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WHEN: Tuesday, March 13, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Federal Register

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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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1128; Directorate Identifier 2011–CE–031–AD; Amendment 39–16933; AD 2012–02–10]

RIN 2120–AA64

Airworthiness Directives; CPAC, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for all CPAC, Inc. (type certificate formerly held by Commander Aircraft Corporation, Gulfstream Aerospace Corporation, and Rockwell International) Models 112, 112B, 112TC, 112TCA, 114, 114A, 114B, and 114TC airplanes. That AD currently requires a one-time inspection of the elevator spar for cracks and, if any crack is found, either replace with a serviceable elevator spar that is found free of cracks or repair/modify the elevator spar with an FAA-approved method. That AD also requires reporting to the FAA the results of the inspection. Since we issued that AD, using the data collected through the reporting requirement, we have determined there is a need for continued inspections. This new AD requires repetitive inspections of the elevator spar for cracks and, if any crack is found, either replacing with a serviceable elevator spar that is free of any cracks and/or corrosion or repairing/modifying the elevator spar with an FAA-approved procedure. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective March 15, 2012.

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: T.N. Baktha, Senior Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; phone: (316) 946–4155; fax: (316) 946–4107; email: *t.n.baktha@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2011–07–13, Amendment 39–16650 (76 FR 18376, April 4, 2011). That AD applies to the specified products. The NPRM published in the **Federal Register** on October 17, 2011 (76 FR 64038). That NPRM proposed to retain all of the requirements of AD 2011–07–13 and make the previous one-time inspection repetitive.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal (76 FR 64038, October 17, 2011) and the FAA's response to each comment.

Request for Clarification

James D. Richards of Aerodyme Corporation requested additional information be added to the final rule AD action to clarify whether or not the inspection intervals and procedures in this AD take precedence over those specified in the FAA-approved Parts Manufacturer Approval (PMA) Elevator Spars 44211–RE9 and 44211–RE10, Instructions for Continued Airworthiness, original issue date May 5, 2011.

James D. Richards obtained a PMA for CPAC, Inc. Models 112, 112B, 112TC, 112TCA, 114, 114A, 114B, and 114TC airplanes elevator spars. The PMA Instructions for Continued Airworthiness have inspection intervals and procedures that are different from the intervals and procedures specified in the proposed AD (76 FR 64038, October 17, 2011).

We agree with the commenter. We do not want to have two different inspection intervals and procedures for the same elevator spars. We revised this AD as requested and added information into paragraph (f) to clarify that the actions required in this AD take precedence over those contained in PMA Elevator Spars 44211–RE9 and 44211–RE10, Instructions for Continued Airworthiness, original issue date May 5, 2011.

Request for Additional Information

Fredrick E. Maupertuis requested that specific information be added to paragraph (l) Special Flight Permit of the final rule AD action about allowable crack criteria. Fredrick E. Maupertuis questioned whether the number of cracks, the length of the cracks, and/or the orientation of cracks found during an inspection will be a determining factor in obtaining a special flight permit.

We agree with the commenter because the requested information was not included in the proposed AD (76 FR 64038, October 17, 2011). We revised this AD as requested by adding crack criteria and allowances into paragraph (l).

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 changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (76 FR 64038, October 17, 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 64038, October 17, 2011).

We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Interim Action

We consider this AD interim action. We continue to evaluate the reported data and repair procedures to determine a possible terminating action. Based on this determination, we may initiate further rulemaking action if needed to address the unsafe condition identified in this AD.

Costs of Compliance

We estimate that this AD affects 773 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 elevator spar	8 work-hours × $85 per hour = $680	N/A	$680	$525,640

We estimate the following costs to do any replacement that will be required based on the results of the inspection. We have no way of determining the number of aircraft that might need this replacement:

ON-CONDITION COSTS

Action	Labor cost per elevator spar	Parts cost per elevator spar	Cost per product per elevator spar
Replace cracked elevator spar with a serviceable elevator spar.	Up to 16 work-hours × $85 per hour = $1,360.	May range from $100 to $1,000	May range from $1,460 to $2,360.
Replace cracked elevator spar with a new elevator spar.	Up to 16 work-hours × $85 per hour = $1,360.	$1,250	$2,610.

We estimate the following costs to do any repair/modification that will be required based on the results of the inspection. We have no way of determining the number of aircraft that might need this repair/modification:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per airplane
Repair/modify cracked elevator spar	Up to 26 work-hours × $85 per hour = $2,210	* $1,690	$3,900

* An STC is available to repair the elevator spars and the STC holder sells the repair kit in pairs only. Kits to repair only one side of the elevator are not available for sale. The parts cost in the table above is for a pair of repair kits. The STC holder currently charges $2,250 to install both repair kits.

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) 2011–07–13, Amendment 39–16650 (76 FR 18376, April 4, 2011), and adding the following new AD:

2012–02–10 CPAC, Inc. (Type Certificate Formerly Held by Commander Aircraft Corporation, Gulfstream Aerospace

Corporation, and Rockwell International): Amendment 39–16933; Docket No. FAA–2011–1128; Directorate Identifier 2011–CE–031–AD.

(a) Effective Date

This airworthiness directive (AD) is effective March 15, 2012.

(b) Affected ADs

This AD supersedes AD 2011–07–13, Amendment 39–16650 (76 FR 18376, April 4, 2011).

(c) Applicability

This AD applies to CPAC, Inc. (type certificate formerly held by Commander Aircraft Corporation, Gulfstream Aerospace Corporation, and Rockwell International) Models 112, 112B, 112TC, 112TCA, 114, 114A, 114B, and 114TC airplanes, all serial numbers, certificated in any category. Type Certificate No. A12SO does not include Models 112A and 115. The Model 112A is a Rockwell ''marketing name'' for the Model 112. The Model 115 is a Rockwell ''marketing name'' for the Model 114. Since they are type-certificated as Model 112 and Model 114, this AD is applicable to the Models 112A and 115.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 55, Stabilizers.

(e) Unsafe Condition

This AD was prompted by reports of a total of nine elevator spar cracks across seven of the affected airplanes, including a crack of 2.35 inches just below the outboard hinge of the right-hand elevator. We are issuing this AD to prevent structural failure of the elevator spar due to such cracking, which could result in separation of the elevator from the airplane with consequent loss of control.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done. The inspection intervals and procedures in this AD take precedence over those contained in Parts Manufacturer Approval (PMA) Elevator Spars 44211–RE9 and 44211–RE10, Instructions for Continued Airworthiness, original issue date May 5, 2011.

