, 236.905, and 240.101.

Paragraph (c), as proposed, would require that an employer include a description in the program if it arranges job-related practice and practice related feedback sessions. These types of practice and feedback sessions are not as structured or comprehensive as OJT, but these sessions could provide useful additional experience. Depending on the job, job-related practice and practice related feedback sessions may be safely conducted with or without qualified instructors or mentors to assist the training participant. An employer who utilizes such practice is required to address the practice in the training program required under this proposed part.

Please note that FRA is concerned that some employers may currently believe that job-related practice and practice related feedback sessions are the same thing as OJT; for purposes of this proposed rule, they are not. This rule includes specific requirements for OJT that puts it in the formal training category, *i.e.,* with a structured and defined curriculum. Job training that occurs in the workplace without meeting the specific proposed regulatory requirements for OJT may still be adequate for some training purposes. This type of informal job training is what FRA considers job-related practice and practice related feedback sessions. Although job-related practice and practice related feedback sessions may have some formality to them and would add value to the training participant's experience, these informal practice sessions should not be confused with OJT as defined and required under this proposed rule.

Finally, paragraph (d) serves as a reminder to any employer submitting a program that FRA may require modifications to any programs, including those programs referenced in paragraph (b) of this section, if it determines essential program components, such as OJT, or arranged practice and feedback, are missing or inadequate. Generally, FRA will require hands-on training if the training participants are expected to learn how to perform a safety-related task. The hands-on portion of the training could occur in a classroom, on a simulator, in a laboratory, or as OJT. Arranged practice and feedback is often an integral part of classroom, laboratory, and simulator training. For some occupational categories or subcategories, lecture that incorporates practice and feedback sessions may provide enough training to consider the person trained. For occupational categories and subcategories where OJT is required any person submitting a program that does not contain an OJT component meeting the proposed requirements is likely to receive feedback from FRA that the program is inadequate in this regard.

Section 243.105 Optional Model Program Development

During the RSAC process, FRA expressed that it wanted to encourage the development of model training programs that could be used by multiple employers. There are several reasons why model programs are desirable as an option. Smaller entities may struggle with the costs and burdens of developing a program independently; thus, a model program could reduce the costs, especially for smaller businesses. For instance, in the context of locomotive engineer training and certification programs required pursuant to 49 CFR part 240, FRA has worked with ASLRRA in developing model programs for use by short line and regional railroads. Furthermore, there are economies of scale that benefit FRA in helping organizations, associations, and other businesses to develop model programs that may be adopted by other entities. That is, the more businesses that adopt model programs, the fewer the number of programs FRA would need to closely scrutinize in the review process. FRA is willing to provide early and frequent feedback to any entity producing a model program. In that way, FRA can ensure that each model program will contain all of the necessary components to a successful program and can be implemented by multiple businesses with little fear of rejection during the program submission and approval process.

Paragraph (a) proposes an option that would permit any organization, business, or association to submit one or more model programs to FRA for later use by multiple employers. In addition to short line and regional railroads, FRA encourages similar types of contractors to submit model programs possibly developed by a common association. In some instances, FRA could foresee that several employers may hire an organization, such as a training organization or learning institution, to develop a model program for those multiple employers to submit to FRA. FRA notes that the model program would be the program for any employer that chooses to submit it, and it is not a program submitted on behalf of the training organization, business, or learning institution that developed the program. Another possibility is that one railroad or contractor develops a program for its own use that it later allows other entities to copy. FRA expects that some organizations, businesses, and associations may take a proprietary interest in any model program it develops; however, FRA would hope that the costs imposed on small entities would be reasonable. Although FRA does not intend to draft and develop programs for employers to use, FRA intends to provide guidance to any person or entity in the development of model or individual employer programs.

Paragraph (a)(1) proposes a requirement that each model program be submitted with a unique identifier associated with the program. If no unique identifier is submitted, FRA proposes that it will assign a unique identifier. FRA proposes this requirement so that it will be easier for FRA to track which railroads and contractors have adopted specific model programs. For example, a model program identifier may include the abbreviation or acronym of the organization, business, or association that developed it and a number or descriptive phrase that helps identify it. Examples of unique identifiers could be: ASLRRA–1, ASLRRA–Part 240, ASLRRA—Conductor, ASLRRA—Short line, ASLRRA—Regional Railroad, NRC—Signal Maintenance, NRC—Locomotive Repair, or NRC—Track Maintenance.

Paragraph (a)(2) proposes to require that each model program associated with the organization's unique identifier shall include all information required by § 243.103. This requirement means that each model program must be able to stand on its own and contain all of the same training components as required for an employer's program.

In paragraph (b), FRA proposes that each employer submit the unique identifier for the model program along with all other information that is specific to that employer or deviates from the model program. FRA would prefer that each model program standardize as many of the components as possible and that each employer that adopts a model program would try to limit the number of provisions it deviates from the model program to a minimum. FRA understands that some components of a model program could be left blank so that each employer may enter information that individualizes

the program to suit that employer's training regimen. In other instances, an employer may want to customize a portion of a model program. FRA would like to encourage an employer that submits a program based on a model program previously approved by FRA, not to submit the entire program to FRA; doing so would be duplicative and defeat part of the purpose of approving model programs.

Section 243.107 Training Program Submission, Introductory Information Required

In proposed paragraphs (a) through (c), FRA requests specific information from each employer submitting a program. The information requested is intended to give FRA some introductory information that the agency will need to understand the employer's approach to training. The information required in these paragraphs is intended to help put the training components in the program in some context before a reviewer reads the finer details of each component. For example, FRA might want to more closely scrutinize a small railroad's training program if the program states that the employer primarily conducts the training of its own safety-related railroad employees using its own resources. The reason that information may raise a concern is that smaller railroads would not always have qualified instructors to implement all the different types of training required by the Federal laws, regulations, and orders.

The RSAC members will recognize that this section follows their recommendation and that the rest of the RSAC's recommended § 243.107 has been placed in § 243.109 in order to improve the organization and readability of these proposed requirements. Because the RSAC's recommended § 243.107 was split into two sections, FRA renumbered the remaining RSAC recommended sections found in this proposed subpart.

Section 243.109 Training Program Submission, Review, and Approval Process

As mentioned at the end of the analysis to the previous section, FRA accepted the intent of the RSAC recommendation that forms the basis for this section; however, FRA has not accepted the RSAC recommendation verbatim. There were several undefined terms that a more general audience than the RSAC membership that helped devise the recommendation might find ambiguous. For instance, in drafting this proposed rule, FRA found that it was confusing to understand the difference between what RSAC and FRA meant by a ''new program'' versus an ''initial program.'' Another example of an undefined term in the RSAC recommendation was ''informational filing;'' there were discussions about what that term meant, but the RSAC did not define the term in its recommendation. Thus, FRA has given meaning to the term ''informational filing'' in the proposed regulatory text and set it apart from other types of revisions to an existing program.

Additionally, FRA attempts to improve on the clarity of the RSAC recommendation by reorganizing the regulatory text. Anyone who has reviewed the RSAC recommendation will recognize that most of the language in this proposed section is derived directly from that recommendation, but that the order of the regulatory text differs. FRA seeks comment on whether the section is easier to understand and whether the section adequately addresses each possible scenario for employers filing initial or revised programs. In the analysis of each paragraph, FRA describes the relationship of the proposed paragraph to the RSAC recommendation to help anyone who has reviewed the RSAC recommendation understand how the proposed section was derived from that recommendation.

Paragraph (a) proposes three processes for approving different types of initial programs. First, paragraph (a)(1) addresses the issue of how employers must address apprenticeship, or similar intern programs, that have begun prior to submission of the employer's initial program filed in accordance with this part. RSAC recommended that FRA address this situation so that those persons who had already started an apprenticeship-type training program would know that their training would not be mooted by this proposed regulation. During the RSAC deliberations, there were general concerns raised that some long term training might be initiated prior to a training program submission and that, when reviewed in the context of the rest of the employer's initial program, the long term training would not meet the employer's program requirements. In some instances, it may be possible to revise an apprenticeship or similar long term intern program that has already begun; in other instances, changing the apprenticeship program would be prohibitively expensive or logistically difficult. RSAC recommended and FRA accepts the premise that as long as the apprenticeship-type training program is described in the employer's initial program, that apprenticeship or similar intern program may continue unless FRA advises the employer of specific deficiencies. FRA also accepts the RSAC recommendation regarding what action should be taken when specific deficiencies are found; however, instead of a reference to another paragraph in this section, FRA proposes that the process be contained in this paragraph so that it is easier for readers to follow. Thus, the paragraph includes the provision that the employer must take action to resubmit the portion of its program that FRA found deficient within 90 days of notification and that a failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. Furthermore, FRA may extend this 90-day period based on a written request. The purpose of creating a deadline for action is to ensure that training programs are eventually corrected to address deficiencies found by FRA. There may be instances when an employer disagrees with an FRA finding of a deficiency and 90 days will typically provide sufficient time for the employer to set up a meeting with FRA to try and resolve any differences. If more than 90 days are needed, FRA could unilaterally extend the deadline or entertain a written request from the employer. Paragraph (a)(1) is modeled after § 243.107(f) and (g) of the RSAC recommendation.

Paragraph (a)(2) proposes to consider an employer's initial training program, as required by § 243.101(a), approved immediately upon submission to the Associate Administrator. The § 243.101(a) programs will be the first programs submitted by each employer in operation one year and 120 days after the effective date of this final rule. Hence, once this type of program is submitted, it is proposed that the employer may implement the initial program without waiting for approval. RSAC recommended, and FRA agrees, that there is a legitimate expectation that there will likely be few programs that will be completely unacceptable. Instead, the expectation is that some programs will be missing pieces of information or lacking in some required components. Those employers who FRA determines will need to improve a program to address a deficiency will do so through a proposed process of resubmission with the Associate Administrator. FRA rejected the option to require implementation only after FRA approval as many RSAC members explained that it would be economically and logistically difficult to comply with such a requirement. FRA also does not

want to hold up the implementation of an entire training program for problems that may only affect some occupational categories of safety-related railroad employees, or may be a minor issue that can be addressed and corrected at a later date. Paragraph (a)(2) is modeled after § 243.107(d) and (g) of the RSAC recommendation.

Paragraph (a)(3) proposes to consider an employer's initial training program, as required by § 243.101(b), differently than those initial programs filed under § 243.101(a). The differences between these two types of initial programs are that § 243.101(b) employers are those that commence operations one year and 120 days after the effective date of this final rule (instead of before that date) and § 243.101(b) requires submission of the program at least 90 days prior to commencing operations (while § 243.101(a) applies to employers already in operation). Paragraph (a)(3), which is modeled after § 243.107(e)(2) and (h) of the RSAC recommendation, proposes a precautionary approach with employers commencing operation significantly after the effective date of this rule to ensure each training program meets the regulatory requirements prior to implementation. As the employer will be required to file the program at least 90 days prior to commencing operations, FRA should have sufficient time to review the program before the employer would have a great need to implement its training program. Employers who need FRA to expedite review of a training program may contact FRA and alert the agency to the employer's reasons for requesting that FRA's review be completed by a certain date. Although FRA is under no proposed requirement to complete its review by any deadline, FRA has no intention of delaying the employer's anticipated date of commencing operations and will attempt to meet all reasonable requests for expedited review.

Paragraph (b) introduces the proposed concept of an annual informational filing requirement. The concept is modeled after § 243.107(i) of the RSAC recommendation. FRA accepts this RSAC recommendation over the alternative option which would require programs to be constantly revised, resubmitted, and reviewed for approval on many routine matters. For instance, FRA expects that nearly every year there will be new safety-related Federal railroad laws, regulations, or orders issued, or new safety-related technologies, procedures, or equipment that are introduced into the workplace. Each of these circumstances would create new knowledge requirements or safety-related tasks that would need to be addressed by amending a previously approved program. FRA proposes that an employer that modifies its training program for these reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise either to individual employers, one or more group of employers, or the general public. Depending on the situation, FRA may decide that an information filing is unnecessary and may advise individual employers or groups of employers through an association of that decision when contacted by the employer or association. At other times, FRA may want to publish a statement on its Web site, or as a safety advisory or other guidance document in the **Federal Register**. Informational filings will be considered approved upon modifying the program and may be implemented immediately without explicit FRA approval. However, FRA expects to audit programs occasionally and proposed paragraph (b) puts employers on notice that FRA may disapprove an informational filing in the same manner as specified in paragraph (a)(2) of this section. Although this annual requirement would have costs of its own, it is expected that this option would save employer and agency resources over the alternative option.

Furthermore, paragraph (b) proposes requirements for what information must be included in an informational filing. In addition to including any substantive changes, which may include pages to be substituted in the previously approved program, FRA proposes a requirement that the filing contain a summary description of sufficient detail that FRA can associate the changes with the employer's previously approved program. The summary description should be considered the equivalent of an executive summary or roadmap to the changes made to the program.

Proposed paragraph (b)(4) is intended to address the circumstances where a previously approved model program is revised through an information filing. The RSAC agreed to FRA's recommendation that a process be required to revise a model program without causing each user of that model program to submit a similar filing. FRA is not looking to take enforcement action against developers of model programs; e.g., FRA does not intend to impose a liability on an organization, business, or association that has an approved model program on file with FRA but fails to inform each employer who requested the right to use the affected training program of the changes and the need for the employer to comply with those changes that apply to its operation. However, FRA would like the developers of model programs to describe how they informed their clients or constituents of the informational filing so that FRA can gauge whether the notification was adequate under the circumstances. Without adequate notification, compliance cannot be expected, and individual employers may not have sufficient opportunity to inform FRA of a different approach.

FRA seeks comment on whether the regulation should address any issues arising from model program developers that are no longer actively updating their programs. For instance, an organization, business, or association that has an approved model program on file may voluntarily decide that it is too great a burden to continue updating the program, or may go out of business or disband. Each employer that has relied on the model program for its submission is ultimately responsible for its program and will need to ensure that any required updates are made. In some instances, the employers relying on the model program may band together and find an alternative way to continue updating the model program.

Paragraph (c) proposes how an employer can revise a training program that has been previously approved. The proposed requirement would allow substantial additions or revisions to a previously approved program to be considered approved and implemented immediately upon submission. For example, a program is considered revised if the employer adds any occupational categories or subcategories of safety-related railroad employees to the training program. Most other changes to an existing program would not be considered a substantial addition or revision but instead would likely require only an ''informational filing'' under proposed paragraph (b). FRA has adopted the RSAC's recommendation that there is no reason to hold up implementation of new portions or revisions to an approved program as FRA can require problems to be fixed after submission. The process for review following submission is the same process for initial programs filed under paragraph (a)(2) of this section. Paragraph (c) is modeled after § 243.107(e) and (e)(1) of the RSAC recommendation.

In several paragraphs in this section, FRA proposes a process for review that allows immediate implementation upon submission but explains that FRA will inform the employer as to whether the program or program revisions conform

to this regulation. Once specific deficiencies are identified by FRA, it is proposed that the employer will be required to take action to correct the deficiencies within 90 days. As some training that has already been initiated may have deficiencies, FRA accepts the RSAC's recommendation not to nullify that training. Thus, the proposed process would permit the deficient portions of the non-conforming program to remain in effect until approval of the revised program, unless FRA provides notification otherwise. Presumably, FRA may take exception to large gaps or deficiencies in training and require the nullification of such seriously deficient training. However, in most instances, FRA would expect the deficiencies to be more minor in nature such that nullification of training would be too severe a reaction. Where the deficiencies are more minor in nature, FRA may ask that an employer simply plug any gaps in training identified rather than nullify the training already conducted.

Another issue involving the review process that is proposed in several paragraphs in this section is that a failure of an employer to resubmit a program with the necessary revisions shall be considered a failure to implement a program under this part. FRA would consider this to be a serious issue of non-compliance if the employer is continuing to train safety-related railroad employees using the rejected portion(s) of the program. The process FRA is proposing allows for a 90-day period for an employer to respond with a program resubmission if FRA receives a written request. FRA will liberally exercise discretion in granting reasonable requests for an extension. FRA would expect reasonable extension requests to include any basis for requesting the extension and a new deadline by which the employer expects to be able to resubmit. FRA is requiring that the extension be in writing so that the parties can establish when the request was made.

Proposed paragraph (d) is modeled after § 243.107(j) and (k) of the RSAC recommendation and flows from the intention to include representatives of railroad labor organizations involved in the program approval process. The proposed requirement is for railroads only, not contractors. By requiring that the president of each labor organization that represents the railroad's employees be simultaneously served with a copy of any submission, resubmission, or informational filing, the regulation is ensuring that employee representatives will have a timely opportunity to participate in FRA's review and approval process. To ensure that this requirement is met, FRA has proposed that the railroad include a statement affirming that service has been completed and the details of who was served. Commenters may wish to address whether this requirement is necessary or should be expanded to include contractors.

Proposed paragraph (d)(2) requires that each railroad labor organization has up to 90 days to file a comment. The reason for the 90 day deadline is that FRA would like to send approval notification to railroads in a timely fashion. Without a deadline for comments, the approval process would seem open ended. However, FRA realizes that, from time-to-time, a labor organization may find something objectionable in a previously approved program, and FRA encourages those types of comments as they are discovered. When a labor organization discovers an objectionable issue outside of the required 90 day window, FRA would still accept the comment and review the issue to see whether a revision to the training program is warranted. Depending on when the comment is raised outside of the 90 day review cycle, FRA could consider whether to grant the employer some leeway in revising and implementing any necessary conforming change to the program. For example, if training is well under way for that year, it may be suitable to allow the employer to accommodate the late comment in its training for the next year, if any accommodations are required.