(g) Inspection Requirement Retained From AD 2011–07–13, Amendment 39–16650 (76 FR 18376, April 4, 2011)

Within the next 5 hours time-in-service (TIS) after April 4, 2011 (the effective date retained from AD 2011–07–13 (76 FR 18376, April 4, 2011)), visually inspect the left-hand (LH) and right-hand (RH) elevator spar behind and around the outboard hinge bracket on the elevator spar for cracks. Do the inspection following the procedures specified in paragraph (j) of this AD. If cracks are found during this inspection, take the necessary corrective actions specified in paragraph (k) of this AD.

(h) Reporting Requirement Retained From AD 2011–07–13, Amendment 39–16650 (76 FR 18376, April 4, 2011)

Within 30 days after the inspection required in paragraph (g) of this AD, report the results of the inspection to the FAA, Wichita Aircraft Certification Office (ACO), Attn: T.N. Baktha, Senior Aerospace Engineer, 1801 Airport Road, Room 100; Wichita, Kansas 67209; phone: (316) 946–4155; fax: (316) 946–4107; email: *t.n.baktha@faa.gov.* Include the following information:

(1) Airplane model and serial number.

(2) Hours TIS at time of inspection.

(3) Annotate any cracking found, including the exact location and length of any cracks.

(4) Any installations, repairs, modifications, etc. that have been done on your airplane in the elevator spar area or that could have affected the elevator spar.

(5) Type of operation primarily flown.

(i) Repetitive Inspection Requirement

As a result of the inspection required in paragraph (g) of this AD, if the elevator spar was:

(1) *Replaced with a new elevator spar,* within the next 300 hours TIS after the replacement, visually inspect the elevator spar behind the outboard hinge bracket and surrounding area for cracks. Repetitively inspect thereafter at intervals not to exceed 12 months or 150 hours TIS, whichever occurs first. Do the inspection following the procedures specified in paragraph (j) of this AD.

(2) *Replaced with a serviceable elevator spar (one that was in service before and had no cracks and/or corrosion),* within the next 150 hours TIS after the replacement, visually inspect the elevator spar behind the outboard hinge bracket and surrounding area for cracks. Repetitively inspect thereafter at intervals not to exceed 12 months or 150 hours TIS, whichever occurs first. Do the inspection following the procedures specified in paragraph (j) of this AD.

(3) *Found free of cracks,* within the next 150 hours TIS after the inspection, visually inspect the elevator spar behind the outboard hinge bracket and surrounding area for cracks. Repetitively inspect thereafter at intervals not to exceed 12 months or 150 hours TIS, whichever occurs first. Do the inspection following the procedures specified in paragraph (j) of this AD.

(j) Inspection Procedures

(1) Disconnect the elevator trim pushrod at the trim tab.

(2) Remove the hinge bolts at the horizontal stabilizer points.

(3) Remove six screws and two bolts at the inboard end of the elevator and remove the elevator.

(4) Remove all fasteners common to the elevator outboard aft end rib, part number (P/N) 44330, and elevator skin, P/N 44323.

(5) Remove the remaining two fasteners common to the elevator outboard aft end rib (P/N 44330) and the elevator spar, P/N 44211.

(6) Remove the elevator aft end rib, P/N 44330, to gain access to the aft side of the elevator spar.

(7) Remove the four bolts, washers, and nuts that secure the outboard elevator hinge bracket, P/N 44285.

(8) Remove elevator hinge bracket, P/N 44285, from the elevator spar.

(9) Clean in and around the location of the elevator outboard hinge bracket, outboard elevator hinge, and the outboard elevator hinge bracket (as applicable) on the elevator spar and visually inspect for cracks. Use a 10× magnifier to facilitate the detection of any crack.

(k) Corrective Actions

(1) If cracks are found during any inspection required in paragraphs (g), (i)(1), (i)(2), or (i)(3) of this AD, before further flight, either replace the elevator spar with a new spar or a serviceable spar that is found free of cracks and/or corrosion or repair/modify the elevator spar following a procedure approved for this AD by the FAA, Wichita ACO;

(2) After doing the actions required in paragraph (k)(1) of this AD, before further flight, reassemble the elevator assembly, rebalance the elevator, and reinstall on the airplane following standard repair practices. Ensure elevator rigging is within tolerance, and that the system operates with ease, smoothness, and positiveness appropriate to its function; and

(3) After taking corrective action, continue with the repetitive inspections required in paragraphs (i)(1), (i)(2), and (i)(3) of this AD.

(l) Special Flight Permit

(1) Special flight permits are permitted for daytime visual flight rules (VFR) only, restricted to crew, calm weather, reduced speed not to exceed 111 knots calibrated air speed (KCAS), and not to exceed 5 flight hours when cracks are found in the elevator spar if:

(i) The cracks are at or near the outboard hinge bracket;

(ii) The cracks are 1.25 inches long or less; and

(iii) There is no more than one crack on the top and one at the bottom of the hinge bracket.

(2) Special flight permits are not allowed if:

(i) The crack length is greater than 1.25 inches; or

(ii) The number of cracks is more than two.

(m) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the

burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(n) AMOCs

(1) The Manager, Wichita 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.

(3) AMOCs approved for AD 2011–07–13, Amendment 39–16650 (76 FR 18376, April 4, 2011), are approved for this AD.

(o) Related Information

For more information about this AD, contact T.N. Baktha, Senior Aerospace Engineer, Wichita ACO, FAA, 1801 Airport Road, Room 100, Wichita, Kansas 67209; phone: (316) 946–4155; fax: (316) 946–4107; email: *t.n.baktha@faa.gov*.

Issued in Kansas City, Missouri, on January 25, 2012.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–1998 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0946; Directorate Identifier 2011–NE–02–AD; Amendment 39–16926; AD 2012–02–03]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain CFM International, S.A. model CFM56–5B series turbofan engines. This AD was prompted by a normal quality sampling at CFM International, S.A. that isolated a production batch of fan blades with nonconforming geometry of mid-span shroud tips of the fan blades. This AD requires removing from service certain serial number (S/N) fan blades. We are issuing this AD to prevent an inflight shutdown (IFSD) of one or more engines following foreign object damage (FOD) or a bird strike.

DATES: This AD is effective March 15, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 15, 2012.

ADDRESSES: For service information identified in this AD, contact CFM International, Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; International Phone: 1–(513) 552–3272; USA Phone: (877) 432–3272; International Fax: 1–(513) 552–3329; USA Fax: (877) 432–3329; email: *geae.aoc@ge.com;* or CFM International S.A., Customer Support Center, International Phone: 33 1 64 14 88 66; Fax: 33 1 64 79 85 55; email: *snecma.csc@snecma.fr.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call (781) 238–7125.