Section 243.111 Approval of Programs Filed by Training Organizations or Learning Institutions

Although the statutory mandate in 49 U.S.C. 20162 does not mention how to treat training organizations or learning institutions that train safety-related railroad employees, FRA accepts the RSAC's recommendation in proposing requirements for FRA to review and approve programs from such organizations or institutions. As proposed, employers will always have the obligation to submit training programs to FRA for approval and will not be relieved of that obligation just because the employer uses a training organization or learning institution with an approved program. Some of those employers may choose to have one or more training organization or learning institution train one or more type of occupational category or subcategory of employee. Other employers may use such outside trainers only for particular training courses while providing other courses ''in-house,'' i.e., training by designated instructors directly employed by the employer. Additionally, other employers may intermittently or regularly hire safety-related railroad employees who have been previously trained by training organizations or learning institutions and view such hiring as a cost-effective or efficient way to avoid the burden of providing initial training. Furthermore, some individuals may wish to pay their own way to get trained in a particular occupational category or subcategory of safety-related railroad employee—most likely with the hope that the training will boost the person's chances of gaining employment.

FRA's purpose in proposing this section is to facilitate the option of using training organizations or learning institutions. An employer that intends to implement any training programs conducted by some other entity [such as a training organization or learning institution], or intends to qualify safety-related railroad employees previously trained by training organizations or learning institutions, has a proposed obligation to inform FRA of that fact in the employer's submission. If FRA has already approved the training organization or learning institution's program, an employer could reference the approved program in its submission, avoid lengthy duplication, and likely expect a quick review and approval by FRA.

Individuals or employers that use training provided by training organizations or learning institutions need assurances that the training will meet or exceed FRA's requirements prior to incurring any training expense. Without such assurances, an individual or employer may determine that paying for such training is not worth the risk. Meanwhile, FRA would benefit from approving this type of training program as it will lead to greater efficiencies in FRA's review and approval process. Thus, proposed paragraph (a) requires that a training organization or learning institution that provides training services for safety-related railroad employees, including providing such training services to independent students who enroll with such training organization or learning institution and who will rely on the training services provided to qualify to become safety-related railroad employees, must submit its program for review and approval.

Although paragraph (b) proposes a one year grace period for an existing training organization or learning institution, FRA deems it essential that each training organization and learning institution obtain FRA approval prior to the expiration of that grace period. FRA

hopes that extensions of this grace period will not be necessary, but it has proposed an explicit process for granting such an extension rather than merely relying on the waiver process proposed in § 243.7. It is proposed that entities that intend to request extensions do so in writing and include an explanation of any factors that the entity wants FRA to consider before deciding whether to approve the request.

FRA has had significant interaction with some of the largest training organizations and learning institutions that currently train safety-related railroad employees. These large organizations are mainly training facilities found within an accredited college or run by a major railroad. In FRA's experience, the training provided at these types of large organizations is of a high caliber. Although FRA can foresee some minor deficiencies with the approval of individual components within the training programs that would be filed by some of these large organizations, FRA does not anticipate significant deficiencies because these programs are currently well-developed and comprehensive.

In contrast, FRA has less experience and greater concern with smaller organizations or new businesses that may start-up in response to any demand for training services as a result of promulgation of this rule. Prior to approval, FRA may want to tour an organization's facilities and discuss the details of program implementation with the organization to ensure that compliance with the program can be reasonably accomplished. A smaller organization will have a greater chance of program approval if it accurately characterizes its ability to offer training services.

Paragraph (c) proposes that a program submitted by a training organization or learning institution must include all information required for an employer's program in accordance with this part, unless the requirement could only apply to an employer's program. This sentence mainly refers to the requirements found in §§ 243.101 and 243.103. In addition, this paragraph contains a list of proposed requirements that only pertain to a training organization or learning institution's program. The list of proposed requirements is intended to ensure that FRA can: contact and audit the organization; review the names and resumes of any designated instructors; gauge the training organization's or learning institution's experience in the training field by contacting references of previous or current employer customers; and understand the methodologies the training organization or learning institution used during development of the training courses. Without this additional information, it would be difficult for FRA to evaluate whether the organization could effectively implement its training program.

Paragraph (d) proposes that, except for the grace period allowed in paragraph (b), FRA will not consider training by a training organization or learning institution to satisfy the requirements of this part until FRA has approved the training organization's or learning institution's program. With the grace period provided, each of these organizations should have sufficient time to submit a training program and have it reviewed by FRA without disrupting its training business. Because these organizations may train employees for multiple employers, there could be a substantial negative impact on the industry if these organizations were allowed to train employees prior to FRA completing its review and approval process. That is, many employees could be trained ineffectively, or without covering all the Federal requirements, if FRA were to allow program implementation immediately upon submission; once such initial defective training occurred, it would take years to correct through refresher training and could potentially lead to unsafe actions. Furthermore, once each of these organizations have had a training program approved, employers that rely on any of these organizations' training will greatly benefit from being able to rely on the approved program in the employer's own program submission.

In accordance with paragraph (b) and (d), a training organization or learning institution that offers one or more apprenticeship or similar intern programs to individuals not associated with an employer will need to assess the viability of those programs in progress as of the effective date of this rule. The paragraph (b) exception proposes to allow apprenticeship or similar intern programs to continue, prior to acceptance by FRA, for a period not to exceed one year. It is expected that any such apprenticeship or similar intern programs would be described in the training organization's or learning institution's program submission so that it could be explicitly approved and continued. If an apprenticeship or similar intern program that began prior to the effective date of the rule is scheduled to continue for a period to exceed one year after the effective date of the rule, the proposed rule would require the training organization or learning institution to address any deficiencies raised by the Associate Administrator prior to concluding completion of such an apprenticeship or similar intern program. FRA would appreciate comments on this proposal and whether other approaches may offer better alternatives. For example, FRA is willing to consider an option similar to the one offered in in § 243.109(a). Paragraphs (e) and (f) propose requirements for each training organization or learning institution that has an existing training program approved by FRA but wants to modify, revise, or add to it. The procedures in paragraph (e) propose criteria for when an informational filing is required and provide procedures that mirror the procedures required for employers under similar circumstances as found in § 243.109(b). Thus, the many listed reasons to update existing training courses and program information will only require an annual information filing and will not require that each training organization or learning institution file a modification to a program each time it makes one of these types of modifications to its program. The RSAC recommended that FRA allow each training organization or learning institution to use this type of informational filing concept, but the wording differs from the recommendation in order to conform to the applicable language required of each employer.

Paragraph (f) is largely based on a recitation of paragraph (d) of this section. The concept behind paragraph (f) is that when a training organization or learning institution makes one or more substantial revisions to a program of the type that cannot be considered an informational filing, the revision should be treated in the same manner as an unapproved program. FRA believes that the RSAC recommendation unintentionally neglected to distinguish between informational filings and non-informational filing modifications. For example, if a training organization or learning institution with an approved plan decided to train a category of employee not previously covered in its program, that modification would be considered the equivalent of an employer submitting a ''new or revised'' program. FRA does not want to consider such substantial modifications to be deemed automatically approved upon filing as it does for informational filings. Without such additional scrutiny, a training organization or learning institution could file a program for initial FRA approval covering training for a single occupational category or subcategory of safety-related railroad employee and add an infinite number of training courses for any number of other

categories of employee without having to acquire specific FRA approval. FRA never intended to provide that much discretion to each training organization or learning institution because FRA is concerned that some of these organizations and institutions are unfamiliar to FRA and would demand greater scrutiny to ensure these businesses have the capability to achieve their stated goals.

In paragraph (g), FRA adopts an RSAC recommendation to require each training organization and learning institution subject to this part to maintain records for each safety-related railroad employee that attends the training, in accordance with the recordkeeping requirements of this part. This requirement means that these organizations must keep the same information required in § 243.203. The information should be shared directly with the employer, so that the employer can maintain its own records adequately. However, in the event of an FRA audit, FRA would be able to ensure that the employer's records matched with the training organization's or learning institution's records.

Paragraph (h) proposes that each training organization and learning institution subject to this part must provide a student's training transcript or training record to any employer upon request by the student. This provision would mainly apply to situations in which a person directly pays an organization for training outside of a normal employer/employee work relationship. In that type of situation, it is imperative that the organization cooperate with the [former] student so that the person can prove to prospective employers that he or she was trained. In the case of safety-related railroad employees currently employed by employers with approved programs, the employer is required pursuant to proposed § 243.203(d)(2) to make an employee's records available during normal business hours for inspection and copying/photocopying to that employee, former employee, or such person's representative upon written authorization by such employee.

Section 243.113 Option to File Program Electronically

This section proposes the option for any employer, training organization, or learning institution to which this part applies to file any program submissions electronically. FRA intends to create a secure document submission site and will need basic information from each company before setting up the user's account. The points of contact information in proposed paragraph (b) are necessary in order to provide secure access.

Proposed paragraphs (c), (e), and (f) are intended to allow FRA to make the greatest use of an electronic database. It is anticipated that FRA may be able to approve or disapprove all or part of a program and generate automated notifications by email to an entity's points of contact. Thus, FRA wants each point of contact to understand that by providing any email addresses, the entity is consenting to receive approval and disapproval notices from FRA by email. Entities that allow notice from FRA by email would gain the benefit of receiving such notices quickly and efficiently.

Proposed paragraph (d) is necessary to provide FRA's mailing address for those entities that need to submit something in writing to FRA. For those entities requesting electronic submission, the list of information specified in proposed paragraph (b) is required. Otherwise, those entities that choose to submit printed materials to FRA must deliver them directly to the specified address. Some entities may choose to deliver a CD, DVD, or other electronic storage format to FRA rather than requesting access to upload the documents directly to the secure electronic database; although this will be an acceptable method of submission, FRA would encourage each entity to utilize the electronic submission capabilities of the system. Of course, if FRA does not have the capability to read the type of electronic storage format sent, FRA can reject the submission.

FRA requests comments on whether this section should address the submission of proprietary materials or other materials that an entity wishes to keep confidential. FRA expects that it could develop its secure document submission site so that confidential materials are identified and not shared with the general public. However, FRA seeks comments on whether that extra step is truly necessary. FRA does not expect the information in a program to be of such a confidential or proprietary nature. For instance, each railroad is expected to share the program submission, resubmission, or informational filing with the president of each labor organization that represents the railroad's employees subject to this part. *See* 243.109(d). It would be expected that information that needed to be kept private would need to be removed prior to sharing that programmatic material with the labor organization. FRA suggests that entities consider this concern when drafting any programmatic material to be submitted to FRA and that each entity takes its own steps not to share such private material with FRA. In that way, FRA may make such programmatic material available to the general public upon request.

Finally, FRA is considering whether to mandate electronic submission and only permit filing in writing based on a waiver request. FRA is strongly leaning toward finalizing this option because the agency will be devoting significant resources to develop the electronic submission process. It will be more costly for the agency to develop the electronic submission process and have to upload written submissions into the electronic database itself. FRA expects that there are few, if any, employers who do not have Internet access and an email address, or who cannot otherwise meet the minimum requirements for electronic submission. FRA requests comments on whether mandatory electronic submission is objectionable to any person or employer.

Subpart C—Program Implementation and Oversight Requirements

Once a program has been approved by FRA, it is proposed that each employer will have to comply with the requirements of this subpart. The subpart includes both implementation and oversight requirements. Some requirements apply only to railroads, and others to both railroads and contractors. Additionally, it is proposed that each training organization and learning institution will be required to maintain records as evidence of completed training.

Section 243.201 Employee Qualification Requirements

This proposed section includes an exemption for existing employees to be designated for a particular occupational category or subcategory without further training, provides procedures for qualifying those employees that are not exempted by the employer for a particular occupational category or subcategory, and requires each employer to deliver refresher training. Prior to the RSAC Working Group reaching the recommendation on which this proposed section is based, the Working Group had extensive discussions about other options. For example, FRA initially proposed to the Working Group that existing employees should not be exempted, *i.e.,* designated, without records proving the employee is trained or without checking that the employee is actually qualified to do the safety-related tasks. This option faced resistance from RSAC members representing both labor and management. Labor representatives

asked that FRA consider a straightforward exemption because the statute called for training regulations, not a certification rule that could be used by employers to disqualify those employees who are currently qualified. It was argued that, by requiring the passing of tests or observed compliance with certain safety-related tasks, FRA would be providing unscrupulous supervisors with a federally endorsed method of firing perfectly capable employees. The management representatives thought that, without a straightforward exemption, the designation requirements would be overly burdensome. The employers generally believed that they would not have training records for many employees that would be detailed enough to satisfy FRA's concerns, and they collectively believed that setting up knowledge and field tests to confirm each employee's qualification for each task would be an extensive undertaking.

In proposing this section, FRA agrees with the criticism leveled at the options discussed in the RSAC meetings. FRA's intention is to ensure that all safety-related railroad employees receive proper initial training if previously unqualified, and that all previously qualified employees receive refresher training at regular intervals to ensure continued compliance. FRA encourages each employer to find ways to provide remedial training and retesting of any employee that fails to successfully pass any training or testing. Under this proposed part, a failure of any test or training does not bar the person from successfully completing the training or testing at a later date. Of course, FRA does not regulate employment issues and will leave those issues to be settled in accordance with any applicable collective bargaining agreement or employment and labor law.

Paragraphs (a) and (b) propose requirements for each employer to declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that category or subcategory. The main difference between the two paragraphs is that (a) applies to each employer in operation as of one year and 120 days after the effective date of this rule and (b) applies to each employer commencing operations after that date. In the case of employers in operation pursuant to paragraph (a), the deadline for designation is two years after the effective date of this rule. In the case of employers commencing operations in accordance with paragraph (b), the deadline for designation of employees existing at the time of commencing operations is prior to the commencement of those operations. Paragraph (a), proposes that FRA may specifically grant an extension for employers in operation to comply with the designation requirements as long as that request is in writing.

In order to close a potential loophole, a slight modification was made to paragraph (a) from the RSAC's recommendation. That is, the proposed rule adds language in paragraph (a) that makes this requirement applicable to each employer, in operation ''as of [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE].'' Without the addition of that language, if an employer began operations after the effective date of the rule but before 1 year and 120 days after the effective date of the rule, the employer would not have to comply with either paragraph (a) or (b). During the RSAC meetings, no member ever expressed the intention to create such a loophole and FRA would not have supported the recommendation if it had identified it during the RSAC process.

Paragraph (c) proposes two conditions for qualifying a safety-related railroad employee who, after the employer's designation in accordance with paragraphs (a) and (b), is newly hired or is to engage in a safety-related task not associated with the employee's previous training. The first condition can be summarized as successful completion of all training and examinations required to do the work. As each employer's program must identify the training components pursuant to 243.103, including course information and the kind of assessment, paragraph (c)(1) reinforces that compliance with the program is necessary for each safety-related railroad employee who is not previously trained. Similarly, paragraph (c)(2) reinforces that compliance with the OJT portion of the program is necessary for each safety-related railroad employee who is not previously trained, if the training curriculum for that occupational category or subcategory of employee includes OJT. This paragraph also proposes that not all tasks required by OJT need to be performed under the direct onsite observation of a qualified instructor. Instead, FRA proposes to accept the RSAC recommendation that OJT may generally be provided under the observation of a ''qualified person,'' who obviously could be an instructor but does not have to be an instructor. In such instances, the qualified person must be advised of the circumstances and be capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed. Without this flexibility, some employers might find it difficult to get employees a sufficient amount of OJT practice sessions as there may be a shortage of instructors available for all the direct observations necessary. However, it should be noted that the employee must demonstrate, to the satisfaction of a designated instructor, that OJT proficiency has been achieved before the employee is qualified. That demonstration cannot be performed by just any qualified person. Thus, this proposed requirement adds a significant safeguard to ensuring that OJT is completed to a measurably high level.

Unlike paragraph (c) which addresses employees not previously trained, paragraph (d) proposes methods for employer's to avoid retraining an employee who has received relevant qualification or training for a particular occupational category or subcategory through participation in a FRA-approved training program submitted by an entity other than the employee's current employer. The RSAC recommended that the regulation address situations where the current record of training from some other entity is obtainable and when that record is unavailable. Read in its entirety, if the employee has performed the relevant safety-related duties in the previous 180 days and has a current record of training obtained from another entity, retraining will not be required. Similarly, if the employee has previously received initial or periodic training from another entity, it is proposed that the previous training will satisfy the requirements of this part as long as the previous training occurred within the previous 180 days and the record of that training is obtained from that other entity. When records of previous training from another entity are unavailable or it has been more than 180 days since the employee was either last trained or performed the relevant safety-related duties, the current employer shall perform testing to ensure the employee has retained the knowledge necessary to remain a member of that occupational category or subcategory of safety-related railroad employee. Paragraph (d)(2) clarifies situations where an employee's records are unavailable and the employee is tested to determine that the employee has the knowledge necessary to be a member of a particular occupational category or subcategory of safety-related railroad employee under paragraph (d)(1)(ii) of this section. In such cases, there is no additional testing

requirement if more than 180 days have passed since the employee either performed the safety-related duties or received initial or periodic training for an occupational category or subcategory.

Paragraph (e) proposes that beginning on January 1, two years after the effective date of this rule (which would likely be January 1, 2015), each employer will be required to deliver refresher training at an interval not to exceed 3 calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. FRA suggested to the RSAC that it could go through FRA's regulations and standardize the 3 calendar year refresher training requirement, but some RSAC members disagreed with this option. It was argued that there are some instances where the refresher training is so important that refresher training should be required more often than a 3 year cycle.

Refresher training may not always be a repeat of initial training. Employees participating in refresher training are expected to have had both initial training and significant experience applying the knowledge and skills previously acquired. Refresher training may include background materials that cover all the essential safety requirements, but place greater emphasis on more advanced areas or subjects that more often lead to accidents, injuries, or non-compliance. The proposed rule requires that each employer ensure that, as part of each employee's refresher training, the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. This requirement emphasizes that, while the refresher training does not have to mirror the initial training, it still needs to be comprehensive.

Paragraph (f) proposes a requirement that an employee designated to provide formal training to other employees must be qualified on the safety-related topics or tasks as specified in accordance with the employer's training program and the requirements of this part. The purpose of this section is to ensure that unqualified employees are not tasked by their employers to conduct formal training. The term ''formal training'' is defined in proposed § 243.5 and includes OJT instruction; in order to eliminate redundancy, FRA did not include a reference to OJT instruction as was recommended by RSAC. In addition, FRA does not believe RSAC intended to preclude an employer from using a ''designated instructor'' who, by definition, has ''an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training.'' Consequently, the proposed requirement contains an exception for designated instructors. FRA also kept the intent of the RSAC recommendation that, in order to be qualified, an employee must meet the requirements found in the employer's training program as well as any requirements of this part; thus, FRA addressed this issue by adding corresponding language and did not accept the more vague language in the RSAC recommendation that only referred to ''this section.''

FRA seeks comments on paragraph (f) and whether it should continue to stand alone or should be combined with proposed paragraph (c)(2) of this section. That is, the proposed paragraph (f) requirement appears to relate directly to situations in which ''as part of the OJT process and prior to completing such training and passing the field evaluation, a person may perform such tasks under the direct onsite observation of any qualified person, provided the qualified person has been advised of the circumstances and is capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed.'' In other words, paragraph (f) provides the context of what is a ''qualified person'' under paragraph (c)(2) of this section.

Section 243.203 Records

An essential requirement of any training program is the maintenance of adequate records to support that the training was completed. In paragraph (a) of this section, FRA sets forth the general requirements for each safety-related railroad employee's qualification status records and the accessibility of those records. First, in paragraph (a), FRA proposes that each employer maintain records to demonstrate the qualification status of each safety-related railroad employee that it employs. The proposed rule does not specify how many years back the records must go as the requirement is only to keep those records necessary to prove the employee is currently qualified. In fact, some electronic recordkeeping systems may only permit the most recent date entered to be kept. Thus, the requirement does not include keeping all training records for each employee in perpetuity.

Paragraph (a)(1), proposes to require that each employer keep records for former safety-related railroad employees for a 6-year period after the employment relationship ends. Those records must be accessible at the employer's system headquarters. By requiring employers to keep former employee records, FRA will have adequate time to obtain records even when an audit and investigation takes places several years after the employment relationship has terminated. This recordkeeping requirement is also intended to aid former employees who want to access their records to prove to a prospective employer that they received prior training. This proposed record retention requirement may be especially helpful to any former employees that may leave the railroading industry for several years, but want to return to safety-related railroad work within the 6-year time frame.

Paragraph (a)(2), proposes to require that the records of current employees be accessible at the ''employer's system headquarters.'' By using this term, FRA means the main headquarters for any employer, whether the employer is a railroad or a contractor. A railroad's system headquarters is defined elsewhere in this chapter as ''the location designated by the railroad as the general office for the railroad system.'' 49 CFR 217.4. Railroads may choose to keep those records at the division headquarters where the employee is currently working, but it is not proposed as a requirement. For contractors, the records must also be accessible at the employer's headquarters, but each contractor may also choose to keep such records accessible at field or branch offices that have jurisdiction over a portion of the company for easy accessibility. FRA is requiring that an international employer that has its main headquarters located in a foreign country must maintain the records for its employees at whatever location the employer identifies as its ''main headquarters'' in the U.S. FRA anticipates that most employers that are not small entities will want to maintain these records electronically so that the records are accessible everywhere with a company computer loaded with the appropriate software and an Internet connection. FRA notes that this proposed section contains specific requirements for electronic recordkeeping in paragraph (e).

In paragraph (b), FRA proposes that certain core information be kept in the records for each current or former safety-related railroad employee. FRA requests comments regarding proposed paragraph (b)(5), which requires that the

records indicate whether the person passed or failed any tests associated with the training. Although this was an RSAC recommendation, FRA questions whether a person can be deemed to successfully complete a course as would be indicated in paragraph (b)(4) without passing the associated tests. If so, then the (b)(5) requirement may be unnecessary. There is also a question of how useful it is to keep information regarding test failures, especially after a person has eventually passed the associated test. FRA is also interested to receive comments on whether it would be burdensome to keep electronic records for test failures.

Paragraph (b)(6) proposes that when the employer accepts training not provided by the employer, it must keep a copy of the transcript or appropriate record. The training accepted must be from a business, a training organization, or a learning institution with an FRA-approved program. It is not enough to keep a record showing that the training was done by some other entity; a copy of the transcript or other appropriate record must be retained by the employer to ensure that the employer has reviewed the transcript or record, and determined that the employee took the appropriate courses and successfully completed them. The RSAC version of this paragraph did not include the reference to businesses that are not a training organization or a learning institution. FRA added this reference to other businesses mainly so it was clear that the obligation is on the employer to obtain and maintain each employee's training records. In the RSAC recommendation under the section titled ''railroad maintained list of contractors utilized,'' RSAC had suggested that each railroad that trains some or all safety-related employees of a contractor must maintain a listing that includes a listing of all contractor employees trained and the courses taken. After further consideration, FRA has decided not to adopt that recommendation in § 243.209 and instead has placed the burden on the employer (e.g. the contractor in the previous sentence) to maintain the relevant records. FRA's reasoning is that the RSAC recommendation would have created a redundant recordkeeping requirement.

Proposed paragraph (b)(7) contains the requirements for recording OJT for each employee. Just as each course requires a unique name and identifier, when each OJT program component is recorded, it must include either a unique name or a unique identifier so that it is clear exactly which OJT program component was successfully completed. Although the RSAC did not suggest it, FRA is adding the proposed requirement that the record include the date the OJT program component was successfully completed. Without the date requirement, questions could arise about whether OJT was held contemporaneously with other related course work. The RSAC agreed that a record should be kept identifying which trainers, instructors, or supervisors determined that the employee successfully completed all OJT training necessary to be considered qualified to perform the safety-related tasks identified with the occupational categories or subcategories for which the employee is designated in accordance with the program required by this part. During audits and investigations, FRA will want this information to verify that the person making the determination was qualified to do so.

Paragraph (b)(8) proposes a separate requirement for the employer to record the date that the employee's status is determined to be qualified and the employee is designated to perform the safety-related duties identified with any particular occupational categories or subcategories, in accordance with the program required by this part. Sometimes, this date will be the same date that the formal training course is successfully completed. In other instances, it will be the same date as the date that OJT or testing is completed. Whatever date it happens to be, each employer will need to decide when the person is qualified to do the work and record that date.

Paragraph (b)(9) proposes that if an employee's qualification status was transferred from another entity with an approved program, the employer must maintain a copy of the training record from that other entity. The RSAC proposed the same requirement, but mentioned each type of other entity such as ''another employer or FRA-approved training organization or learning institution.'' The term ''entity'' is intended to include all these other types of businesses without creating a list that could potentially be under-inclusive.

Finally, paragraph (b)(10) proposes the catchall phrase that if any additional information is required by this part, the employer needs to keep that information in its records for each employee.

Paragraph (c) proposes a 3 year record retention requirement for any records that are not individual employee records. The records referred to here would mainly be those kept in accordance with periodic oversight (§ 243.205) and the annual review (§ 243.207). The proposed 3 year window for retention would actually be a bit longer than 3 years because it would be measured as 3 calendar years after the end of the calendar year to which the event relates. Thus, if a test occurred on March 1, 2012, the record would need to be maintained through December 31, 2015.

Paragraph (c) also proposes a requirement that any records that are not individual employee records must be accessible at the system headquarters and at each division headquarters where the test, inspection, annual review, or other event is conducted. Although the language ''system headquarters and at each division headquarters'' may seem to refer to railroads, the intent is for paragraph (c) to apply to each employer, regardless of whether the employer is a railroad or a contractor. As described previously in the analysis to paragraph (a)(2) of this section, FRA intends the term ''system headquarters'' to have the same meaning for railroads as in the definition of that term in § 217.4, and for contractors the term is intended to mean an employer's main headquarters in the U.S. Regarding the term ''division headquarters,'' the term should have the same meaning for railroads as in the definition of that term in § 217.4. In that regulation, ''*division headquarters* means the location designated by the railroad where a high-level operating manager (e.g., a superintendent, division manager, or equivalent), who has jurisdiction over a portion of the railroad, has an office.'' For contractors, the term ''division headquarters'' is intended to have a similar meaning to that of a railroad, but FRA will provide more discretion to each contractor to identify its division headquarters. Generally speaking, if a contractor divides its U.S. operations into regional areas that are managed on a day-to-day basis by one or more high-level managers at a field or branch office (as opposed to the system or main headquarters), then the intent of the regulation is to require those regional offices to maintain accessible records in addition to the maintenance of those records at the system headquarters.

FRA seeks comment on whether this language would cause confusion or should be modified to exempt railroads or contractors from maintaining such records at division headquarters. As previously discussed in the analysis to paragraph (a)(2), FRA anticipates that most employers that are not small entities will want to maintain these records electronically so that the records are accessible everywhere with a company computer loaded with the appropriate software and an internet connection. The electronic accessibility

of records would appear to alleviate the need to require that these records be kept at each division headquarters. Again, it is worth noting that this proposed section contains specific requirements for electronic recordkeeping in paragraph (e).

Paragraph (d) contains the requirements for each employer, training organization, or learning institution to make available those records that it is required to maintain under this part. All such records must be made available to FRA. Also, an employee's records must be made available to the employee (whether or not the person is a current employee or former employee) or any person the employee chooses as long as the employee provides such authorization in writing. The records must be made accessible upon request during normal business hours. Thus, requests made near the close of business on Friday may reasonably not be retrieved until early the following week, unless the employer has normal business hours on weekends.

As with any request for one or more records, the retrieval should be completed contemporaneously with the request, but with the understanding that a reasonable amount of time should be afforded the employer that maintains the record. When the employer maintains the records electronically, expectations for quick retrieval will be higher. Although not specified by this proposed rule, it is reasonable to expect that most records can be made available for inspection and copying/photocopying during the same day that the request is made. In some instances, for example, when the person is a former employee who has not worked at the employer for a few years, it would be understandable if the record were kept off-site in a warehouse and it might take a week or more to retrieve the original file. However, employers are encouraged to scan and electronically maintain records of former employees (in accordance with proposed paragraph (e) of this section) to avoid lengthy retrieval delays. Furthermore, the rule is silent on whether employers and employees may agree to ''copy'' electronic files by sending copies as attachments to an email or saving the electronic file to some other standardized storage disk or device, but FRA believes that it should be an acceptable copying practice.

Paragraph (e) proposes requirements for each employer that chooses to retain the information prescribed in this section by maintaining an electronic recordkeeping system. These requirements were adopted by the RSAC without much debate as they are based on requirements promulgated in other FRA regulations. FRA notes that the conductor certification NPRM published slightly different requirements for electronic recordkeeping on November 10, 2010, and that FRA may want to amend the requirements in this final training rule to conform to the final conductor certification standards. 75 FR 69166. FRA invites comment on these procedures.

Paragraph (f) proposes a transfer of records requirement with the goal of preserving training records that might otherwise be lost when an employer ceases to do business. When an employer ceases to do business and its assets will be transferred to a successor employer, there may be a question of whether the successor employer has any obligation to maintain the records for the employer company it has acquired. The answer is an emphatic yes. FRA has accepted the RSAC recommendation that the successor employer shall retain all records required to be maintained under this part for the remainder of the period prescribed in this part. As most successor employers would want to retain at least some portion of the acquired employer's safety-related railroad employees, it is expected that successor employers would have an interest in maintaining these records even if there was no specific regulatory requirement.

Section 243.205 Periodic Oversight

There are two central purposes to conducting periodic oversight under a training rulemaking. One central purpose is to take notice of individual employees who are in non-compliance and to take corrective action to ensure that those specific employees know how to do the work properly. In some instances, the employee might need coaching or retraining, especially if the person has not had much experience doing the work. In other instances, training may not be an issue and other remedial action may be appropriate. A second central purpose in conducting periodic oversight is to look at all of the oversight data as a whole to detect patterns of non-compliance. The annual review proposed in § 243.207 is intended to spur such a global review of training and trigger adjustments that improve the effectiveness of training courses. Taken together, these oversight and review actions should lead to significant improvements in compliance and the overall quality of training programs. The recording of oversight, and the identification of problem areas, is intended to compel each employer to focus on how a training course can be improved to place greater emphasis on the causes of such non-compliance.

During the RSAC process, FRA initially took the position that each employer should be required to conduct annual task proficiency oversight over each safety-related railroad employee. After significant deliberations, FRA agreed that such extensive oversight would be costly, burdensome, and potentially overreaching given the statutory mandate for this rulemaking. This proposed rule contains a compromise that, while adding costs and burdens, is intended to be narrowly focused on closely monitoring compliance with the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. These particular compliance issues are not currently required to be as closely monitored as train movements and other railroad operations. For that reason, FRA would like to close that gap and require each employer to conduct periodic oversight covering compliance with the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety.

Paragraph (a) proposes the general periodic oversight provision and, as explained in the previous paragraph, limits the required testing and inspection oversight to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. When FRA discussed this recommended provision with the RSAC, FRA clarified that the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety that FRA is referring to are currently limited to 49 CFR part 214 (Railroad Workplace Safety), part 218 (Railroad Operating Practices), and part 220 (Railroad Communications). Periodic oversight means regularly conducting both tests and inspections. In this context, a test is conducted by a qualified supervisor who changes the work environment so that one or more employees would need to act to prevent non-compliance. An inspection involves a qualified supervisor observing one or more employees at a job site and determining whether the employees are in compliance. FRA clarifies the RSAC recommendation to ensure that this provision requires that each employer must ''adopt and comply with a program'' to conduct the periodic oversight tests and inspections. FRA does not want to give the impression that the regulation would only require conducting the periodic oversight without adopting a written strategy explained in the training program filed

with FRA. FRA proposes that the program of periodic oversight must commence on the day the employer files its program with FRA; however, if the employer has not yet commenced operations when the program is filed, the employer would begin its oversight program on the same day that it commences operations. Paragraph (a) also reiterates that the purpose of gathering the data is to determine whether systemic performance gaps exist, and to determine if modifications to the training component of the program are appropriate to close those gaps.

Paragraph (b) proposes to exempt railroads from conducting periodic oversight under this part on certified locomotive engineers and conductors as those safety-related railroad employees are already covered (or will soon be covered) by similar requirements found elsewhere in this chapter. The intent of the exemption is not to eliminate locomotive engineers and conductors from tests and inspections of Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety; instead, the intent is not to require a duplication of efforts already being made by railroads under other Federal requirements. Meanwhile, the results of the assessments required by parts 240 and 242 are required to be considered in determining if changes in a railroad's training programs are necessary to close any proficiency gaps found during those assessments. For example, inspections and tests might reveal that many locomotive engineers and conductors could have used a railroad-supplied cell phone during an operation in which the railroad supplied radio was not working; meanwhile, the employees claimed that they did not use the railroad-supplied cell phone because they were confused about when it was sanctioned for use versus when it was prohibited. Considering that example, an employer should review its part 220, subpart C training on electronic devices and decide whether there are ways to improve conveying the legal uses of the cell phone. The review and action are required by this part even though the periodic oversight was done to comply with one or more other parts of this chapter.

Although only proposed paragraph (c) contains the heading ''[r]ailroad oversight,'' proposed paragraphs (c) through (f) need to be read together in order to fully understand the proposed responsibilities for each railroad as it performs oversight. Paragraph (c) begins by proposing a requirement that each railroad identify supervisory employees, by category or subcategory, responsible for conducting periodic oversight tests and inspections for the safety-related railroad employees that the railroad authorizes to perform safety-related duties on its property. This requirement includes contractors that may be working on the railroad's property, but there are a number of caveats to that portion of the requirement that are addressed by the exceptions in paragraph (c) and the subsequent paragraphs in this proposed section. For example, paragraph (c)(1) qualifies the requirement in paragraph (c) by stating that a railroad is not required to provide oversight for a contractor's safety-related railroad employees if that contractor is required to conduct its own periodic oversight because it meets the criteria specified in paragraph (g) of this section. The wording of paragraph (c)(1) differs slightly from the RSAC recommendation but the intent is the same and commenters should find the clarity of the proposed exception an improvement. The RSAC recommended language suggested that a railroad would have to figure out whether the contractor was performing the oversight in addition to meeting the paragraph (g) requirements of this section; in the RSAC recommendation, an undue burden would be placed on a railroad to determine if a contractor was actually performing the oversight. Paragraph (c)(2) provides an exception to a railroad providing periodic oversight to a contractor's employees when the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories or subcategories. For example, this second exception would apply when a railroad contracts out for all its signal system installation and maintenance work and does not employ any supervisory employees who are qualified to install or maintain signal systems. Paragraph (c)(3) provides that a railroad does not have to conduct oversight for any supervisory employee identified by the railroad as responsible for conducting oversight in accordance with this section. This third exception is based on an RSAC recommendation and the concern that it is often logistically difficult to arrange periodic oversight of supervisors who are the ones generally tasked with conducting oversight for non-supervisory employees. FRA agrees that periodic oversight can be meaningful without requiring oversight of those supervisory employees identified by the railroad as responsible for conducting oversight.

Proposed paragraph (d) further limits a railroad's requirement to conduct periodic oversight of a contractor's employees. In situations where a railroad is obligated to conduct oversight of a contractor's employees, it is proposed that a railroad would not be required to perform operational tests of safety-related railroad employees employed by a contractor. As explained in the analysis to paragraph (a) of this section, a test is conducted by a qualified supervisor that changes the work environment so that one or more employees would need to act to prevent non-compliance. FRA accepted the RSAC recommendation that conducting operational tests, sometimes known as efficiency tests, on contractor employees who may be working on projects of varying duration, would put an undue burden on railroads. That is, it could be difficult to find opportunities to set up operational tests when contractors are doing a wide-variety of projects that may not be suitable for creating a test and for which there may be insufficient time to set up a test given other supervisory responsibilities.

Although paragraph (d) does not require a railroad to conduct operational tests, this proposed provision does not prohibit it either. Additionally, paragraph (d) would still leave a railroad with the responsibility to conduct inspections of a contractor's employees if no exceptions applied. FRA accepts this RSAC recommendation because the inspection requirement should not be overly burdensome on railroads and yet still provide opportunities for effective oversight.