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: Martin Adler, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: (781) 238–7157; fax: (781) 238–7199; email: *martin.adler@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 October 18, 2011 (76 FR 64293). That NPRM proposed to require removing from service within 5,000 flight hours (FHs) after the effective date of the AD, any fan blade, P/N 338–002–114–0, that has an S/N listed in CFM International Service Bulletin (SB) No. CFM56–5B S/B 72–0777, Revision 1, dated April 11, 2011. After the effective date of the AD, it would also prohibit installing any fan blade, P/N 338–002–114–0, that has an S/N listed in Appendix A of CFM International SB No. CFM56–5B S/B 72–0777, Revision 1, dated April 11, 2011.

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 Reword the Unsafe Condition Statement

One commenter, CFM International, S.A., requested that we reword the unsafe condition statement ''This defect would cause the upper panel of the fan blade to be liberated following FOD or a bird strike and likely result in an in-flight shutdown (IFSD)'' to ''This non-conforming condition could increase the potential for damage during a foreign object impact. This secondary damage could include liberation of the upper panel of the blade, which increases the potential for in-flight shutdown.'' The commenter stated that the outcome of FOD or bird strike event will not necessarily result in an outer panel release, therefore it is suggested that the sentence be replaced to more accurately reflect the possible outcome.

We agree. The unsafe condition increases the likelihood of separation after an event, but will not result in separation in every case. We changed paragraph (d) of the AD, which is the only place in the final rule that this information appears, to state that this defect could cause the upper panel of the fan blade to be liberated following FOD or a bird strike and likely result in an IFSD.

Request for Terminating Action

One commenter, American Airlines, requested that we establish a terminating action that would specify a point at which the AD would be considered closed. This would allow the airline to limit the time that it must verify compliance with the AD and reduce operating costs.

We do not agree. The AD as written clearly limits the fan blade serial numbers affected. The affected blades must never be installed in operating engines. We have no mechanism to assure that the affected fan blades have been completely purged from all inventories and so we can not stipulate when the AD is no longer applicable. We did not change the AD.

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 changes described previously.

Costs of Compliance

We estimate that this AD will affect 16 engines installed on airplanes of U.S. registry. We also estimate that it will take about 6 work-hours per engine to perform the required actions and that the average labor rate is $85 per work-hour. Required parts will cost about $47,830 per engine. Based on these figures, we estimate the total cost of this AD to U.S. operators to be $773,440.

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):

2012–02–03 CFM International, S.A.: Amendment 39–16926; Docket No. FAA–2011–0946; Directorate Identifier 2011–NE–02–AD.

(a) Effective Date

This AD is effective March 15, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to CFM International, S.A. CFM56–5B1/3, CFM56–5B2/3, CFM56–5B3/3, CFM56–5B4/3, CFM56–5B5/3, CFM56–5B6/3, CFM56–5B7/3, CFM56–5B8/3, CFM56–5B9/3, CFM56–5B3/3B1, and CFM56–5B4/3B1 engines equipped with fan blades part number (P/N) 338–002–114–0 that have a serial number (S/N) listed in Appendix A of CFM International Service Bulletin (SB) No. CFM56–5B S/B 72–0777, Revision 1, dated April 11, 2011.

(d) Unsafe Condition

This AD was prompted by a normal quality sampling at CFM International. S.A. that isolated a production batch of fan blades with nonconforming geometry of mid-span shroud tips of the fan blades. This defect could cause the upper panel of the fan blade to be liberated following foreign object damage (FOD) or a bird strike, and likely result in an inflight shutdown (IFSD). We are issuing this AD to prevent an IFSD of one or more engines following FOD or a bird strike.

(e) Compliance

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

(f) Remove Fan Blades From Service

For engines that have fan blades, P/N 338–002–114–0, with S/Ns listed in Appendix A of CFM International SB No. CFM56–5B S/B 72–0777, Revision 1, dated April 11, 2011, remove the fan blades from service within 5,000 flight hours after the effective date of this AD.

(g) Installation Prohibition

After the effective date of this AD, do not install any fan blade, P/N 338–002–114–0, that has a S/N listed in Appendix A of CFM International SB No. CFM56–5B S/B 72–0777, Revision 1, dated April 11, 2011, onto any engine.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(i) Related Information

For more information about this AD, contact Martin Adler, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: (781) 238–7157; fax: (781) 238–7199; email: *martin.adler@faa.gov.*

(j) Material Incorporated by Reference

(1) You must use the following service information to identify the fan blade S/Ns affected by this AD. 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.

(2) CFM International Service Bulletin No. CFM56–5B S/B 72–0777, Revision 1, dated April 11, 2011.

(3) For service information identified in this AD, contact CFM International, Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; International Phone: 1–(513) 552–3272; USA Phone: (877) 432–3272; International Fax: 1–(513) 552–3329; USA Fax: (877) 432–3329; email: *geae.aoc@ge.com;* or CFM International SA, Customer Support Center, International Phone: 33 1 64 14 88 66; Fax: 33 1 64 79 85 55; e-mail: *snecma.csc@snecma.fr.*

(4) You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

(5) 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 Burlington, Massachusetts, on January 19, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–2893 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0004; Directorate Identifier 2012–NE–01–AD; Amendment 39–16927; AD 2012–02–04]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Rolls-Royce plc RB211–Trent 500 series turbofan engines. This AD requires a one-time inspection of the fuel tubes and fuel tube clips for evidence of damage, wear, and fuel leakage. This AD was prompted by reports of wear found between the securing clips and the low-pressure (LP) fuel tube outer surface, which reduces the fuel tube wall thickness, leading to fracture of the fuel tube and consequent fuel leak. We are issuing this AD to prevent engine fuel leaks, which could result in risk to the airplane.

DATES: This AD becomes effective February 24, 2012.

We must receive comments on this AD by March 26, 2012.

The Director of the Federal Register approved the incorporation by reference of Rolls-Royce plc Alert Service Bulletin No. RB.211–73–AG797, dated October 26, 2011, listed in the AD as of February 24, 2012.

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

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

For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; phone: 011–44–1332–242424; fax: 011–44–1332–245418 or email: *http://www.rolls-royce.com/contact/civil_team.jsp.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

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 regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (phone: (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *alan.strom@faa.gov;* phone: (781) 238–7143; fax: (781) 238–7199.

SUPPLEMENTARY INFORMATION:

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 2011–0243, dated December 20, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Fuel leaks from the LP fuel tubes which run between the LP fuel pumps and high pressure (HP) fuel pumps have occurred in service.
>
> The subsequent technical investigations have shown that these have resulted from frettage between the securing clips and the LP fuel tube outer surface, which reduces the fuel tube wall thickness, leading to fracture of the fuel tube and consequent fuel leak.

The corrective action includes inspection of the tubes and the associated clips. The fretting and thinning of the fuel tubes is caused by relative movement between the tubes and the clips. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Rolls-Royce plc has issued Alert Service Bulletin No. RB.211–73–AG797, dated October 26, 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 AD

This product has been approved by the United Kingdom and is approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, EASA has notified us of the unsafe condition described in the MCAI and service information referenced above. 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 products of the same type design.