A railroad's obligations to conduct oversight are further qualified by proposed paragraph (e). In order to relieve a railroad's burden, FRA accepts the RSAC recommendations that provide each railroad great latitude to conduct oversight when it is convenient for the railroad. Thus, in paragraph (e)(1), FRA proposes that a railroad may choose to require supervisory employees to perform oversight test and inspection sessions when these sessions are scheduled specifically to determine if safety-related employees are in compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. For example, some maintenance-of-way worksites may have a mix of railroad employees and employees from multiple contractors. It may often be difficult to distinguish a railroad employee from a contractor. As long as the supervisory employee is qualified to conduct the oversight, the supervisory employee would have the discretion to test or inspect any of the safety-related railroad employees at the

worksite—regardless of what company employed the person.

In paragraph (e)(2), FRA proposes that a railroad may choose to require supervisory employees to perform oversight of safety-related railroad employees employed by a contractor when a qualified railroad supervisory employee's duties place him or her in the vicinity of one or more safety-related railroad employees employed by a contractor and performing the oversight would result in minimal disruption of this supervisory employee's other assigned duties. Unlike the paragraph (e)(1) situation where the supervisor is at the worksite with the intention to perform oversight, paragraph (e)(2) addresses the situation where the supervisor is at the worksite and either observes non-compliance in his or her normal duties or finds him or herself with the time and opportunity to conduct the oversight.

Paragraph (f) proposes that when any railroad finds evidence of contractor employee non-compliance during the periodic oversight it shall provide that employee and that employee's employer with details of the non-compliance. This proposed requirement is based on an RSAC recommendation and it reinforces the central purposes of periodic oversight. Those central purposes were elaborated on in the introductory paragraph for the analysis to this proposed section. In summary, the two central purposes of periodic oversight are to (1) take corrective action to ensure that specific employees know how to do the work properly and (2) review the oversight data as a whole to detect weaknesses that can be addressed by improvements to the training program. This proposed requirement is not referring to non-compliance with any type of employer rule; instead, the concern addressed by proposed paragraph (f) is intended to only require a railroad to notify a contractor of non-compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. Although some Working Group members thought it would be sufficient if FRA addressed this issue in the preamble or this analysis, FRA has decided to make an affirmative change to the RSAC recommended regulatory text so that there would be no possible chance of confusion.

Paragraph (g) proposes that each contractor be required to conduct periodic oversight tests and inspections of its safety-related railroad employees provided that certain conditions are met. If any condition is not met, the contractor is exempt from being required to perform the oversight. For instance, in paragraph (g)(1) there is a small business exemption for any contractor that employs 15 or fewer safety-related railroad employees. FRA accepts the RSAC recommendation in paragraph (g)(2) that a contractor should typically be responsible for periodic oversight of its own employees if it trains its own employees directly. If a contractor uses a railroad, a training organization, or a learning institution to train a category or subcategory of employees, then the contractor probably does not have the ''in-house'' expertise needed to conduct periodic oversight. Finally, paragraph (g)(3), proposes that a contractor would not be required to perform periodic oversight if the contractor does not employ supervisory safety-related railroad employees capable of performing the oversight. In the application of this proposed requirement, a contractor will need to determine whether it is exempt based on each occupational category or subcategory of safety-related railroad employees that the contractor employs. For example, a contractor would be required to perform oversight of its operators of roadway maintenance machines equipped with a crane if the contractor employs 16 or more safety-related railroad employees, trains its operators of roadway maintenance machines equipped with a crane by using one or more designated instructors it employs, and employs one or more supervisors capable of performing the oversight of those operators of roadway maintenance machines equipped with a crane. If the same contractor also employs only one employee capable of inspecting and maintaining wayside signal systems, then the contractor would not be required to conduct periodic oversight of that signal employee because the employer cannot meet the conditions in proposed paragraphs (g)(2) and (g)(3).

Paragraph (h) proposes a requirement that would allow a railroad and a contractor to agree that the contractor will provide the periodic oversight, notwithstanding the requirements of this section that impose the requirements on either the railroad or the contractor. During the RSAC deliberations, FRA heard discussions that contracts between railroads and contractors will often specify which party is responsible for complying with certain laws, regulations, or orders where either party could potentially be held responsible. FRA recognizes that there may be some instances where a contractor would not be required under paragraph (g) to conduct periodic oversight but that it is willing to accept the oversight responsibility in order to secure a contract with a railroad. When devising this proposed option, the RSAC considered that this situation would otherwise be handled by the railroad providing the oversight and that the railroad would be expected to have supervisory employees qualified to do the oversight. With that understanding, the RSAC proposed that in order to accept this oversight responsibility, the contractor would need to address in its program that the railroad has trained the contractor employees responsible for training and oversight. In other words, the contractor may accept responsibility for the oversight, but not until the railroad trains the contractor's supervisory employee and qualifies that person to do the oversight; thus, the railroad has some obligation to ensure that the contractor's supervisory employees are capable of conducting the oversight before abdicating what would otherwise be the railroad's responsibility.

Paragraph (i) proposes the requirements for retaining oversight records. At a minimum, it proposes that each employer that conducts periodic oversight in accordance with this section must keep a record of the date, time, place, and result of each test or inspection. Without such basic records, it would be impossible to audit an oversight program and detect whether it has been implemented. The records shall specify each person administering tests or inspections and each person tested so that audits can confirm that the people administering the oversight are qualified to perform the oversight. The record shall also provide a method to note whether the employee complied with the monitored duties, and any interventions used to remediate non-compliance; in keeping such records, audits can confirm that employers are using oversight to achieve the central purposes of oversight correcting individual behavior and improving training. Finally, FRA does not want to require duplication of oversight programs; thus, where periodic operational oversight is required in accordance with § 217.9 of this chapter, a railroad may specify this overlap in its program submitted in accordance with part and is not required to duplicate that oversight.

Paragraph (j) contains the statement that the records required under this section are subject to the requirements of § 243.203, which is the section containing the recordkeeping requirements of this part. The RSAC recommended this paragraph and FRA agrees that it should be a requirement. However, FRA would appreciate

comments on whether this paragraph is necessary given that the requirements of § 243.203 would apply to any records of period oversight required under this part even if paragraph (j) was deleted. FRA is willing to consider retaining paragraph (j) if commenters suggest that it provides a useful reminder that records of periodic oversight must be retained and that without the paragraph some employers might not grasp that the recordkeeping requirements apply under these circumstances.

FRA acknowledges that it made several word and phrase changes in this section as compared to the RSAC recommendation. FRA believes that the intent of the proposed requirements has not changed and the changes are intended to address word choices that, when the words or phrases were used in RSAC meetings, were thought to be interchangeable. For example, in paragraph (b), FRA changed the term ''task proficiency oversight'' to simply ''periodic oversight.'' During the early RSAC deliberations, FRA proposed that each employee be observed to determine that each employee was proficient in performing safety-related tasks; as that requirement dropped out, the language needs to be standardized. Similarly, in paragraphs (e) and (e)(1), FRA changes the term ''oversight inspection'' to simply ''oversight.'' As FRA has drafted this notice, it realized that we meant the term oversight to mean both tests and inspections, so the term oversight inspection would be too limiting. Paragraph (f) of the RSAC recommended language explained that a requirement would be the ''minimum'' action required under certain particular circumstances. FRA deletes this qualifier as this rule is intended to contain ''general minimum training and qualification requirements'' (*see* § 243.1(b)) and thus it is unnecessary to restate this qualifier elsewhere in this proposed part. Also, in paragraph (i), FRA changed the RSAC suggested term ''periodic oversight and inspections'' to ''periodic oversight.'' Again, if the term periodic oversight refers to both tests and inspections, there is no reason to add the qualifier of ''and inspections.''

FRA seeks comment on a potential scope issue that would allow some situations where safety-related railroad employees would not be subject to any oversight. Those situations would likely occur when a short line railroad hires a contractor with 15 or fewer safety-related railroad employees. It is possible that the short line railroad would not have the supervisors with the expertise necessary to conduct the oversight and the contractor would be too small to be required to do it themselves per the proposed requirements. During the RSAC deliberations, FRA acknowledged that the recommendation included a narrow number of employers that would not be covered. FRA expressed concern that including every employer would place a debilitating burden on the smallest employers.

Section 243.207 Annual Review

In the analysis to the previous section, the opening paragraph mentions that one of the central purposes in conducting periodic oversight is to look at all of the oversight data as a whole to detect patterns of non-compliance. Additionally, if other relevant data is analyzed on a regular basis, that data could also be used to detect non-compliance trends. The purpose of detecting these trends is so that employers can determine if knowledge or performance gaps exist in the current training and use that information to plot ways to fill in those gaps. For this reason, FRA is proposing in paragraph (a) of this section that each railroad with at least 400,000 total employee work hours per year must conduct an annual review in accordance with the requirements of this section. This proposed section only applies to railroads except that, in accordance with paragraphs (a) and (f), contractors must use any information provided by railroads to adjust training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety.

It is likely that in most instances, it would be determined that the current method of formal training covers the subject matter, but some aspect of the training could be improved. For example, it might be determined that the training does not place enough emphasis on compliance with one or more specific tasks. Greater emphasis could be placed on the task by increasing the amount of time covering how to perform the task and the problems that could be encountered when conducting the task. The course materials should be reviewed to see if they could be improved for clarity. In other instances, especially when the pattern of non-compliance is detected in a safety-related task, adding an OJT component or adding more repetitions within the OJT may increase an employee's proficiency and lead to more lasting compliance. In still other instances, adding opportunities for individualized instruction and feedback could cut down on non-compliance. It could also be determined that a particular instructor is ineffective, or some other aspect of the way the course is taught is not conducive to learning.

There are certainly a number of ways to improve training and that is why it is important that each person a railroad designates to conduct the annual review should be familiar with the training program filed with FRA. FRA does not propose any knowledge requirements on the designated person requirement in paragraph (c) and invites comment on whether there should be any requirements. Instead, the proposal considers that the person designated to conduct the review will need to have extensive information about the training program and individual course material, as well as direct access to shape the methods of delivery. As previously explained, the annual review is intended to effect change in how training is delivered to improve performance and should not be viewed as the end itself. In other words, if the annual report identifies gaps, the report itself has little value unless it is used to change the training program in order to improve knowledge acquisition and safety performance.

Although proposed paragraph (a) would eliminate the annual review requirement for those short line railroads with less than 400,000 total employee work hours per year, paragraph (b) contains the proposed requirement that each railroad that is required to conduct periodic oversight in accordance with § 243.205 of this part shall also be required to conduct an annual review, as provided in this section, and shall retain, at its system headquarters, one copy of the written annual review. This proposed paragraph is based on an RSAC recommendation. The intention is that, except for the smallest railroads, any railroad that conducts periodic oversight must also conduct an annual review.

The analysis necessary to do the annual review must be put in writing to prove that it was conducted. It would be expected that the document would speak for itself in that it would describe what data the review is based on and how the conclusions are reached. As with other written records required by this proposed part, it would be permissible for the annual review to be kept electronically pursuant to the recordkeeping requirements found in § 243.203(e) of this proposed part. Please note that the written annual review and the records supporting the analysis in the annual review would need to be maintained for 3 calendar years after the end of the calendar year to which the annual review relates and made available to FRA pursuant to

§ 243.203(c) and (d) of this proposed part.

FRA accepts the RSAC recommendation that a system-wide annual review should be sufficient, even for those railroads large enough to have divisions. Some railroads with divisions may choose to conduct division-wide annual reviews in addition to system-wide reviews. It is possible that a knowledge or performance gap could be identified in one division but not system-wide. Railroads large enough to have divisions may want to target modifications to training for safety-related railroad employees in certain divisions that face particular hazards or trend toward non-compliance, without unnecessarily incurring additional training expenses system-wide. However, requiring that each railroad address gaps on a division level would introduce a level of complexity that would likely go beyond what is necessary to implement an effective annual review. After all, each training program is based on training provided system-wide, not by division.

Paragraph (c) proposes a requirement that each railroad designate one or more person to conduct the written annual review. Although the proposed rule does not specify who that person must be, FRA envisions that each railroad would choose one or more managers at the system-wide level with significant knowledge of the railroad's training and oversight programs. For some railroads, a high level manager representing each discipline (*e.g.,* track, mechanical, signal, operations, etc.) might participate. However, FRA only proposes requiring that at least one person be designated because the agency wants to be able to address any questions related to the annual review with the person that the railroad designates as responsible for conducting the written review.

Proposed paragraph (c) also contains a list of types of data that must be analyzed in accordance with the annual review. Given prior analysis discussion regarding the purpose of periodic oversight, it should come as no surprise that paragraph (c)(1) proposes that periodic oversight data required by § 243.205 must be analyzed for purposes of the annual review.

Paragraph (c)(2) proposes a requirement that reportable accident/incident data, as defined in part 225 of this chapter, must also be analyzed for purposes of the annual review. The inclusion of accident/incident data generated some discussion at the RSAC Working Group meetings. During those meetings, FRA suggested that railroads also consider ''accountable'' injuries, illnesses, and rail equipment accidents. Accountable incidents may be attributable to work exposure or events, but are not required to be reported to FRA; consequently, accountable incidents may generally be categorized as those incidents that pose a lesser safety hazard than those incidents resulting in reportable accidents. Railroads also argued that information attributable to the causes of reportable accidents are less likely to be controversial compared to the causes of accountable incidents. Although FRA would encourage each railroad to consider accountable incident data when conducting an annual review, FRA accepts the RSAC recommendation to limit the requirements for accident data analysis to reportable incidents. Overall, FRA's purpose in requiring analysis of these types of data is to improve training in ways that reduce the number of reportable accidents/incidents. Thus, by addressing the reportable incidents in the annual review, it is proposed that each railroad will focus on this goal.

Paragraph (c)(3) proposes that each railroad consider FRA inspection report data in its annual review. Each year, FRA conducts thousands of audits and inspections of railroad safety compliance. Many of those inspections find instances of non-compliance, although not all of those non-complying instances result in FRA taking enforcement action as FRA may exercise enforcement discretion. *See* 49 CFR part 209, app. A. Whether or not FRA took enforcement action should be irrelevant to the analysis necessary for detecting knowledge or performance gaps for a railroad's annual review. The thrust of FRA's argument is that, as a safety agency, we often find safety problems—either reaffirming that the railroad has a compliance problem or uncovering a concern previously undetected by the railroad's compliance officers. FRA recognizes that each railroad will often take remedial action to immediately correct non-compliance, whether or not FRA requires that the remedial action be taken. *See* 49 CFR part 209, subpart E. In the context of this proposed rule, FRA wants to require that each railroad take the additional step of looking for trends of non-compliance and how training courses or programs can be adjusted to stop those trends from getting worse. FRA heard some complaints during the RSAC Working Group meetings that not every railroad currently has an electronic database or other method to track non-compliance detected by FRA inspections. For those railroads that may have difficulty detecting such trends with FRA inspection data, FRA suggests that those railroads contact FRA for help as FRA anticipates that it could readily provide meaningful inspection data for analysis.

Paragraph (c)(4) proposes that the annual review include analysis of employee training feedback received though a course evaluation process, but only if such feedback is available. It is anticipated that most training courses and programs have built in mechanisms for obtaining employee feedback. For example, it is common for a survey to be handed out at the end of a training course and for participants to rank the quality of the course instructor, the training materials, and the training generally. There is also typically an opportunity for participants to comment about any aspect of the training by writing in a comment. The proposed rulemaking is not intended to require employee participant feedback where none existed previously; instead, the proposal is to use that information, when it is being gathered, and to use it productively to further identify gaps in knowledge or performance. FRA would expect that this information would be used for similar purposes now if it is already being gathered. By including the analysis of the employee feedback in the annual review, the feedback may be used to strengthen or weaken the argument for a modification to a training course or program.

Paragraph (c)(5) proposes that the annual review include analysis of feedback received from labor representatives, but only if such feedback is available. Like the employee training feedback through a course evaluation, the feedback received from labor representatives may be subjective but of significant value. Labor representatives may be able to act as a conduit for comments for an employee that is concerned about raising the issue directly to the railroad. In addition, labor representatives may detect non-compliance trends or learning difficulties among a union's members through conversations or surveys. Furthermore, where a union represents employees on more than one railroad, the labor representatives may have knowledge about best practices on other railroads that may be transferrable to the training program of another railroad. For all these reasons, the RSAC Working Group recommended, and FRA accepted, this proposed requirement.

Paragraph (d) proposes a requirement for the railroad's designated person to coordinate any necessary adjustments to the initial and refresher training programs based upon the results of the annual review. This proposed

requirement is a call for action when the results of the annual review strongly suggest changes are necessary in the interests of improving the program. FRA does not expect that every course or program will require an adjustment every year. It is expected that some trends or data may be inconclusive. In other instances, a trend or gap may be identified but an effective way to address the problem through a modification to the training program or a particular course is not found. Although FRA would prefer that each railroad take some affirmative action to address knowledge or performance gaps, FRA does not intend to take enforcement action against a railroad that acknowledges a trend but decides to defer modifications to training in order to take the time to properly assess the causes of the underlying non-compliance and determine the best options available to improve compliance.

Paragraph (d) also contains the railroad's option to allow the annual review required under this section to be conducted in conjunction with any periodic review required under part 217 of this chapter. FRA is not looking for railroads to duplicate reviews already required under other Federal regulations. *See* 49 CFR 217.9(e) and (f). It is expected that the part 217 reviews could be incorporated into the proposed reviews required by this section. However, compliance with part 217 of this chapter does not automatically ensure complete compliance with this section as it mainly would be used only to comply with paragraph (c)(1) of this section.

Proposed paragraph (e) contains a requirement for a railroad to notify any contractor it utilizes about the contractor amending its training program if the railroad's annual review of its own program reveals information that would also improve the contractor's program. The railroad must determine whether the safety-related railroad employees supplied by each contractor it utilizes are trained by the contractor or some other entity. If a contractor trains its own safety-related railroad employees, the railroad will have a duty to provide the contractor with the information needed to make the same adjustments in the contractor's program that was made in the railroad's program.

Likewise, paragraph (f) requires that contractors have a duty to use any information provided by railroads to adjust training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. If the information the contractor receives from a railroad is not so narrowly focused, the contractor may choose to ignore the information. FRA does not want contractors to receive information and not act. When RSAC made this recommendation, it did not consider that there could a situation where a contractor believes that making the modification requested by the railroad is contrary to safety or is otherwise not beneficial. FRA seeks comment regarding whether this proposed section should contain a provision explaining what a contractor should do if it disagrees with the railroad's information that a modification to the training program is necessary.

Paragraph (g) proposes a deadline of September 1 of each calendar year for each railroad, to which this section applies, to complete its annual review for the previous calendar year. FRA initially suggested a March 1 deadline, but during the RSAC Working Group meetings some railroads suggested September 1 would work better based on their current training schedules. That is, the major railroads conduct all regularly scheduled training during the first half of each year. Consequently, it would be difficult to conduct annual reviews during the first half of each year as the people likely designated to help with the review would be busy implementing the training. Also, it would be difficult for each railroad to immediately implement any modifications to a training program that is already underway. By requiring the annual review to be completed no later than September 1, each railroad should have several months to implement any modifications in the training programs prior to January 1 of each calendar year.

Section 243.209 Railroad Maintained List of Contractors Utilized

One issue that was repeatedly raised during the RSAC meetings was that employees of contractors routinely work alongside employees of railroads. From an enforcement viewpoint, it is essential that FRA be able to identify which employees work for railroads and which for contractors. When an employee works for a contractor, FRA can sometimes find it an additional burden to figure out basic contact information for the contractor employer. This proposed section is intended to require each railroad to maintain a list of the contractors it uses and some basic contact information about each of those contractors.

Paragraph (a) proposes that each railroad utilizing contractors to supply the railroad with safety-related railroad employees shall maintain a list, at its system headquarters, with information regarding each contractor utilized. FRA provides for an exception to this requirement when two conditions are met. The first condition for the exception to apply is that the railroad must qualify each of the contractor's safety-related railroad employees that it uses, and the second condition requires that the railroad maintain the training records for each of the contractor's safety-related railroad employees utilized. FRA is willing to permit this exception because a railroad that is both qualifying and keeping training records for the contractor's employees is, in effect, responsible for the contractor's training under this part. Thus, if there is a training issue that arises, FRA may be able to address its concern directly with the railroad.

Paragraph (b) proposes the three items that must be contained in a railroad's listing of contractors. It is proposed that the listing include (1) the full corporate or business name of the contractor, (2) the contractor's primary business and email address, and (3) the contractor's primary telephone number. With this basic information, FRA should be able to track down a contractor to follow-up during any audit or investigation.

Paragraph (c) proposes that the information contained in the listing be continuously updated as additional contractors are utilized, and no contractor information shall be deleted from the list unless the contractor has not been utilized for 3 years from the end of the calendar year the contractor was last utilized. The proposed requirements are intended to keep information on the list for a reasonable length of time but allow removal when the information becomes stale. This information should likely not be necessary 3 years from the end of the calendar year the contractor was last utilized as most audits or investigations would take place inside that time frame.

FRA acknowledges to its RSAC members that the wording of this section was changed from the RSAC recommendation; however, the intent of the changes was to improve clarity and not change the intent. For example, some language in the RSAC recommendation was worded in the negative; this proposed rule switches the wording so it reads in the positive and is easier to understand. Also, as FRA acknowledged earlier in this analysis, FRA deleted the RSAC's recommended paragraph (c) and edited § 243.203(b)(6) to capture the same concept; the provision contained a good idea, but seemed out of place. The removed recommendation would have required that if a railroad elects to train some or all of a contractor's safety-

related railroad employees, the listing should also include the course name and unique identifier for each course so designated and a listing of all contractor employees trained. FRA deletes that recommended requirement because the burden for maintaining records should fall on the employer, not the railroad. FRA improved on the RSAC recommendation by proposing that the contractor will need to maintain training records of its employees whether those records are received from another business (which could be a railroad), a training organization, or a learning institution. Railroads that are in the business of training safety-related railroad employees from other railroads or contractors would need to maintain those records in order to retain such training business from other employers.

Appendix A

In the final rule, Appendix A will contain a penalty schedule similar to that FRA has issued for all of its existing rules. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless interested parties are welcome to submit their views on what penalties may be appropriate.

VIII. Regulatory Impact and Notices

A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

This proposed rule is a significant regulatory action within the meaning of Executive Order 12866, Executive Order 13563, and the U.S. Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this proposed rule.

The RIA details estimates of the costs likely to occur over the first twenty years after its effective date and a breakeven analysis that details the reductions in human factor-caused accidents that would be necessary for the proposed rule to breakeven in the same timeframe. Informed by its analysis of the economic effects of this proposed rule, FRA concludes that this proposed rule would likely result in positive net benefits. FRA believes the proposed rule would achieve positive net benefits primarily through requiring that training programs include ''hands-on'' training components, which scientific literature has shown to be much more effective at reducing human factor-caused accidents than traditional training.[1] The costs that may be induced by this proposed rule over the twenty-year period considered include: the costs of revising training programs to include ''hands-on'' training where appropriate, as well as the costs of creating entirely new training programs for any employer that does not have one already; the costs of customizing model training programs for those employers that choose to adopt a model program rather than create a new program; the costs of annual data review and analysis required in order to constantly improve training programs; the costs of revising programs in later years; the costs of additional time new employees may have to spend in initial training; the costs of additional periodic oversight tests and inspections; the costs of additional qualification tests; and the costs of additional time all safety-related railroad employees may have to spend in refresher training. The summed total of the estimated costs over the first twenty years of this proposed rule equals about $81.6 million, discounted at a 3 percent discount rate, and about $64.1 million, discounted at a 7 percent discount rate (in 2010 dollars).

The table below summarizes the costs considered in the RIA, summed over the twenty-year period analyzed and discounted to present value using 3 percent and 7 percent discount rates.

Cost element	Twenty-year total (3% discount rate)	Twenty-year total (7% discount rate)
Creating and revising training programs and performing annual reviews, original program users	$1,999,728	$1,564,484
Creating and revising training programs and performing annual reviews, model program users	179,116	129,245
Creating and revising training programs, model program users with <400k annual labor hours	4,751,465	3,428,505
Customizing model programs	910,245	842,919
Designating employees by class or craft	771,316	709,480
Additional time in initial training	16,539,877	12,235,174
Additional time in refresher training	25,456,709	18,831,293
Periodic oversight tests and inspections	15,242,583	11,275,517
Additional qualification testing	15,741,416	15,075,836
Total	81,592,455	64,092,452

FRA has performed a breakeven analysis for this proposed rule. FRA expects that improving training primarily by requiring the inclusion of ''hands-on'' elements where appropriate will reduce the number of human factor-caused railroad accidents. Rather than assume any specific reduction will be achieved, FRA has calculated the percentage of human factors accidents that would need to be prevented by this proposed rule to at least offset the total costs of the proposed rule. Reductions in human factors accidents would result in fatalities avoided, injuries avoided, and property damage avoided, all of which can be monetized and quantified using FRA safety data.

List of benefits of reducing human factor-caused accidents
Fatalities avoided
Injuries avoided
Property damage avoided

In addition, human factor-caused railroad accidents can result in train delay and environmental damages, emergency response, but FRA does not have data with which to estimate those costs. Human factors also play a role in limiting the consequences of accidents—in other words reducing the severity of their outcomes. Some FRA regulations are focused on this and thus this proposed rule has the potential to result in improvements in this area as well.

Evaluated at either the three or seven percent discount rate, FRA estimates that this proposed rule will break even if it results in a twenty-year total

[1] For a review and citation information of this scientific literature, please see the Regulatory Impact Analysis that accompanies this NPRM and that has been placed in the docket.

reduction in human factors accidents of 7.3 percent using a 3 percent discount rate, and a reduction of 7.1 percent using a 7 percent discount rate. The table below details the total present discounted annual costs of the proposed rule. The table also shows the total present discounted annual costs of human factors accidents that would be incurred over the next 20 years without this proposed rule, as well as the percent reduction in human factors accidents that would be necessary for the accident reduction benefits to justify implementation of the proposal. This calculation takes into account various recent and concurrent initiatives to address human factor-caused accidents including implementation of positive train control systems, revisions to hours of service regulations, development of proposed conductor certification standards and a proposed roadway worker protection rule, and implementation of programs to address fatigue and electronic device distraction among others.

Total present discounted cost of HF accidents (3% discount rate)	Total present discounted costs (3% discount rate)	Percent reduction for breakeven (3% discount rate)	Total present discounted cost of HF accidents (7% discount rate)	Total present discounted costs (7% discount rate)	Percent reduction for breakeven (7% discount rate)
$1,246,926,928	$81,592,455	7.3	$1,020,012,541	$64,092,452	7.1

Given the role and prevalence of human factor-caused accidents in the railroad industry and the relationship between quality training and safety, FRA believes it is not unreasonable to expect that improvements in training as proposed in this rule would yield safety benefits that will exceed the costs. FRA requests comments, including any relevant data and information, on all aspects of the RIA.

B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment

To ensure that the potential impact of this rulemaking on small entities is properly considered, FRA developed this rule in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's policies and procedures to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct an initial regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA is publishing this initial regulatory flexibility analysis to aid the public in commenting on the potential small business impacts of the proposals in this NPRM. We invite all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. We will consider all comments received in the public comment process when making a determination in the Final Regulatory Flexibility Assessment.

As discussed in earlier sections of this preamble, FRA is proposing regulations to establish minimum training standards for each category and subcategory of safety-related railroad employee. The proposed rule would require each railroad or contractor that employs one or more safety-related railroad employee to develop and submit a training program to FRA for approval and to designate the qualification of each such employee. As part of that program, most employers would need to conduct periodic oversight of their own employees to determine compliance with Federal railroad safety laws, regulations, and orders applicable to those employees. The proposal would also require most railroads to conduct annual written reviews of their training programs to close performance gaps. Furthermore, FRA proposes specific training and qualification requirements for operators of roadway maintenance machines that can hoist, lower, and horizontally move a suspended load. Finally, FRA proposes minor clarifying amendments to the existing training requirements for railroad and contractor employees that perform brake system inspections, tests, or maintenance.

Description of the Reasons That Action by the Agency Is Being Considered

Pursuant to the Rail Safety Improvement Act of 2008 § 401(a), Public Law 110–432, 122 Stat. 4883, (Oct. 16, 2008) (codified at 49 U.S.C. 20162) Congress required the Secretary of Transportation to establish minimum training standards for safety-related railroad employees and the submission of training plans from railroad carriers, contractors, and subcontractors for the Secretary's approval.

Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

FRA is addressing the RSIA's statutory mandate to establish minimum training standards for safety-related railroad employees and the submission of training plans in this rulemaking by proposing that each employer of one or more safety-related railroad employees, whether the employer is a railroad, contractor, or subcontractor, be required to train and qualify each such employee on the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. The proposal would also require that the training program developed by each employer be submitted to FRA for approval.

The scientific literature on training in general and FRA's own experience with training in the railroad industry show a clear link between the quality of training programs—including whether training is engaging or ''hands-on''—and safety. Even though rail transportation in the United States is generally an extremely safe mode of transportation and rail safety has been improving, well-designed training programs have the potential to further reduce risk in the railroad environment.

The main goal of this proposal is to improve railroad safety by ensuring that safety-related employees receive appropriate training that takes into consideration the type of activities they perform and analysis of relevant data.

Description of and, Where Feasible, an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

''Small entity'' is defined in 5 U.S.C. 601 (Section 601). Section 601(3) defines a ''small entity'' as having the same meaning as ''small business concern'' under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not

dominant in its field of operation. Section 601(4), likewise includes within the definition of ''small entities'' not-for-profit enterprises that are independently owned and operated, and are not dominant in their fields of operation. Additionally, section 601(5) defines ''small entities'' as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. The U.S. Small Business Administration (SBA) stipulates in its ''Size Standards'' that the largest a railroad business firm that is ''for-profit'' may be, and still be classified as a ''small entity,'' is 1,500 employees for ''Line Haul Operating Railroads'' and 500 employees for ''Switching and Terminal Establishments.''

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final policy that formally establishes ''small entities'' as railroads which meet the line haulage revenue requirements of a Class III railroad.[2] The revenue requirements are currently $20 million or less in annual operating revenue. The $20 million limit (which is adjusted by applying the railroad revenue deflator adjustment) [3] is based on the Surface Transportation Board's (STB) threshold for a Class III railroad carrier. FRA is using the STB's threshold in its definition of ''small entities'' for railroads affected by this rule. FRA has also adopted the STB threshold for Class III railroad carriers as the size standard for railroad contractors.[4] FRA estimates that 720 railroads would be affected by this proposed rule. This number equals the number of railroads that reported to FRA in 2009, minus those railroads that are tourist, scenic, or historic railroads and are not part of the general system (these railroads are exempted from the proposed rule). Of those railroads, 46 are Class I, Class II, commuter, and intercity passenger railroads. The remaining 674 railroads are therefore assumed to be small railroads for purposes of this assessment. The proposed rule would affect all employers of safety-related railroad employees, which, in addition to railroads of all sizes, includes contractors and subcontractors who are engaged to perform safety-related duties on railroads. FRA assumes in its RIA that approximately 795 railroad contractors and subcontractors exist, based on conversations with industry experts. That figure of 795 includes 155 well-established track and signal maintenance contractors, 500 very small (1–4 employee) or relatively new track and signal maintenance contractors, and another 140 contractors who do not perform track or signal maintenance. FRA has previously clarified its definition of small entity with respect to contractors, stating that FRA defines railroad contractors that meet the income level established for Class III railroads as small entities. For purposes of this analysis, FRA conservatively assumes that about 10 of these contractors have annual revenues in excess of $20 million, leaving 785 contractors that are considered small entities that may be affected by this proposed rule. FRA requests comments on this assumption and any information regarding the number of small contractors impacted by this proposal.

Thus, the total estimate of the number of small entities that the proposed rule may affect equals 674 Class III railroads plus approximately 785 contractors, totaling approximately 1,459 entities.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The proposed rule would include several recordkeeping requirements that may pertain to small entities. Each employer would be required to maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs. Each employer would be required to maintain records to demonstrate the qualification status of each safety-related railroad employee that it employs. Each employer that conducts periodic oversight in accordance with the proposed rule would be required to keep a record of the date, time, place, and result of each test or inspection. Each railroad utilizing contractors to supply the railroad with safety-related railroad employees would be required to maintain a list, at its system headquarters, with information regarding each contractor utilized unless: FRA believes that a professional or administrative employee would be capable of maintaining these records. FRA requests comment on whether other skills beyond those typical of a professional or administrative employee would be necessary for the above recordkeeping requirements.

The proposed rule would require employers of safety-related railroad employees to submit a training program to FRA for approval. Each employer's training program will be required to include on-the-job training where appropriate and practicable. However, FRA has given employers the option to adopt a model program, and FRA assumes in this assessment that nearly all small entities will adopt model programs rather than hire training experts to develop a complete, unique program. However, for the sake of the RIA and this assessment, FRA assumes that any entity that adopts a model program would customize the model program, if necessary, and FRA also assumes that such customization should require about 8 hours on average.

Following the initial submission of the training program, employers of safety-related railroad employees would be required to revise the training programs if necessary. The decision on whether to revise a training program would be required annually and would depend on changes in the workplace environment. When new laws, regulations, technologies, procedures, or equipment are introduced into the workplace, for example, it may be appropriate for training programs to be modified accordingly. FRA assumes in the RIA accompanying the NPRM that some annual revision of training programs will be required every year for all employers of safety-related railroad employees. Furthermore, these annual revisions would be required to reflect the results of annual reviews of safety data for all entities with 400,000 or more annual labor hours. For purposes of this analysis, FRA assumes that 4 Class III railroads and 3 small contractors will surpass this threshold. FRA requests comments on this assumption.

Specifically, as in the RIA, FRA assumes that 2 Class III railroads would choose to develop their own programs, while the remaining 674 Class III railroads adopt model programs, and FRA also believes that all 785 small contractors would adopt model programs. As the table below shows, all of the hours spent creating or revising training programs are assumed to be incurred by training experts or craft-specific technical experts at a cost $56.84 per hour, which is the average wage rate in 2010 dollars of Professional and Administrative employees for Class I railroads as reported to the Surface Transportation Board, multiplied by 1.75 to cover overhead.

[2] *See* 68 FR 24891 (May 9, 2003); 49 CFR part 209, app. C.

[3] For further information on the calculation of the specific dollar limit, please see 49 CFR part 1201.

[4] *See* 68 FR 24891 (May 9, 2003)

COSTS OF COMPLIANCE WITH TRAINING PROGRAM REQUIREMENTS FOR SMALL ENTITIES

Small entity group	Action	Cost per hour ($)	Hours required	Cost per small entity ($)
Own-program adopters (2 Class III railroads)	Create or revise and submit initial program in first year.	56.84	160	9,094.40
Own-program adopters (2 Class III railroads)	Perform annual revisions in subsequent years, annual costs, not discounted.	56.84	40	2,273.60
Model program adopters with 400,000 or more annual labor hours (4 Class III railroads, 3 contractors).	Customize and submit relevant parts of model program in first year.	56.84	8	454.72
Model program adopters with 400,000 or more annual labor hours (4 Class III railroads, 3 contractors).	Perform annual review and annual revisions in subsequent years, annual costs, not discounted.	56.84	20	1,136.80
Model program adopters with less than 400,000 annual labor hours (668 Class III railroads, 785 contractors).	Customize and submit relevant parts of model program in first year.	56.84	8	454.72
Model program adopters with less than 400,000 annual labor hours (668 Class III railroads, 785 contractors).	Perform annual revisions in subsequent years as necessary, annual costs, not discounted.	56.84	4	227.36

While the proposed rule does not explicitly require any increase in the amount of time that must be spent in initial or refresher training, such increases may arise for some small entities if those entities add substantial amounts of on-the-job training to training programs. In the RIA, FRA assumes that new hires would require one extra day of initial training as a result of the proposed rule, and that one additional hour of refresher training would be required on average for each employee. However, many small entities typically hire previously qualified safety-related railroad employees who, for example, have previously been trained by a Class I or Class II railroad. It is thus not clear to what extent the cost of additional initial training—to whatever extent that is induced by the proposed rule—would be borne by small entities. FRA requests comment on the prevalence of initial training of safety-related railroad employees by small entities.