FAA's Determination of the Effective Date

No domestic operators use this product. Therefore, we find that notice and opportunity for prior public comment are unnecessary and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0004; Directorate Identifier 2012–NE–01–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

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.

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:

2012–02–04 Rolls-Royce plc: Amendment 39–16927; Docket No. FAA–2012–0004; Directorate Identifier 2012–NE–01–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective February 24, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce plc RB211–Trent 553–61, RB211–Trent 553A2–61, RB211–Trent 556–61, RB211–Trent 556A2–61, RB211–Trent 556B–61, RB211–Trent 556B2–61, RB211–Trent 560–61, and RB211–Trent 560A2–61 turbofan engines that have not complied with Rolls-Royce plc Service Bulletin No. RB.211–73–G723, and that have any of the following fuel tube part numbers installed:

(1) FW57605.
(2) FW17689.
(3) FW57604.
(4) FK30710.
(5) FW57578.
(6) FK30713.

(d) Reason

This AD was prompted by reports of wear found between the securing clips and the low-pressure (LP) fuel tube outer surface, which reduces the fuel tube wall thickness, leading to fracture of the fuel tube and consequent fuel leak. We are issuing this AD to prevent engine fuel leaks, which could result in risk to the airplane.

(e) Actions and Compliance

Unless already done, do the following one-time actions within 1,600 flight hours after the effective date of this AD.

(1) Visually inspect the fuel tube clips holding the LP fuel tube run from the LP fuel pump to the fuel-oil-heat exchanger, and the clips holding the LP fuel tube run from the LP filter to the high-pressure (HP) fuel pump, for evidence of damage or wear and replace as necessary. Do this in accordance with paragraphs 3.A(4)(a) through 3.A(4)(c) of Rolls-Royce plc Alert Service Bulletin No. RB.211–73–AG797, dated October 26, 2011.

(2) Clean and dry the LP fuel tube run from the LP fuel pump to the fuel-oil-heat exchanger, and the LP fuel tube run from the LP filter to the HP fuel pump.

(i) Visually inspect for evidence of damage, wear near the clip locations, and for fuel leakage.

(ii) Reject the tube and replace it if evidence of fuel leakage or contact frettage to a depth of greater than 0.1 mm (0.004 in.) on the outer surface of a bend, or 0.2 mm (0.008 in.) in any other area, is evident.

(f) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(g) Related Information

(1) For more information about this AD, contact Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *alan.strom@faa.gov;* phone: (781) 238–7143; fax: (781) 238–7199.

(2) Refer to European Aviation Safety Agency AD 2011–0243, dated December 20, 2011, for related information.

(h) 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 of the following service information under 5 U.S.C. 552(a) and 1 CFR part 51:

(2) Rolls-Royce plc Alert Service Bulletin No. RB.211–73–AG797, dated October 26, 2011.

(3) For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; phone: 011–44–1332–242424; fax: 011–44–1332–245418 or email: *http://www.rolls-royce.com/contact/civil_team.jsp.*

(4) You may review copies of the service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call (781) 238–7125.

(5) You may also review copies of the service information 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 Burlington, Massachusetts, on January 19, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–2895 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0789; Directorate Identifier 2011–NE–04–AD; Amendment 39–16929; AD 2012–02–06]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc. TPE331–10 and TPE331–11 Series Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD was prompted by a report of an uncontained failure of a first stage turbine disk that had a metallurgical defect. This AD requires inspecting certain serial number (S/N) first stage turbine disks, part number (P/N) 3101520–1 and P/N

3107079–1. We are issuing this AD to prevent uncontained failure of the first stage turbine disk and damage to the airplane.

DATES: This AD is effective March 15, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 15, 2012.

ADDRESSES: For service information identified in this AD, contact Honeywell International Inc., 111 S. 34th Street, Phoenix, AZ 85034–2802; phone: (800) 601–3099 (toll free in U.S. or Canada) or (602) 365–3099 (International direct); Web site: *http://portal.honeywell.com*. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

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: Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210; email: *joseph.costa@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 August 9, 2011 (76 FR 48749). That NPRM proposed to require inspecting certain S/N first stage turbine disks, P/N 3101520–1 and P/N 3107079–1.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD affects 90 engines installed on airplanes of U.S. registry. We also estimate that it will take about 20 work-hours per engine to perform these actions, and that the average labor rate is $85 per work-hour. Required parts cost about $19,000 per engine. We estimate that one disk will fail the initial inspection and that repetitive inspections will be performed on 89 engines. We estimate that one engine will fail the repetitive inspections and that further repetitive inspections will be performed on 88 engines. We estimate that an additional one disk will fail those repetitive inspections before retirement. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $511,155.

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):

2012–02–06 Honeywell International Inc. (formerly AlliedSignal Inc., Garrett Engine Division; Garrett Turbine Engine Company; and AiResearch Manufacturing Company of Arizona): Amendment 39–16929; Docket No. FAA–2011–0789; Directorate Identifier 2011–NE–04–AD.

(a) Effective Date

This AD is effective March 15, 2012.

(b) Affected ADs

None.

(c) Applicability

Honeywell International Inc. TPE331–10, –10AV, –10GP, –10GT, –10N, –10P, –10R, –10T, –10U, –10UA, –10UF, –10UG, –10UGR, –10UR, and TPE331–11U model turboprop engines with a first stage turbine disk, part number (P/N) 3101520–1 or 3107079–1, with a serial number (S/N) listed in Table 2 of Honeywell International Inc. Alert Service Bulletin (ASB) TPE331–72–A2156, dated December 2, 2008, installed.

(d) Unsafe Condition

This AD was prompted by a report of an uncontained failure of a first stage turbine disk that had a metallurgical defect. We are issuing this AD to prevent uncontained failure of the first stage turbine disk and damage to the airplane.

(e) Compliance

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

(f) Initial Inspection

(1) For first stage turbine disks, P/N 3101520–1 or 3107079–1, that have an S/N listed in Table 2 of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, inspect the disks as follows:

(i) For turbine disks with 4,100 or fewer cycles-since-new (CSN) on the effective date of this AD, perform an initial fluorescent penetrant inspection (FPI) by using paragraph 3.B.(2) through 3.B.(5) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, within 4,500 CSN or at the next access, whichever occurs first.

(ii) For turbine disks with more than 4,100 CSN on the effective date of this AD, perform an initial FPI by using paragraph 3.B.(2) through 3.B.(5) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, within 400 cycles-in-service (CIS) after the effective date of this AD or at the next access, whichever occurs first.

(iii) If the disk passes the FPI inspection, perform a special eddy current inspection (ECI) by using paragraph 3.B.(6) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, before returning the disk to service.

(2) If you find a crack in the disk, remove the disk from service.

(g) Repetitive Inspection

(1) Thereafter, for first stage turbine disks, P/N 3101520–1 or 3107079–1, that have an S/N listed in Table 2 of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, inspect the disks as follows:

(i) Perform a repetitive inspection at each scheduled hot section inspection, but not to exceed 3,600 hours-since-last inspection. Use paragraph 3.B.(2) through 3.B.(5) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008.

(ii) If the disk passes the FPI inspection, perform a special ECI by using paragraph 3.B.(6) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, before returning the disk to service.

(2) If you find a crack in the disk, remove the disk from service.

(h) Definition

For the purpose of this AD, ''next access to the first stage turbine disk'' is defined as the removal of the second stage turbine nozzle from the turbine stator housing.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, Los Angeles Aircraft Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(j) Related Information

(1) For more information about this AD, contact Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: (562) 627–5246; fax: (562) 627–5210; email: *joseph.costa@faa.gov.*

(2) Contact Honeywell International Inc., 111 S. 34th Street, Phoenix, AZ 85034–2802; phone: (800) 601–3099 (toll free in U.S. or Canada) or (602) 365–3099 (International direct); Web site: *http://portal.honeywell.com;* for a copy of the service information referenced in this AD.

(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) Honeywell International Inc., Alert Service Bulletin TPE331–72–A2156, December 2, 2008.

(2) For service information identified in this AD, contact Honeywell International Inc., 111 S. 34th Street, Phoenix, AZ 85034–2802; Web site: *http://portal.honeywell.com;* or call Honeywell toll free at (800) 601–3099 (U.S./Canada) or (602) 365–3099 (International Direct).

(3) You may review copies of the service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

(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 Burlington, Massachusetts, on January 12, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–2894 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0547; Directorate Identifier 2011–NE–13–AD; Amendment 39–16947; AD 2012–03–06]

RIN 2120–AA64

Airworthiness Directives; Superior Air Parts, Lycoming Engines (Formerly Textron Lycoming), and Continental Motors, Inc., Fuel-Injected Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding an existing airworthiness directive (AD) for Superior Air Parts and Lycoming Engines fuel-injected reciprocating engines. That AD currently requires removing AVStar Fuel Systems, Inc. (AFS) fuel servos installed after May 20, 2010, if the servo contained an AFS diaphragm, part number (P/N) AV2541801 or P/N AV2541803, from certain production lots. This AD expands the applicability, and changes the compliance interval for all affected Superior Air Parts, Lycoming Engines, and Continental Motors, Inc., fuel-injected reciprocating engines. This AD was prompted by an accident involving a Piper PA32R–301 airplane, and by the discovery of additional engines being affected by the unsafe condition since we issued the existing AD. We are issuing this AD to prevent an in-flight engine shutdown due to a failed fuel servo diaphragm, and damage to the airplane.

DATES: This AD is effective February 24, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 16, 2011 (76 FR 45655, August 1, 2011).

We must receive any comments on this AD by March 26, 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 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact AVStar Fuel Systems, Inc., 1365 Park Lane South, Jupiter, FL 33458; phone: (561) 575–1560; Web site: *www.avstardirect.com.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

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 street address for the Docket Office (phone: (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Kevin Brane, Aerospace Engineer, Atlanta Certification Office, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (404) 474–5582; fax: (404) 474–5606; email: *kevin.brane@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On July 13, 2011, we issued AD 2011–15–10, Amendment 39–16757 (76 FR 45655, August 1, 2011), for Superior Air Parts and Lycoming Engines fuel-injected reciprocating engines. That AD requires, before further flight, removing AFS fuel servos installed after May 20, 2010, if the servo contained an AFS diaphragm, P/N AV2541801 or P/N AV2541803, from certain production lots. That AD resulted from an accident involving a Piper PA32R–301 airplane. We issued that AD to prevent an in-flight engine shutdown due to a failed fuel servo diaphragm, and damage to the airplane.

Actions Since AD Was Issued

Since we issued AD 2011–15–10, Amendment 39–16757 (76 FR 45655, August 1, 2011), five commenters made us aware of eight additional engine models affected by the unsafe condition. We concur with the commenters. Discussions with AFS as a result of the comments indicated that the diaphragm problem extended to other reciprocating engines. AFS also indicated that the problem diaphragms could be installed on other unknown fuel injected engines. Therefore, we determined that we need to change the applicability from a table of specific engine models, to all Superior Air Parts, Lycoming Engines, and Continental Motors, Inc., fuel injected reciprocating engine models with an AFS fuel servo diaphragm, P/N AV2541801 or P/N AV2541803, installed.

Also since we issued AD 2011–15–10, Amendment 39–16757 (76 FR 45655, August 1, 2011), we relaxed the compliance from before further flight to within 5 flight hours after the effective date of the AD.

Relevant Service Information

We reviewed AFS Mandatory Service Bulletin (MSB) No. AFS–SB6, Revision 2, dated April 6, 2011. The MSB provides P/Ns and serial numbers (S/Ns) of affected servos.

FAA's Determination

We conducted an updated risk analysis using the known number of diaphragms potentially still in service and concluded that an unacceptable risk of an in-flight engine shutdown still exists. We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires within 5 flight hours after the effective date of this AD, that you determine if an AFS fuel servo diaphragm P/N AV2541801 or P/N AV2541803 from specific production lots, as identified in AFS MSB No. AFS–SB6, Revision 2, dated April 6, 2011, was installed in your fuel servo at any time after May 20, 2010, and if installed, that you remove the fuel servo from service before further flight.

This AD also replaces Table 1 of the existing AD with the statement that this AD applies to all Superior Air Parts, Lycoming Engines, and Continental Motors, Inc., fuel injected reciprocating engine models with an AFS fuel servo diaphragm, P/N AV2541801 or P/N AV2541803, installed.

Differences Between the AD and the Service Information

AFS MSB No. AFS–SB6, Revision 2, dated April 6, 2011, does not specify a compliance time and recommends limiting special flight permits to delivery to a service location. This AD requires performing the actions within 5 flight hours and prohibits special flight permits.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because of the compliance requirement of 5 flight hours. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

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 before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2011–0547 and directorate identifier 2011–NE–13–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD will affect 61,000 engines installed on aircraft of U.S. registry. We also estimate that it will take about 0.5 work-hour per engine to perform the inspection, 2.0 work-hours per engine to remove the servo from 261 engines with a discrepant AFS diaphragm, P/N AV2541801 or P/N AV2541803 installed, and that the average labor rate is $85 per work-hour. We estimate the parts cost to be $565 per servo. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $2,784,335.