Small entities would likely have to incur the cost of additional refresher training, to whatever extent that would be required. FRA assumed one extra hour would be required every three years for each employee, at a cost of $47.46 per hour. FRA requests comment on the amount of additional refresher training small entities would undertake as a result of this proposed rule, and on whether $47.46 per hour of additional refresher training seems appropriate for small entities.

Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA has attempted to avoid any duplication, overlap, or conflict with other federal rules. The proposed rule, at § 243.103(b), states, ''An employer that is required to submit one or more similar training programs or plans in accordance with requirements found elsewhere in this chapter may choose to cross-reference these other programs or plans in the program required by this part rather than resubmitting that similar program or plan. When any such similar program or plan did not include the OJT [on-the-job] training components specified in paragraph (a)(3) of this section, the employer shall supplement its program in accordance with this part by providing that additional information.'' The preamble lists, as examples of other training programs or plans that were previously required elsewhere in 49 CFR, 214.307, 217.9, 217.11, 218.95, 236.905, and 240.101.

Additionally, the proposed rule would avoid possible duplication or conflict with a recently finalized U.S. Department of Labor, Occupational Safety and Health Administration regulation. In 2010, the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) published a final rule regarding ''Cranes and Derricks in Construction'' (Final Crane Rule). The Final Crane Rule establishes requirements designed to improve safety for employees who work with or around cranes and derricks in the construction industry, including the establishment of qualification and certification requirements for certain operators of cranes.

Because the railroad industry uses cranes differently than those used in general construction, it may be economically burdensome for railroads to meet any of the four certification options offered by OSHA in the Final Crane Rule. The lack of logistically feasible options for many crane operators in the railroad industry to become certified under OSHA's Final Crane Rule could cause a shortage in the availability of such operators to conduct vital roadway maintenance work, which could have a significant detrimental effect on the safety of rail operations. Additionally, to whatever degree operators chose to become certified in multiple states or jurisdictions, redundant costs would have been incurred.

FRA is proposing various requirements in part 243 that would require each employer of a safety-related railroad employee, which would include employers of one or more operators of roadway maintenance machines that are equipped with a crane, to submit a training program that explains in detail how each type of employee would be trained and qualified. However, part 243 is only intended to cover training of Federal standards and those railroad rules and procedures promulgated to implement the Federal standards. Consequently, FRA is proposing the addition of § 214.357 to those Federal standards which would include training and qualification requirements for operators of roadway maintenance machines equipped with a crane, which would replace OSHA regulations with respect to those operators training and qualification. FRA's proposed rule would eliminate the negative effects of multiple states or jurisdictions requiring licensing or qualification of crane operators, resulting in a lower cost burden on railroads and contractors than the OSHA regulation.

Description of any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize any Significant Economic Impact of the Proposed Rule on Small Entities, Including Alternatives Considered, Such as: (1) Establishment of Differing Compliance or Reporting Requirements or Timetables That Take Into Account the Resources Available to Small Entities; (2) Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements Under the Rule for Such Small Entities; (3) Use of Performance Rather Than Design Standards; (4) any Exemption From Coverage of the Rule, or any Part Thereof, for Such Small Entities

FRA is unaware of any significant alternatives that would meet the intent of RSIA08 and that would minimize the economic impact on small entities. FRA is exercising its discretion to provide the greatest flexibility for small entities available under RSIA08.

The process by which this proposed rule was developed provided outreach to small entities. As noted earlier in the preamble, this notice was developed in consultation with industry representatives via the RSAC, which includes small railroad representatives. Throughout the development of this proposed rule, FRA met with the entire Working Group on several occasions and often focused discussions on issues specific to short line and regional railroads and contractors. The discussions yielded many insights and this proposed rule takes into account the concerns expressed by small railroads during the deliberations. Several alternatives were considered in the creation of this proposed rule in order to attempt to minimize its impact on small entities. FRA and the Working Group recognized very early on in the rulemaking process that small entities probably do not have training experts on staff. Requiring every small entity to create or revise a unique training program could create a disproportionate, and possibly unnecessary, burden on small entities because it might require the small entities to hire a training expert to perform the task, whereas larger railroads and contractors may already have training experts on staff. As an alternative to requiring every entity to create unique programs, FRA is proposing to formalize a process for entities (including and especially small entities) to adopt a ''model program.'' FRA envisions a model program to be a state-of-the-art training program reflecting best practices in training program development. Any organization, business, or association may create a model program and submit that model program to FRA for approval. Subsequently, any employer may then choose to use a model program approved by FRA, rather than create its own program. An employer adopting a model program need only inform FRA that the employer plans to use a model program, submit the unique identifier for the program, and include any information reflecting customization or deviation from the model program that the employer has undertaken. This alternative can significantly simplify and consolidate the reporting requirements of this proposed rule for small entities.

The proposed rule's requirements with respect to periodic oversight also contain alternatives that were designed by FRA and the Working Group to limit the proposed rule's impact on small entities. Periodic oversight operational tests and inspections would be required by the proposed rule to determine if safety-related railroad employees comply with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. FRA and the Working Group considered requiring that periodic oversight tests and inspections be performed by all employers of safety-related railroad employees. However, FRA and the Working Group also recognized that small entities may not employ supervisory employees who are qualified as safety-related railroad employees in some or all categories of employees, and requiring these entities to perform periodic oversight would necessitate that those entities expand their workforce expressly for that purpose. Additionally, one purpose of periodic oversight with respect to this proposed rule is to determine if changes in training programs are necessary to close any proficiency gaps found during oversight assessments. As such, it would make sense if the entity that performs the training of safety-related employees also is the entity that performs the periodic oversight tests and inspections.

As an alternative approach designed to ensure that periodic oversight is useful, and to minimize the burden that would arise if small entities had to expand their workforce just to comply, several provisions are included in the proposed rule that limit the extent to which small contractors will have to conduct periodic oversight. In general, railroads will be responsible for performing oversight for all railroad employees and some oversight for contractors performing safety-related duties on its property. Railroads would not be required to perform operational tests of contractor employees, but railroads would be required to perform periodic oversight inspections of contractor employees performing safety-related duties on railroad property. However, if a contractor employs more than 15 safety-related railroad employees, trains its own employees, and employs supervisory safety-related railroad employees capable of performing oversight, the contractor, rather than the railroad, would be required to perform periodic oversight on its own employees. Contractors who meet those criteria may not be small entities, and contractors would only perform periodic oversight if it relied on its own training in accordance with its training program and could therefore improve the program with the results of the oversight program. In any case, a railroad and contractor may voluntarily agree that the contractor will perform the periodic oversight.

The requirements for periodic oversight also contain provisions designed to limit impact on small railroads. First, if a contractor conducts its own periodic oversight, then the railroad would not be required to also do so. Second, railroads would not be required to perform operational tests of contractor employees in any case, as mentioned above. Third, a railroad would not be required to perform oversight test or inspections for categories of a contractor's safety-related railroad employees if the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories. This final exception is designed mostly with small entities in mind. Small railroads may maintain a very small workforce and hire contractors to perform most safety-related duties. Those small entities who do not have employees on staff who are capable of performing oversight of contractor employees would therefore not be required to expand their workforces by hiring a supervisory employee trained in the safety-related duties that the contractor employees perform in order to perform oversight of contractor employees.

FRA and the Working Group also considered alternatives for small entities in the section of the proposed rule requiring annual reviews of safety data. Railroads would be required, under the proposed rule, to conduct an annual review of periodic oversight data, reportable accident/incident data, FRA inspection report data, employee training feedback, and feedback received from labor representatives if available. However, all railroads with

less than 400,000 total employee work hours per year would be exempted from this annual review requirement. FRA believes that all but six Class III freight railroads would fall below this threshold, but FRA requests comment regarding this belief.

FRA requests comments on this finding of no significant alternative related to small entities. FRA also requests comments on whether this proposed regulation exercises the appropriate level of discretion and flexibility to comply with RSIA08 in the most cost effective and beneficial manner.

Requests for Comment To Assist Regulatory Flexibility Analysis

FRA requests comments on all aspects of this initial regulatory flexibility assessment.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the current and proposed information collection requirements and the estimated time to fulfill each requirement are as follows:

49 CFR Section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
214.357—Training and Qualification Program for Operators of Roadway Maintenance Machines (RMM) Equipped with a Crane.	535 railroads/contractors	535 revised programs.	4 hours	2,140 hours
—Initial Training/Qualification of RMM Operators (Cranes).	17,396 roadway workers	1,750 trained workers.	24 hours	42,000 hours
—Initial Training/Qualification of RMM Operators (Boom Trucks).	17,396 roadway workers	15,646 trained workers.	4 hours	62,584 hours
—Periodic Training/Qualification of RMM Operators	17,396 roadway workers	17,396 trained workers.	1 hour	17,396 hours
—Records of Training/Qualification	17,396 roadway workers	17,396 records	15 minutes	4,349 hours
243.7—Waivers—Petitions	1,541 railroads/contractors	3 petitions	6 hours	18 hours
243.101—Training Programs	1,541 railroads/contractors	1,541 programs	160 hours + 8 hours.	19,624 hours
—Revisions to Training Programs	59 RRs/contractors	59 programs	40 hours + 20 hours.	2,140 hours
—New RRs/Contractors—Initial Training Programs	37 RRs/contractors	37 programs	8 hours	296 hours
—Contractor Validation Document to RRs on Training Its Own Workers.	795 contractors	155 documents	15 minutes	39 hours
—RR Copy of Contractor Validation Document	720 railroads	155 copies	15 minutes	39 hours
243.103—Already Existing Training Programs Supplemented with On the Job Training Component.	1,541 railroads/contractors	2 programs	80 hours	160 hours
—Already Existing Training Program FRA Required Modification.	1,541 railroads/contractors	385 programs	8 hours	3,080 hours
243.109—Initial Training Programs Found Deficient by FRA—Revisions.	1,541 railroads/contractors	385 programs	8 hours	3,080 hours
—Request to Extend Resubmission Deadline	1,541 railroads/contractors	19 requests	15 minutes	5 hours
—Initial Training Program Found Deficient and Needing Revision by FRA.	37 railroads/contractors	9 programs	8 hours	72 hours
—Request to Extend Resubmission Deadline	37 railroads/contractors	2 requests	15 minutes	1 hour
—Previously Approved Programs Requiring an Informational Filing When Modified.	1,541 railroads/contractors	150 info. filings	6 hours	900 hours
—Previously Approved Training Programs Found Deficient and Modified Further.	1,541 railroads/contractors	7 programs	4 hours	28 hours
—New Portions or Revisions to an Approved Training Program Needing Revision.	1,541 railroads/contractors	15 modified programs.	4 hours	60 hours
—Request to Extend Resubmission Deadline	1,541 railroads/contractors	3 requests	15 minutes	1 hour
—Copies of Submissions, Resubmissions, Informational Filings to Labor Presidents.	720 railroads	2,000 copies	15 minutes	500 hours
—Labor Representative Comment on Submissions, Resubmissions, Info. Filing.	5 RR labor organizations	500 comments	4 hours	2,000 hrs.
243.111—Programs Filed by Training Organizations/Learning Institutions.	12 training organizations	72 programs	80 hours	5,760 hours
—Written Request for Extension to Submit Program by Tr. Organization.	12 training organizations	3 requests	15 minutes	1 hour
—Info. Filing for Prev. Modified Prog.	12 training organizations	7 filings	6 hours	42 hours
—Substantial Additions or Revisions to Previously Approved Training Program.	12 training organizations	3 documents	4 hours	12 hours
—Revised Program Found Deficient and Needing Further Revision.	12 training organizations	1 further revised document.	4 hours	4 hours
—Safety Related Employees Instructed by Training Organizations and Records.	12 training organizations	20,000 trained employees + 20,000 records.	8 hours + 5 minutes.	161,667 hours

49 CFR Section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Request to Training Organization/Learning Institution by Student to Provide Transcript or Record.	.....	2,500 requests + 2,500 records.	5 minutes + 5 minutes.	416 hours
243.113—Required Information to File Submissions Electronically.	1,541 railroads/contractors	1,155 letters	15 minutes	289 hours
243.201—Designation of Existing Safety-related Employees by Job Category—Lists.	1,541 railroads/contractors	1,541 lists	15 minutes	385 hours
—Request to Extend Deadline for Designation List	1,541 railroads/contractors	100 requests	15 minutes	25 hours
—Designation Lists for Employers Commencing Operations After Specified Date.	37 railroads	37 lists	15 minutes	9 hours
—Training of Newly Hired Employees or Those Assigned New Safety-related Duties and Records.	1,541 railroads/contractors	2,250 trained employees + 2,250 records.	8 hours + 15 minutes.	18,563 hours
—Requests for Relevant Qualification or Training Record from an Entity Other Than Current Employer.	1,538 railroads/contractors	250 requests + 250 records.	5 minutes + 5 minutes.	42 hours
—Testing of Employees When Current Record of Training is Unavailable.	1,538 railroads/contractors	1,667 tests + 1,667 records.	8 hours + 30 minutes.	14,170 hours
—Testing of Employees Who Have Not Received Initial/Periodic Training.	1,538 railroads/contractors	2,667 tests + 2,667 records.	16 hours + 30 minutes.	44,006 hours
—Employee Refresher Training Every Three Years	1,538 railroads/contractors	35,000 retrained employees + 35,000 records.	1 hour + 15 minutes.	43,750 hours
—Qualified Employees Designated/Listed to Provide Formal Training to Other Employees and Records.	1,538 railroads/contractors	2,100 listings + 2,100 qualified + 2,100 records.	30 minutes + 24 hours + 5 minutes.	51,625 hours
243.203—Electronic Recordkeeping—Representatives Designated by Employers to Authenticate Retrieved Information.	1,538 railroads/contractors	4,200 designations.	5 minutes	350 hours
—Transfer of Records to Successor Employer	1,538 railroads/contractors	500 records	15 minutes	125 hours
243.205—Modified Training Resulting from Periodic Oversight Tests and Inspections.	1,538 railroads/contractors	10 modified programs.	40 hours	400 hours
—Periodic Tests and Inspections	1,538 railroads/contractors	210,000 tests/inspections.	10 minutes	35,000 hours
—Results of Part 240/242 Assessments Causing Modification of Training Program.	1,538 railroads/contractors	5 programs	8 hours	40 hours
—Identification of Supervisory Employees Who Conduct Periodic Oversight Tests by Category/Subcategory.	1,538 railroads/contractors	250 identifications.	5 minutes	21 hours
—Contractor Periodic Tests/Inspections Conducted by RR Supervisory Employees.	720 railroads	65,000 tests/inspections.	10 minutes	10,833 hours
—Notification by RR of Contractor Non-Compliance with Federal Laws/Regulations/Orders to Employee and Employer.	720 railroads	2,500 notices + 2,500 notices.	5 minutes	416 hours
—Contractor conduct of Periodic Oversight Tests/Inspections of Its Safety-related Employees.	795 contractors	65,000 tests/inspections.	10 minutes	10,833 hours
—Contractor Direct Training of Its Employees for Qualifying Those Employees to Perform Safety-related Duties.	795 contractors	32,000 trained employees.	8 hours	256,000 hours
—Employer Records of Periodic Oversight	1,538 railroads/contractors	32,000 records ..	5 minutes	2,667 hours
243.207—Annual Review of Safety Data	53 railroads	53 reviews	2 hours	106 hours
—RR Copy of Annual Review at System Headquarters.	53 railroads	53 copies	1 hour	53 hours
—RR Designation of Person(s) to Conduct Annual Review.	53 railroads	106 designation	15 minutes	27 hours
—Adjustments to Initial/Refresher Training Based Upon Results of Annual Review.	53 railroads	5 adjusted programs.	1 hour	5 hours
—RR Notification to Contractor of Relevant Training Program Adjustments.	53 railroads	8 notifications	15 minutes	2 hours
—Contractor Adjustment of Its Training Program Based on RR Information.	795 contractors	8 programs	16 hours	128 hours
243.209 Railroad Maintained List of Contractors Utilized.	720 railroads	795 lists	30 minutes	398 hours
—Updated Lists of Contractors	720 railroads	79 lists	15 minutes	20 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at (202) 493–6292, or Ms. Kimberly Toone at (202) 493–6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via email to Mr. Brogan or Ms. Toone at the following address: *Robert.Brogan@dot.gov; Kimberly.Toone@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA 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'' are 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, the agency may not issue a regulation with 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, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This proposed rule would not have a substantial effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the Federal government and the States or their political subdivisions, 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.

However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to section 20106.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

E. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

This proposed rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State,

local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $140,800,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The proposed rule will not result in the expenditure, in the aggregate, of $140,800,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this NPRM is not a ''significant energy action'' within the meaning of Executive Order 13211.

I. Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.regulations.gov/#!privacyNotice.*

List of Subjects

49 CFR Part 214

Bridges, Occupational safety and health, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 232

Incorporation by reference, Railroad power brakes, Railroad safety, Two-way end-of-train devices.

49 CFR Part 243

Administrative practice and procedure, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

PART 214—[AMENDED]

1. Section 214.7 is amended by adding a definition in alphabetical order for *roadway maintenance machines equipped with a crane* to read as follows:

* * * * *

Roadway maintenance machines equipped with a crane means any roadway maintenance machine equipped with a crane or boom that can hoist, lower, and horizontally move a suspended load.

* * * * *

2. Section 214.341 is amended by revising paragraph (b)(2) to read as follows:

* * * * *

(b) * * *

(2) No roadway worker shall operate a roadway maintenance machine without having knowledge of the safety instructions applicable to that machine. For purposes of this paragraph, the safety instructions applicable to that machine means:

(i) the manufacturer's instruction manual for that machine; or

(ii) the safety instructions developed to replace the manufacturer's safety instructions when the machine has been adapted for a specific railroad use. Such instructions shall address all aspects of the safe operation of the crane and shall be as comprehensive as the manufacturer's safety instructions they replace.

* * * * *

3. Section 214.357 is added to read as follows:

§ 214.357 Training and qualification for operators of roadway maintenance machines equipped with a crane.

(a) In addition to the general training and qualification requirements for operators of roadway maintenance machines set forth in §§ 214.341 and 214.355 of this subpart, each employer shall adopt and comply with a training and qualification program for operators of roadway maintenance machines equipped with a crane to ensure the safe operation of such machines.

(b) Each employer's training and qualification program for operators of roadway maintenance machines equipped with a crane shall require initial and periodic qualification of each operator of a roadway maintenance machine equipped with a crane and shall include:

(1) Procedures for determining that the operator has the skills to safely operate each machine the person is authorized to operate; and

(2) Procedures for determining that the operator has the knowledge to safely operate each machine the person is authorized to operate. Such procedures shall determine that either:

(i) The operator has knowledge of the safety instructions (*i.e.,* the manufacturer's instruction manual) applicable to that machine; or

(ii) The operator has knowledge of the safety instructions developed to replace the manufacturer's safety instructions when the machine has been adapted for a specific railroad use. Such instructions shall address all aspects of the safe operation of the crane and shall be as comprehensive as the manufacturer's safety instructions they replace.

(c) Each employer shall maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs.

(d) *Availability of records.* Each employer required to maintain records under this part shall make all records available for inspection and copying/photocopying to representatives of FRA, upon request during normal business hours.

(e) Training conducted by an employer in accordance with operator qualification and certification required by the Department of Labor (29 CFR 1926.1427) may be used to satisfy the

training and qualification requirements of this section.

PART 232—[AMENDED]

4. Section 232.203 is amended by revising paragraphs (b)(6)(iv), and (e)(6) through (e)(8) to read as follows:

* * * * *

(b) * * *

(6) * * *

(iv) Any combination of the training or testing contained in paragraphs (b)(6)(i) through (b)(6)(iii) of this section and paragraphs (b)(3) through (b)(5) of this section may be used to satisfy the training and testing requirements for an employee in accordance with this paragraph.

* * * * *

(e) * * *

(6) The tasks required to be performed under this part which the employee is deemed qualified to perform;

(7) Identification of the person(s) determining that the employee has successfully completed the training necessary to be considered qualified to perform the tasks identified in paragraph (e)(6) of this section; and

(8) The date that the employee's status as qualified to perform the tasks identified in paragraph (e)(6) of this section expires due to the need for refresher training.

* * * * *

PART 243—TRAINING, QUALIFICATION, AND OVERSIGHT FOR SAFETY-RELATED RAILROAD EMPLOYEES

5. Add a new part 243 to read as follows:

Subpart A—General

Sec.

243.1 Purpose and scope.
243.3 Application and responsibility for compliance.
243.5 Definitions.
243.7 Waivers.
243.9 Penalties and consequences for noncompliance.
243.11 Information collection requirements.

Subpart B—Program Components and Approval Process

243.101 Employer program required.
243.103 Training components identified in program.
243.105 Optional model program development.
243.107 Training program submission, introductory information required.
243.109 Training program submission, review, and approval process.
243.111 Approval of programs filed by training organizations or learning institutions.
243.113 Option to file program electronically.

Subpart C—Program Implementation and Oversight Requirements

243.201 Employee qualification requirements.
243.203 Records.
243.205 Periodic oversight.
243.207 Annual review.
243.209 Railroad maintained list of contractors utilized.
Appendix A to Part 243—Schedule of Civil Penalties

Authority: 49 U.S.C. 20103, 20107, 20131–20155, 20162, 20301–20306, 20701–20702, 21301–21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart A—General

§ 243.1 Purpose and scope.

(a) The purpose of this part is to ensure that any person employed by a railroad or a contractor of a railroad as a safety-related railroad employee is trained and qualified on any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

(b) This part contains the general minimum training and qualification requirements for each category and subcategory of safety-related railroad employee, regardless of whether the employee is employed by a railroad or a contractor of a railroad. Contractors shall coordinate with railroads and comply with the contents of this part, including those aspects of training that are specific to the contracting railroad's rules and procedures.

(c) The requirements in this part do not exempt any other requirement in this chapter.

(d) Unless otherwise noted, this part augments other training and qualification requirements contained in this chapter.

§ 243.3 Application and responsibility for compliance.

(a) This part applies to all railroads, contractors of railroads, and training organizations or learning institutions that train safety-related railroad employees except:

(1) Railroads or contractors of railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (i.e., plant railroads, as defined in § 243.5);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 243.5; or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs any duty covered by this part, shall perform that duty in accordance with this part.

§ 243.5 Definitions.

As used in this part—

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Associate Administrator means the Associate Administrator for Railroad Safety and Chief Safety Officer of the Federal Railroad Administration or that person's delegate as designated in writing.

Calendar year means the period of time beginning on January 1 and ending on December 31 of each year.

Contractor means a person under contract with a railroad, including, but not limited to, a prime contractor or a subcontractor.

Designated instructor means a person designated as such by an employer, training organization, or learning institution, who has demonstrated, pursuant to the training program submitted by the employer, training organization, or learning institution, an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training.

Employer means a railroad or a contractor of a railroad that employs at least one safety-related railroad employee.

Formal training means training that has a structured and defined curriculum, and which provides an opportunity for training participants to have questions timely answered during the training or at a later date. In the context of this part, formal training may include, but is not limited to, classroom, computer-based, on-the-job, simulator, or laboratory training.

Knowledge-based training is a type of formal training that is not task-based and is intended to convey information required for a safety-related railroad employee to comply with Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

On-the-job training (OJT) means job training that occurs in the workplace, i.e., the employee learns the job while doing the job.

Person means an entity of any type covered under 1 U.S.C. 1, including, but not limited to, the following: A railroad;

a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Qualified means that a person has successfully completed all instruction, training, and examination programs required by both the employer and this part, and that the person, therefore, may reasonably be expected to proficiently perform his or her duties in compliance with all Federal railroad safety laws, regulations, and orders.

Safety-related duty means either a safety-related task or a knowledge-based prohibition that a person meeting the definition of a safety-related railroad employee is required to comply with, when such duty is covered by any Federal railroad safety law, regulation, or order.

Safety-related railroad employee means an individual who is engaged or compensated by an employer to:

(1) Perform work covered under the hours of service laws found at 49 U.S.C. 21101, et seq.;

(2) Perform work as an operating railroad employee who is not subject to the hours of service laws found at 49 U.S.C. 21101, et seq.;

(3) In the application of parts 213 and 214 of this chapter, inspect, install, repair, or maintain track, roadbed, and signal and communication systems, including a roadway worker or railroad bridge worker as defined in § 214.7 of this chapter;

(4) Inspect, repair, or maintain locomotives, passenger cars or freight cars;

(5) Inspect, repair, or maintain other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter;

(6) Determine that an on-track roadway maintenance machine or hi-rail vehicle may be used in accordance with part 214, subpart D of this chapter, without repair of a non-complying condition;

(7) Directly instruct, mentor, inspect, or test, as a primary duty, any person while that other person is engaged in a safety-related task; or

(8) Directly supervise the performance of safety-related duties in connection with periodic oversight in accordance with § 243.205.

Safety-related task means a task that a person meeting the definition of a safety-related railroad employee performs, when such task is covered by any Federal railroad safety law, regulation, or order.

Task-based training means a type of formal training with a primary focus on teaching the skills necessary to perform specific tasks that require some degree of neuromuscular coordination.

Tourist, scenic, historic, or *excursion operations that are not part of the general railroad system of transportation* means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (i.e., there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

§ 243.7 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section shall be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

§ 243.9 Penalties and consequences for noncompliance.

(a) A person who violates any requirement of this part, or causes the violation of any such requirement, is subject to a civil penalty of at least $650 and not more than $25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. *See* Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

§ 243.11 Information collection requirements.

(a) The information collection requirements of this part were reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and are assigned OMB control number _____.

(b) The information collection requirements are found in the following sections: _____

Subpart B—Program Components and Approval Process

§ 243.101 Employer program required.

(a) Effective [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE], each employer conducting operations subject to this part shall submit, adopt, and comply with a training program for its safety-related railroad employees.

(b) An employer commencing operations subject to this part after [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE] shall submit a training program for its safety-related railroad employees and request FRA approval at least 90 days prior to commencing operations. After FRA approves the training program in accordance with this part, the employer shall adopt and comply with the training program.

(c) In the program required by this part, the employer shall:

(1) Classify its safety-related railroad employees in occupational categories or subcategories by craft, class, task, or other suitable terminology;

(2) Define the occupational categories or subcategories of safety-related railroad employees. The definition of each category or subcategory shall include a list of the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, based on the employee's assignments and duties, broken down at a minimum to the applicable part of the Code of Federal Regulations, section of the United States Code, or citation to an order. The listing of the Federal requirements shall contain the descriptive title of each law, regulation, or order;

(3) Create tables or utilize other suitable formats which summarize the information required in paragraphs (c)(1) and (c)(2) of this section, segregated by major railroad departments (e.g., Operations, Maintenance of Way, Maintenance of Equipment, Signal and Communications). After listing the major departments, the tables or other formats should list the categories and subcategories of safety-related railroad employees within those departments;

(4) Develop procedures to design and develop key learning points for any task-based or knowledge-based training; and

(5) Determine how training shall be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, OJT, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders.

(d) *On-the-job (OJT) training requirements.*

(1) The OJT portion of the training program shall consist of the following three key components:

(i) A brief statement describing the tasks and related steps the employee learning the job shall be able to perform;

(ii) A statement of the conditions (prerequisites, tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(2) Prior to beginning the initial safety-related tasks associated with OJT exercises, employers shall make any relevant information or materials, such as operating rules, safety rules, or other rules available to employees involved for referencing.

(3) The tasks and related steps associated with OJT exercises for a particular category or subcategory of employee shall be maintained together in one manual, checklist, or similar document. This reference shall be made available to all employees involved in those OJT exercises.

(e) *Contractor's responsibility to validate approved program to a railroad.* A contractor that chooses to train its own safety-related railroad employees shall provide each railroad that utilizes it with a document indicating that the contractor's program of training was approved by FRA. A contractor is being utilized by a railroad when any of the contractor's employees conduct safety-related duties on behalf of the railroad and the railroad does not otherwise qualify those employees of the contractor that are allowed to perform those duties.

(f) *Railroad's responsibility to retain contractor's validation of program.* A railroad that chooses to utilize contractor employees to perform safety-related duties and relies on contractor-provided training as the basis for those employees' qualification to perform those duties shall retain a document from the contractor indicating that the contractor's program was approved by FRA. A copy of the document required in paragraph (e) of this section satisfies this requirement.

§ 243.103 Training components identified in program.

(a) Each employer's program shall include the following components:

(1) A unique name and identifier for each formal course of study;

(2) A course outline for each course that includes the following:

(i) Any prerequisites to course attendance;

(ii) A brief description of the course, including the terminal learning objectives;

(iii) A brief description of the target audience, e.g., a list of the occupational categories and subcategories of employees the course will be delivered to;

(iv) The method(s) of course delivery, which may include, but are not limited to, classroom, computer-based, simulator, laboratory, correspondence courses, or any combination thereof;

(v) The anticipated course duration;

(vi) A syllabus of the course to include any applicable U.S.C. chapters, 49 CFR parts, or FRA orders covered in the training; and

(vii) The kind of assessment (written test, performance test, verbal test, OJT standard, etc.) performed to demonstrate employee competency.

(3) A document for each OJT program component that includes the following:

(i) The roles and responsibilities of each category of person involved in the administration and implementation, guidelines for program coordination, and the progression and application of the OJT;

(ii) A listing of the occupational categories and subcategories of employees for which the OJT program applies; and

(iii) Details of the safety-related tasks and subtasks, conditions, and standards covered by the program components.

(4) The job title and telephone number of the employer's primary training point(s) of contact, listed separately by major department or employee occupational category, if applicable.

(5) If any training organization or learning institution developed and will deliver all or any part of the training, the employer must include the following:

(i) A narrative, text table, or other suitable format which describes those portions of the training that fit into this category;

(ii) The business name of the organization that developed and will deliver the training; and

(iii) The job title and telephone number of the training organization or learning institution's primary training point of contact.

(b) An employer that is required to submit similar training programs or plans pursuant to other regulatory requirements contained elsewhere in this chapter may elect to cross-reference these other programs or plans in the program required by this part rather than resubmitting that similar program or plan. When any such similar program or plan did not include the OJT components specified in paragraph (a)(3) of this section, the employer shall supplement its program in accordance with this part by providing that additional information.

(c) If an employer arranges job-related practice and practice related feedback sessions to supplement classroom, laboratory, simulator training, or OJT, the program shall include a description of the supplemental training.

(d) FRA may require modifications to any programs, including those programs referenced in paragraph (b) of this section, if it determines essential program components, such as OJT, or arranged practice and feedback, are missing or inadequate.

§ 243.105 Optional model program development.

(a) Any organization, business, or association may develop and submit one or more model training programs to FRA for review and approval so that the model program(s) may be used by multiple employers.

(1) Any such model program should be submitted with a unique identifier associated with the program, or FRA will assign a unique identifier.

(2) The program associated with the organization's unique identifier shall include all information required by § 243.103.

(b) An employer that chooses to use a model program approved by FRA is not required to submit the entire program to FRA. Instead, the employer must submit only the unique identifier, and all other information that is specific to that employer or deviates from the model program.

§ 243.107 Training program submission, introductory information required.

(a) An employer who provides or is responsible for the training of safety-related railroad employees shall submit its training program to FRA for review and approval. Each employer shall state in its submission whether, at the time of filing, it:

(1) Primarily conducts the training program of its own safety-related railroad employees, utilizing its own resources;

(2) Conducts any training for other than its own safety-related railroad employees;

(3) Implements any training programs conducted by some other entity on its behalf but adopted by that employer;

(4) Qualifies safety-related railroad employees previously qualified by other employers;

(5) Qualifies safety-related railroad employees previously trained by training organizations or learning institutions; or

(6) Any combination of paragraph (a)(1) through (a)(5) of this section.

(b) An employer who utilizes any of the options specified in paragraphs (a)(2) through (a)(5) of this section shall provide the following information in its submission:

(1) The categories of safety-related railroad employees who, at the time of filing, will receive training utilizing one or more of these options; and

(2) Whether the training delivered, utilizing one or more of these options, composes all or part of the overall training program regimen for that category of employee at the time of filing.

(c) An employer that elects to use training organizations or learning institutions to train some or all of its safety-related railroad employees, or to hire new safety-related railroad employees that have previously received training from any training organizations or learning institutions, shall include the full name of the training organization or learning institution in its submission.

§ 243.109 Training program submission, review, and approval process.

(a) *Initial programs.* (1) Apprenticeship or similar intern programs, that began prior to submission of the employer's initial program filed in accordance with this part, shall be described in the employer's initial program. Any such apprenticeship or similar intern programs may continue, but if the Associate Administrator advises the employer of specific deficiencies, the employer shall resubmit that portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(2) An employer's initial program, as required by § 243.101(a), must be submitted to the Associate Administrator and is considered approved, and may be implemented immediately upon submission. Following submission, the Associate Administrator will review the program and inform the employer as to whether the initial program conforms to this part. If the Associate Administrator determines that all or part of the program does not conform, the Associate Administrator will inform the employer of the specific deficiencies. The deficient portions of the non-conforming program may remain in effect until approval of the revised program, unless FRA provides notification otherwise. An employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(3) For an employer that is commencing operations in accordance with § 243.101(b), the employer's initial program, must be submitted to the Associate Administrator and is considered approved upon notification from the Associate Administrator that the program has been approved. Following submission, the Associate Administrator will review the program and inform the employer as to whether the initial program conforms to this part. If the Associate Administrator determines that the program does not conform to this part, the employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. At the Associate Administrator's discretion, the Associate Administrator may determine that the employer may implement any portion of its program prior to resubmission. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(b) *Previously approved programs require an informational filing when modified.* The employer must review its previously approved training program and modify it accordingly when new safety-related Federal railroad laws, regulations, or orders are issued, or new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or modification of existing safety-related duties. An employer that modifies its training program for these described reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise to individual employers, one or more group of employers, or the general public. Programs modified in accordance with this paragraph, after the initial FRA approval, are considered approved upon being modified and may be implemented immediately. Any program deficiencies noted by the Associate Administrator shall be addressed in the same manner as paragraph (a)(2) of this section. The filing shall contain a summary description of sufficient detail that FRA can associate the changes with the employer's previously approved program, and shall include:

(1) Descriptions of all new or refresher training courses developed since the previous FRA approval, using the same criteria required for an initial filing;

(2) Explanations whenever OJT or arranged practice is added to, or discontinued from, a program;

(3) Explanations as to how the methods of delivering training, or qualifying employees has changed; and

(4) A statement from an organization, business, or association that has submitted a model program pursuant to this part, that the organization, business, or association has informed each employer who requested the right to use the effected training program of the changes and the need for the employer to comply with those changes that apply to the employer's operation.

(c) *New portions or revisions to an approved program.* Substantial additions or revisions to a previously approved program, that are not described as informational filings in accordance with paragraph (b) of this section, shall be considered approved and may be implemented immediately upon submission. Following submission, the Associate Administrator will review the new portions or revisions to the previously approved program and inform the employer as to whether the modifications conform to this part. Any program deficiencies noted by the Associate Administrator shall be addressed in the same manner as paragraph (a)(2) of this section. The Associate Administrator will inform the employer as to whether a new portion or revision to an approved program conforms to this part. If the Associate Administrator has determined that the changes do not conform to this part, the employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. Failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(d) *Additional submission, resubmission, or informational filing requirement for railroads.* (1) Each railroad shall:

(i) Simultaneous with its filing with the FRA, serve a copy of any submission, resubmission, or informational filing required pursuant to this section, to the president of each labor organization that represents the railroad's employees subject to this part; and

(ii) Include in its submission, resubmission, or informational filing required pursuant to this section a statement affirming that the railroad has served a copy to the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons served.