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 part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2011–15–10, Amendment 39–16757 (76 FR 45655, August 1, 2011) and adding the following new AD:

012–03–06 Superior Air Parts, Lycoming Engines (formerly Textron Lycoming), and Continental Motors, Inc. (formerly Teledyne Continental Motors, Continental) Fuel-Injected Reciprocating Engines: Amendment 39–16947; Docket No. FAA–2011–0547; Directorate Identifier 2011–NE–13–AD.

(a) Effective Date

This AD is effective February 24, 2012.

(b) Affected ADs

This AD supersedes AD 2011–15–10, Amendment 39–16757 (76 FR 45655, August 1, 2011).

(c) Applicability

This AD applies to all Superior Air Parts, Lycoming Engines, and Continental Motors, Inc., fuel injected reciprocating engine models with an AVStar Fuel Systems, Inc. (AFS) fuel servo diaphragm, part number (P/N) AV2541801 or P/N AV2541803, installed.

(d) Unsafe Condition

This AD was prompted by an accident involving a Piper PA32R–301 airplane, and by the discovery of additional engines being affected by the unsafe condition since we issued AD 2011–15–10, Amendment 39–16757 (76 FR 45655, August 1, 2011). We are issuing this AD to prevent an in-flight engine shutdown due to a failed fuel servo diaphragm, and damage to the airplane.

(e) Compliance

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

(f) Remove Fuel Servo

(1) Within 5 flight hours after the effective date of this AD, determine if an AFS fuel servo diaphragm P/N AV2541801 or P/N AV2541803, from an affected production lot was installed in your fuel servo at any time after May 20, 2010. Use AFS Mandatory Service Bulletin (MSB) No. AFS–SB6, Revision 2, dated April 6, 2011 to determine if your fuel servo has an affected diaphragm. If you determine that your fuel servo has an affected diaphragm, remove the fuel servo from service before further flight.

(2) After the effective date of this AD, do not install any fuel servo containing an AFS fuel servo diaphragm, P/N AV2541801 or P/N AV2541803 from the production lots listed in AFS MSB No. AFS–SB6, Revision 2, dated April 6, 2011, into any airplane.

(g) Special Flight Permit

Special flight permits are not authorized.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Atlanta Aircraft Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(i) Related Information

For more information about this AD, contact Kevin Brane, Aerospace Engineer, Atlanta Certification Office, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (404) 474–5582; fax: (404) 474–5606; email: *kevin.brane@faa.gov.*

(j) Material Incorporated by Reference

(1) You must use AVStar Fuel Systems Mandatory Service Bulletin No. AFS–SB6, Revision 2, dated April 6, 2011, to do the actions required by this AD, unless the AD specifies otherwise.

(2) The Director of the Federal Register approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 on August 16, 2011.

(3) For service information identified in this AD, contact AVStar Fuel Systems, Inc., 1365 Park Lane South, Jupiter, FL 33458; (561) 575–1560; Web site: *www.avstardirect.com.*

(4) You may review copies of the service information at the FAA, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

(5) 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 Burlington, Massachusetts, on January 31, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–2896 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 954

[Doc. No. FR–5568–F–01]

RIN 2577–AC87

Removal of the Indian HOME Investment Partnerships Program Regulation

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule removes HUD's outdated regulations for the Indian HOME Investment Partnerships (Indian HOME) program. Under the Indian HOME program, HUD awarded funds competitively to eligible applicants to provide affordable housing. The Indian HOME program was replaced by the Indian Housing Block Grant (IHBG) program established under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). However, HUD retained the Indian HOME program regulations because they continued to govern grants awarded prior to the enactment of NAHASDA. Since September 30, 1997, HUD has not awarded grants under the Indian HOME program and, therefore, the regulations are no longer necessary.

DATES: *Effective Date:* March 12, 2012.

FOR FURTHER INFORMATION CONTACT: Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 4126, Washington, DC 20410, telephone number (202) 401–7914 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Indian HOME Investment Partnerships Program

The HOME Investment Partnerships Act (Title II of the Cranston-Gonzales National Affordable Housing Act (Pub. L. 101–925, approved November 28, 1990; 42 U.S.C. 12701 *et seq.*)) established the HOME Investment Partnerships program (HOME program) and its subsidiary Indian HOME program. The HOME program regulations are codified at 24 CFR part 92. The HOME program provides grants to state and local governments to fund activities that build, buy, or rehabilitate affordable housing or provide direct rental assistance. The HOME program is the largest federal block grant to states and localities designed exclusively to create affordable housing for low-income households.

Each fiscal year, one percent of the funds appropriated for the HOME program were allocated to the Indian HOME program. The Indian HOME program awarded competitive grants to eligible applicants to increase affordable housing for low-income and very low-income persons. Eligible applicants for Indian HOME program funds included any Indian Tribe, band, group, or nation. The Indian HOME program regulations are codified in 24 CFR part 954. Under the Indian HOME program, grant recipients could use funds for housing rehabilitation, acquisition of housing, new housing construction, and tenant-based rental assistance. Assistance was provided in the form of loans, advances, equity investments, interest subsidies, and other forms of investment that HUD approved.

B. The Native American Housing Assistance and Self-Determination Act and the Indian Housing Block Grant Program

NAHASDA (25 U.S.C. 4101 *et seq.*) reorganized federal housing assistance to Native Americans by eliminating several separate programs of assistance and replacing them with the IHBG program, a single block grant program that recognizes the right of Indian self-determination and tribal self-governance. The Indian HOME program was one of the programs that was terminated and replaced with the new block grant program under NAHASDA.

The IHBG program supports a range of affordable housing activities on Indian reservations and Indian areas. Eligible IHBG recipients include federally recognized Indian tribes or their tribally designated housing entity, and a limited number of state recognized tribes. IHBG funds must be used to develop or support rental or homeownership opportunities or provide housing services to benefit low-income Indian families. Eligible IHBG activities include modernization or operating assistance for housing previously developed using HUD assistance; acquisition, new construction, or rehabilitation of additional units; housing-related services such as housing counseling, self-sufficiency services, energy auditing, and establishment of resident organizations; housing management services; crime prevention and safety activities; rental assistance; model activities; and administrative expenses.

When NAHASDA was enacted and the IHBG program was created, previously awarded Indian HOME grants continued to be governed by the provisions of the statutes and regulations governing the program in effect at the time of funding. When funded activities were completed, Indian HOME grants were closed in accordance with their program requirements and grant agreements. As a result, HUD initially retained the Indian HOME program regulations because they continued to govern these previously awarded grants. As intended by NAHASDA, grants under the IHBG program have now replaced Indian HOME program grants.