(2) Not later than 90 days from the date a railroad files its submission, resubmission, or informational filing required pursuant to this section, a representative designated by the president of each labor organization that represents railroad employees subject to this part, may file a comment on the submission, resubmission, or informational filing:

(i) Each comment shall be submitted to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; and

(ii) The commenter shall certify that a copy of the comment was served on the railroad.

§ 243.111 Approval of programs filed by training organizations or learning institutions.

(a) A training organization or learning institution that provides training services for safety-related railroad employees, including providing such training services to independent students who enroll with such training organization or learning institution and who will rely on the training services provided to qualify to become safety-related railroad employees, must submit its program to FRA for review and approval.

(b) A training organization or learning institution that has provided training services to employers covered by this part prior to [EFFECTIVE DATE OF THIS RULE] may continue to offer such training services without FRA approval for a period not to exceed one year. The Associate Administrator may extend this period at any time based on a written request. Such written requests for an extension of time to submit a program should contain any factors the training organization or learning institution wants the Associate Administrator to consider prior to approving or disapproving the extension.

(c) A program submitted by a training organization or learning institution must include all information required for an employer's program in accordance with this part, unless the requirement could only apply to an employer's program. The submitted program for a training organization or learning institution must also include the following information:

(1) The full corporate or business name of the training organization or learning institution;

(2) The training organization or learning institution's primary business and email address;

(3) The training organization or learning institution's primary telephone number and point of contact;

(4) A listing of the training organization or learning institution's designated instructors;

(5) A resume for each designated instructor, showing how the instructor achieved the subject-matter and training expertise necessary to develop and deliver training to safety-related railroad employees, unless the designated instructors are currently employed by a railroad;

(6) A list of references of employer customers the learning organization or training institution has provided services to in the past; and

(7) A brief summary statement indicating how the training organization or learning institution determined the knowledge, skills, and abilities necessary to develop the training courses it provides to employers and independent students who enroll with such training organization or learning institution in order to become safety-related railroad employees. This brief summary should be of sufficient detail so that FRA can ascertain the methodologies the training organization or learning institution used during training development.

(d) Except as specified in paragraph (b) of this section, prior approval by the Associate Administrator is required before FRA will accept such training as sufficient to meet the requirements of this part. The Associate Administrator will advise the training organization or learning institution in writing whether FRA has approved the program. If all or part of the program is not approved by FRA, the Associate Administrator will inform the training organization or learning institution of specific deficiencies. At the time that the Associate Administrator informs of any deficiencies, the Associate Administrator will clarify whether any particular training courses shall be considered approved.

(e) *Previously approved programs require an informational filing when modified.* The training organization or learning institution shall review its previously approved training program and modify it accordingly when new safety-related Federal railroad laws, regulations, or orders are issued, or new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or in modifications of existing safety-related duties. A training organization or

learning institution that modifies its training program for these described reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise. Programs modified in accordance with this paragraph are considered approved upon modification and may be implemented immediately. Any program deficiencies noted by the Associate Administrator shall be addressed as specified in this section. The filing shall contain a summary description of sufficient detail so that FRA can associate the changes with the training organization's or learning institution's previously approved program, and shall include:

(1) Descriptions of all new or refresher training courses developed after the previous FRA approval, using the same criteria required for an initial filing;

(2) Explanations whenever OJT or arranged practice is added to, or discontinued from, a program; and

(3) Explanations as to how the methods of delivering training, or qualifying employees has changed.

(f) *New portions or revisions to an approved program.* Substantial additions or revisions to a previously approved program, that are not described as informational filings in accordance with paragraph (e) of this section, shall require prior approval by the Associate Administrator before FRA will accept such training as sufficient to meet the requirements of this part. The Associate Administrator will advise the training organization or learning institution in writing whether FRA has approved the new or revised program. If all or part of the program is not approved by FRA, the Associate Administrator will inform the training organization or learning institution of specific deficiencies. At the time that the Associate Administrator informs the training organization or learning institution of any deficiencies, the Associate Administrator will clarify whether any particular new or revised training courses shall be considered approved.

(g) Training organizations and learning institutions subject to this part are required to maintain records for each safety-related railroad employee that attends the training, in accordance with the recordkeeping requirements of this part.

(h) Training organizations and learning institutions subject to this part shall provide a student's training transcript or training record to any employer upon request by the student.

§ 243.113 Option to file program electronically.

(a) Each employer, training organization, or learning institution to which this part applies is authorized to file by electronic means any program submissions required under this part in accordance with the requirements of this section.

(b) Prior to any person submitting an employer, training organization, or learning institution's first program submission electronically, the person shall provide the Associate Administrator with the following information in writing:

(1) The name of the employer, training organization, or learning institution;

(2) The names of two individuals, including job titles, who will be the entity's points of contact and will be the only individuals allowed access to FRA's secure document submission site;

(3) The mailing addresses for the entity's points of contact;

(4) The entity's system or main headquarters address located in the United States;

(5) The email addresses for the entity's points of contact; and

(6) The daytime telephone numbers for the entity's points of contact.

(c) An entity that electronically submits an initial program, informational filing, or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email.

(d) A request for electronic submission or FRA review of written materials shall be addressed to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

(e) FRA may electronically store any materials required by this part regardless of whether the entity that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically.

(f) An entity that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

Subpart C—Program Implementation and Oversight Requirements

§ 243.201 Employee qualification requirements.

(a) *Designating existing employees.* By no later than [DATE 2 YEARS AFTER EFFECTIVE DATE OF THIS RULE], each employer, in operation as of [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE], shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory. The Associate Administrator may extend this period based on a written request.

(b) An employer commencing operations after [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE] shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory prior to beginning operations, and only permit designated employees to perform safety-related service in that category or subcategory. Any person designated shall have met the requirements for newly hired employees or those assigned new safety-related duties in accordance with paragraph (c) of this section.

(c) *Newly hired employees or those assigned new safety-related duties.* The following requirements apply to qualifying a safety-related railroad employee who, subsequent to the employer's designation in accordance with paragraphs (a) and (b) of this section, is newly hired or is to engage in a safety-related task not associated with the employee's previous training.

(1) Prior to an employee becoming a qualified member of an occupational category or subcategory, the employer shall require a safety-related railroad employee who is newly hired or is to engage in safety-related duties not associated with the employee's previous training to successfully complete the formal training curriculum for that category or subcategory of safety-related railroad employee. Successful completion of the formal training curriculum includes passing any required examinations covering the skills and knowledge the employee will need to possess in order to perform the safety-related duties necessary to be a member of the occupational category or subcategory.

(2) If the training curriculum includes OJT, the employee shall demonstrate, to the satisfaction of a designated

instructor, OJT proficiency by successfully completing the safety-related tasks necessary to become a qualified member of the occupational category or subcategory. However, as part of the OJT process and prior to completing such training and passing the field evaluation, a person may perform such tasks under the direct onsite observation of any qualified person, provided the qualified person has been advised of the circumstances and is capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed.

(d) *Employees previously qualified or trained, but not by the current employer.* If an employee has received relevant qualification or training for a particular occupational category or subcategory through participation in a FRA-approved training program submitted by an entity other than the employee's current employer, that training shall satisfy the requirements of this part:

(1) Provided that:

(i) a current record of training is obtained from that other entity; or

(ii) when a current record of training is unavailable from that other entity, an employer performs testing to ensure the employee has the knowledge necessary to be a member of that category or subcategory of safety-related railroad employee; and

(2) When the employee, in the previous 180 days, has either not performed the safety-related duties or not received initial or periodic training for an occupational category or subcategory, the employer shall perform testing to ensure the employee has retained the knowledge necessary to remain a member of that occupational category or subcategory. In the situation where an employee's records are unavailable and the employee is subject to testing under paragraph (d)(1)(ii) of this section, no additional testing is required.

(e) *Refresher training requirements and options.* Beginning [DATE on January 1, TWO YEARS AFTER EFFECTIVE DATE OF THIS RULE], each employer shall deliver refresher training at an interval not to exceed 3 calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. Each employer shall ensure that, as part of each employee's refresher training, the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

(f) An employee designated to provide formal training to other employees, and who is not a designated instructor, shall be qualified on the safety-related topics or tasks in accordance with the employer's training program and the requirements of this part.

§ 243.203 Records.

(a) *General requirements for qualification status records; accessibility.* Each employer shall maintain records to demonstrate the qualification status of each safety-related railroad employee that it employs.

(1) The records for former safety-related railroad employees shall be accessible for 6 years at the employer's system headquarters after the employment relationship ends.

(2) Current employee records shall be accessible at the employer's system headquarters.

(b) The records shall include the following information concerning each such employee:

(1) The name of the employee;

(2) Occupational category or subcategory designations for which the employee is deemed qualified;

(3) The dates that each formal training course was completed;

(4) The title of each formal training course successfully completed;

(5) An indication of whether the person passed or failed any associated tests;

(6) If the safety-related railroad employee attended safety-related training offered by a business, a training organization, or a learning institution with an FRA-approved program, a copy of the transcript or appropriate record from that business, training organization, or learning institution;

(7) The employee's OJT performance, which shall include the unique name or identifier of the OJT program component in accordance with § 243.103, the date the OJT program component was successfully completed, and the identification of the person(s) determining that the employee successfully completed all OJT training necessary to be considered qualified to perform the safety-related tasks identified with the occupational categories or subcategories for which the employee is designated in accordance with the program required by this part;

(8) The date that the employee's status is determined to be qualified and the employee is designated to perform the safety-related duties identified with any particular occupational categories or subcategories, in accordance with the program required by this part;

(9) If an employee's qualification status was transferred from another entity with an approved program, a copy of the training record from that other entity; and

(10) Any additional information required by this part.

(c) *Record accessibility for other than individual employee records.* Except for records demonstrating the qualification status of each safety-related railroad employee as described in paragraph (b) of this section or otherwise specified in this part, each record required by this part shall be accessible at the system headquarters and at each division headquarters where the test, inspection, annual review, or other event is conducted for 3 calendar years after the end of the calendar year to which the event relates.

(d) *Availability of records.* Each employer, training organization, or learning institution required to maintain records under this part shall:

(1) Make all records available for inspection and copying/photocopying to representatives of FRA, upon request during normal business hours; and

(2) Make an employee's records available for inspection and copying/photocopying to that employee, former employee, or such person's representative upon written authorization by such employee during normal business hours.

(e) *Electronic recordkeeping.* Each employer, training organization, or learning institution to which this part applies is authorized to retain by electronic recordkeeping the information prescribed in this section, provided that all of the following conditions are met:

(1) The electronic system is designed so that the integrity of each record is maintained through appropriate levels of security such as recognition of an electronic signature, or other means, which uniquely identify the initiating person as the author of that record. No two persons shall have the same electronic identity;

(2) The electronic system shall ensure that each record cannot be modified in any way, or replaced, once the record is transmitted and stored;

(3) The employer, training organization, or learning institution adequately limits and controls accessibility to such information retained in its electronic database system and identifies those individuals who have such access;

(4) The employer, training organization, or learning institution has a terminal at the system headquarters,

and each railroad that has operating divisions has a terminal at each division headquarters;

(5) Each such terminal has a computer (i.e., monitor, central processing unit, and keyboard) and either a facsimile machine or a printer connected to the computer to retrieve and produce information in a usable format for immediate review by FRA representatives;

(6) The employer, training organization, or learning institution has a designated representative who is authorized to authenticate retrieved information from the electronic system as true and accurate copies of the electronically kept records; and

(f) *Transfer of records.* If an employer ceases to do business and its assets will be transferred to a successor employer, it shall transfer to the successor employer all records required to be maintained under this part, and the successor employer shall retain them for the remainder of the period prescribed in this part.

§ 243.205 Periodic oversight.

(a) As part of the program required in accordance with this part, an employer shall adopt and comply with a program to conduct periodic oversight tests and inspections to determine if safety-related railroad employees comply with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. The program of periodic oversight shall commence on the day the employer files its program with FRA pursuant to § 243.101(a) or on the day the employer commences operations pursuant to § 243.101(b). The data gathered through the testing and inspection components of the program shall be used to determine whether systemic performance gaps exist, and to determine if modifications to the training component of the program are appropriate to close those gaps.

(b) Periodic oversight specified in this section is not required for employees covered by parts 240 and 242 of this chapter, but a railroad shall use results of the assessments required by those parts to determine if changes in its training programs are necessary to close any proficiency gaps found during those assessments.

(c) *Railroad oversight.* Each railroad shall identify supervisory employees, by category or subcategory, responsible for conducting periodic oversight tests and inspections for the safety-related railroad employees that it authorizes to perform safety-related duties on its property, except a railroad is not required to:

(1) Provide oversight for a contractor's safety-related railroad employees if that contractor is required to conduct its own periodic oversight because it meets the criteria specified in paragraph (g) of this section;

(2) Provide oversight for categories or subcategories of a contractor's safety-related railroad employees if the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories or subcategories; or

(3) Provide oversight for any supervisory employee identified by the railroad as responsible for conducting oversight in accordance with this section.

(d) A railroad is not required to perform operational tests of safety-related railroad employees employed by a contractor.

(e) A railroad may choose to require supervisory employees to perform oversight of safety-related railroad employees employed by a contractor either:

(1) When oversight test and inspection sessions are scheduled specifically to determine if safety-related employees are in compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety; or

(2) When a qualified railroad supervisory employee's duties place this person in the vicinity of one or more safety-related railroad employees employed by a contractor and performing the oversight would result in minimal disruption of this person's other assigned duties.

(f) Any railroad that finds evidence of contractor employee non-compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety during the periodic oversight shall provide that employee and that employee's employer with details of the non-compliance.

(g) *Contractor oversight.* Each contractor shall conduct periodic oversight tests and inspections of its safety-related railroad employees provided:

(1) A contractor employs more than 15 safety-related railroad employees;

(2) A contractor relies on training it directly provides to its own employees as the basis for qualifying those employees to perform safety-related duties on a railroad; and

(3) A contractor employs supervisory safety-related railroad employees capable of performing oversight.

(h) Notwithstanding the requirements of paragraphs (c) and (g) of this section, a railroad and a contractor may agree that the contractor will provide the oversight by specifying in the program that the railroad has trained the contractor employees responsible for training and oversight.

(i) Each employer that conducts periodic oversight in accordance with this section must keep a record of the date, time, place, and result of each test or inspection. The records shall specify each person administering tests and inspections, and each person tested. The record shall also provide a method to record whether the employee complied with the monitored duties, and any interventions used to remediate non-compliance. Modifications of the program required by § 217.9 of this chapter may be used in lieu of this oversight program, provided a railroad specifies it has done so in its program submitted in accordance with this part.

(j) Records required under this section are subject to the requirements of § 243.203.

§ 243.207 Annual review.

(a) *Review of safety data and adjustments to required training programs.* The purpose of this review is to determine if knowledge or performance gaps exist in the application of Federal railroad safety laws, regulations, and orders. This section shall apply to each railroad once a program has been approved by FRA in accordance with this part. This section does not apply to a railroad with less than 400,000 total employee work hours annually. In addition, this section does not apply to employers other than railroads except as specified in paragraph (f) of this section.

(b) Each railroad that is required to conduct periodic oversight in accordance with § 243.205 is also required to conduct an annual review, as provided in this section, and shall retain, at its system headquarters, one copy of the written annual review.

(c) Each railroad shall designate a person(s) who shall conduct a written annual review. The annual review shall be designed to identify knowledge or performance gaps in occupational categories and determine whether adjustments to the training component of the program are the appropriate intervention to close those gaps or otherwise improve the effectiveness of the program. Such review shall include analysis of the following data:

(1) Periodic oversight data required by § 243.205;

(2) Reportable accident/incident data as defined in part 225 of this chapter;

(3) FRA inspection report data;

(4) Employee training feedback received though a course evaluation process, if such feedback is available; and

(5) Feedback received from labor representatives, if such feedback is available.

(d) Based upon the results of the annual review, the designated person(s) shall coordinate any necessary adjustments to the initial and refresher training programs. At the railroad's option, the annual review required under this section may be conducted in conjunction with any periodic review required under part 217 of this chapter.

(e) If a railroad utilizes a contractor that directly trains its own safety-related railroad employees, the railroad shall notify the contractor of the relevant training program adjustments made to the railroad's program in accordance with paragraph (d) of this section.

(f) A contractor shall use any information provided by a railroad to adjust its training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety.

(g) Prior to September 1 of each calendar year, each railroad to which this section applies shall complete its annual review for the previous calendar year.

§ 243.209 Railroad maintained list of contractors utilized.

(a) Each railroad utilizing contractors to supply the railroad with safety-related railroad employees shall maintain a list, at its system headquarters, with information regarding each contractor utilized unless:

(1) the railroad qualifies each of the contractor's safety-related railroad employees utilized; and

(2) the railroad maintains the training records for each of the contractor's safety-related railroad employees utilized.

(b) The listing required by paragraph (a) of this section shall include:

(1) The full corporate or business name of the contractor;

(2) The contractor's primary business and email address; and

(3) The contractor's primary telephone number.

(c) The information required by this section shall be continuously updated as additional contractors are utilized, and no contractor information shall be deleted from the list unless the contractor has not been utilized for at least 3 years from the end of the calendar year the contractor was last utilized.

APPENDIX A TO PART 243—SCHEDULE OF CIVIL PENALTIES

A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $100,000 for any violation where circumstances warrant. *See* 49 CFR part 209, Appendix A.

(Penalty Schedule to be included in Final Rule)

Issued in Washington, DC, on January 25, 2012.

Joseph C. Szabo,

Administrator.

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