C. Executive Order 13563 on Improving Regulation and Regulatory Review

On January 18, 2011, President Obama issued Executive Order 13563, ''Improving Regulation and Regulatory Review'' (see 76 FR 3821, January 21, 2011). The Executive Order requires federal agencies to coordinate, simplify, and harmonize regulations to reduce costs and promote certainty for businesses and the public. Section 6 of this Executive Order requires agencies to review existing significant regulations to determine if they are outmoded or ineffective. In response to the Executive Order, HUD is working to ensure that all of its regulations are updated and remain necessary. As discussed, the regulations pertaining to the terminated Indian HOME program are no longer necessary.

II. This Final Rule

This final rule responds to the mandate in Executive Order 13563 by removing regulations for a program that is now obsolete. Part 954 of title 24 of the Code of Federal Regulations governs the Indian HOME program. At this time, the Indian HOME program no longer awards grants. This final rule removes all regulations pertaining to the Indian HOME program because it no longer exists. However, Indian HOME grantees are still required to comply with any statutory and regulatory requirements that continue to apply beyond the close-out date of an Indian HOME grant, such as ensuring compliance with applicable affordability requirements. Continued affordability for HOME rental housing projects is required by 42 U.S.C. 12745(a)(1)(E), as implemented by 24 CFR 92.252(e) and 954.306(a)(5).

III. Justification for Final Rulemaking

In general, HUD publishes a rule for public comment before issuing a rule for effect, in accordance with HUD's regulations on rulemaking at 24 CFR part 10. Section 10.1 of part 10, however, provides for exceptions from that general rule where HUD finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when the public procedure is ''impracticable, unnecessary, or contrary to the public interest.'' HUD finds that good cause exists to publish this rule for effect without soliciting public comment on the basis that public procedure is unnecessary. After all, the purpose of this final rule is to remove all regulations pertaining to a program that is obsolete. The Indian HOME program in part 954 was replaced by the IHBG program. Public comment is unnecessary because this final rule updates the HUD regulations to reflect that the Indian HOME program no longer exists, and there is no exercise of agency discretion upon which the public could comment.

IV. Findings and Certifications

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on

the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Environmental Impact

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Accordingly, under the authority of 42 U.S.C. 35335(d) and 25 U.S.C. 4101 *et seq.,* HUD amends 24 CFR chapter IX by removing part 954, as follows:

PART 954—[REMOVED]

■ 1. Remove part 954.

Dated: February 1, 2012.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2012–3015 Filed 2–8–12; 8:45 am]

BILLING CODE 4210–67–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4007

Premium Penalty Relief for Certain Delinquent Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Policy statement.

SUMMARY: Executive Order 13563 on Improving Regulation and Regulatory Review directs agencies to review and improve their regulatory processes. As a result of this regulatory review, among other initiatives, PBGC is announcing a limited window for covered plans that have never paid required premiums to pay past-due premiums without penalty.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion (*klion.catherine@pbgc.gov*), Manager, Regulatory and Policy Division, Legislative and Regulatory Department, 1200 K Street NW., Washington, DC 20005–4026, 202–326–4024. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024).

SUPPLEMENTARY INFORMATION: The Pension Benefit Guaranty Corporation (PBGC) administers the pension insurance program under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Under sections 4006 and 4007 of ERISA, plans covered by title IV must pay premiums to PBGC. The vast majority of plans covered by PBGC make every effort to pay required premiums in full and on time. PBGC depends on these premium funds to provide participants and beneficiaries of terminated defined benefit plans guaranteed benefits as provided under ERISA.

A few times a year, PBGC becomes aware of a covered plan that has never filed PBGC premiums, in some cases because the plan administrator was unaware that the plan was covered.[1] PBGC's regulation on Payment of Premiums (29 CFR part 4007) requires that in addition to the unpaid premiums, such a plan must pay interest and penalties. PBGC believes that one reason plan administrators of covered plans that have not paid any required premiums fail to come forward is that penalties can be quite substantial, often as much as 100 percent of the unpaid premium (see 29 CFR 4007.8(a)).

On January 18, 2011, the President issued Executive Order 13563 on Improving Regulation and Regulatory Review (76 FR 3821, Jan. 21, 2011). Executive Order 13563 calls, among other things, for agencies to develop a plan to review existing regulations to identify any that can be made more effective or less burdensome in achieving regulatory objectives.

As part of PBGC's review of its premium regulations pursuant to Executive Order 13563,[2] PBGC is adopting a voluntary compliance program to encourage compliance and reduce workload burden in connection with covered plans that have never paid required premiums. PBGC will waive premium payment penalties (as well as information penalties under ERISA section 4071 for failure to timely file premium information) for any such plan, if the plan administrator contacts PBGC, pays past due premiums, and files required information within the time frames described in this document.[3] (The relief provided in this notice does not apply to late payment interest charges.)

To qualify for the relief provided in this document, the plan administrator of an eligible plan (or a representative) must—

1. *By July 31, 2012,* contact Robert Callahan (*callahan.robert@pbgc.gov*) or Bill O'Neill (*oneill.bill@pbgc.gov*) of PBGC's Financial Operations Department (202–346–4067) to discuss how to comply with premium filing requirements to obtain this relief, and

2. *By August 31, 2012* (or a later date specified by PBGC), pay past-due premiums and file required premium information.[4]

PBGC will use its Web site (*www.pbgc.gov*) and other methods (e.g., presentations at professional conferences) to educate plan administrators of covered plans that may not be paying required premiums about premium requirements. PBGC expects that these efforts, together with the relief provided in this document, will encourage compliance.

Out of fairness to compliant plan sponsors and to protect participants, after the end of the period for taking advantage of this relief, PBGC will step up its efforts to enforce premium requirements for covered plans that have not paid any required premiums, including assessment of penalties.

Issued in Washington, DC, this 31st day of January 2012.

Joshua Gotbaum,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2012–3054 Filed 2–8–12; 8:45 am]

BILLING CODE 7709–01–P

[1] PBGC's benefit guarantees apply to plan participants in a covered plan even if the plan has failed to pay required premiums. However, if the sponsor goes out of business, PBGC often finds out that benefits need to be paid only when it is contacted by a plan participant.

[2] PBGC's Plan for Regulatory review can be found at *www.pbgc.gov/documents/plan-for-regulatory-review.pdf.*

[3] PBGC recognizes that there may be difficulty in determining premiums and premium-related information for years in the distant past. PBGC is willing to discuss application of the relief in this notice even in situations where not all premiums for past years are paid and/or not all premium information for past years is provided.

[4] Currently, premiums must be filed electronically. The requirement to file electronically applies to filings for plan years beginning in 2006 that are made on or after July 1, 2006, for plans with 500 or more participants for the prior plan year and to filings for all plans for plan years beginning after 2006. Plan administrators and their representatives should review the information under the ''New Users'' heading at *www.pbgc.gov/prac/prem/online-premium-filing-with-my-paa.html* for information on how to file premiums electronically. PBGC will discuss with plan administrators how to file for years for which electronic filing was not available.

POSTAL SERVICE

39 CFR Part 230

Office of Inspector General; Contractor Requirements

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This rule establishes standards of qualification and responsibility for contractors employed by the Office of Inspector General. The rule also emphasizes consistency in contractor selection, and clarifies the OIG's exclusive authority to set qualifications and standards for its own contractors, as well as ensure the use of contracting best practices as established by the Federal Acquisition Regulations and other applicable sources in making contract awards.

DATES: *Effective Date:* March 12, 2012.

FOR FURTHER INFORMATION CONTACT: Anil Murjani, Office of General Counsel, Office of Inspector General, United States Postal Service, (703) 248–2244.

SUPPLEMENTARY INFORMATION: The OIG possesses contracting authority pursuant to the Inspector General Act of 1978, as amended (section 6(a)(9) of 5 U.S.C. App. 3). Under 39 CFR 230.1(i), the Postal Service's Office of the Inspector General (OIG) may hire and retain the services of expert consultants and other personnel as necessary to fulfill the duties and responsibilities of the Office. This rule establishes general standards of qualification and responsibility for such contractors. The rule also emphasizes consistency in contractor selection, and clarifies the OIG's exclusive authority to set qualifications and standards for its own contractors, as well as ensure the use of contracting best practices as established by the Federal Acquisition Regulations and other applicable sources in making contract awards. Neither the United States Postal Service nor the OIG will be bound by the Federal Acquisition Regulations through the adoption of this rule.

List of Subjects in 39 CFR Part 230

Authority delegations (Government agencies), Freedom of information, Organization and functions (Government agencies), Privacy.

For the reasons stated, the Postal Service adopts the following amendment to 39 CFR Part 230:

PART 230—OFFICE OF INSPECTOR GENERAL

■ 1. The authority citation for Part 230 continues to read as follows:

Authority: 5 U.S.C. App. 3; 39 U.S.C. 401(2) and 1001.

■ 2. Subpart A of Part 230 is amended by adding new § 230.6 to read as follows:

§ 230.6 Contractor requirements.

(a) The Office of Inspector General shall be the exclusive judge of its contractors' qualifications.

(b) The Office of Inspector General shall award contracts to and make purchases from only responsible contractors. In order to award a contract, a contracting officer must make an affirmative determination of responsibility.

(c) A responsible prospective contractor is one who:

(1) Has the financial and logistical resources to perform the contract;

(2) Has the necessary organization, experience, and technical ability to perform the contract;

(3) Is able to comply with the delivery and performance schedules established by the Office of Inspector General;

(4) Has a satisfactory performance record (although a lack of relevant performance history shall not disqualify a prospective contractor from award);

(5) Has a satisfactory record of integrity and business ethics; and,

(6) Is otherwise qualified and eligible to receive an award under applicable federal laws and regulations.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–2941 Filed 2–8–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL REGULATORY COMMISSION

39 CFR Parts 3001 and 3025

[Order No. 1171; Docket No. RM2011–13]

Appeals of Post Office Closings

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting a new set of rules for appeals of post office closings. The new rules are intended to update existing rules; foster clarity and simplicity, especially in terms of requirements that apply to the public; and expedite the appeal process. The rules incorporate some, but not all, of the proposed rules, as well as some commenters' suggestions. Some proposals have been deferred to allow time for further consideration. Adoption of a new set of rules will improve the post office closing appeal process.

DATES: *Effective Date:* March 12, 2012.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION: *Regulatory history:* 76 FR 54179 (August 31, 2011) and 76 FR 59085 (September 23, 2011).

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I. Introduction

On August 18, 2011, the Commission issued a notice of proposed rulemaking.[1] That notice was intended, in part, to simplify the rules applicable to appeals of post office closings and consolidations and to make the rules consistent with current practice. *See* Order No. 814 at 1–3. On August 25, 2011, the Commission issued a supplemental notice proposing to remove from the current rules the requirement that the Commission publish notice of appeals in the **Federal Register**.[2]

Some of the proposed rules generated opposition. Others were relatively uncontroversial. The Commission finds that it will be beneficial to promptly adopt rules that were, for the most part, unopposed. The Commission will address the other proposed rules in a later order. This order is organized as follows. First, proposed rules that generated no opposition are described and adopted. Next, proposed rules that generated suggestions for improvement are described, modified as appropriate, and adopted or deferred for further consideration. Third, proposed rules that generated controversy that is easily resolved are described, modified as appropriate, and adopted. Finally, proposed rules that generated significant opposition that requires additional research and analysis are described and deferred to a later date.

II. Unopposed Rules

Rules of general applicability. The Commission has proposed amendments to rules of practice 9, 10, 12, and 17 in 39 CFR part 3001, subpart A. These amendments are intended to ease requirements for persons who file appeals of post office closings or consolidations but who do not or cannot

[1] Notice of Proposed Rulemaking Regarding Appeals of Postal Service Determinations to Close or Consolidate Post Offices, August 18, 2011 (Order No. 814).

[2] Supplemental Notice Regarding Proposed Rules Governing Appeals, August 25, 2011 (Order No. 823).

use the Internet. They also correct cross-references and remove the requirement to publish in the **Federal Register** notice of an appeal of a post office closing or consolidation. The Commission confirms that it will continue to publish on its Web site a notice of each appeal containing the applicable procedural schedule.[3] The proposed amendments to rules 9, 10, 12, and 17 in 39 CFR part 3001, subpart A are unopposed and are adopted as proposed. The Commission also amends rule 3001.7(b) to replace the words ''Subpart H'' with ''Part 3025''. Rule 7(b) would be incorrect if not amended, which constitutes good cause under 5 U.S.C. 553(d)(3) for not publishing proposed notice of this amendment.[4]

Consolidation of appeals. Proposed rule 3025.12 explains that the Commission consolidates appeals relating to the same post office into a single docket. This rule is unopposed. Rule 3025.12 is adopted as proposed.

Participant statement. Proposed rule 3025.40, which describes participant statements (Form 61), is unopposed. It is adopted as proposed.

III. Suggested Improvements

Rules of general applicability. The Public Representative suggests a change to rule 3001.5(m) as well as changes to the list of rules of general applicability contained in proposed rule 3025.2(b).[5] Rule 5(m) defines the word ''Appellant.'' Proposed Part 3025 uses the word ''Petitioner'' instead of ''Appellant.'' Rule 5(m) is hereby amended accordingly. Proposed rule 3025.2(b) makes rule 3001.11 applicable in appeal proceedings. Rule 11(b) refers to notices of intervention, which are no longer required under proposed part 3025. Interested persons may file comments without first intervening. Rule 11(g) concerns certificates of service for documents filed as hard copy. Amended rule 12 provides that the Secretary will serve hard-copy documents filed by participants in appeals cases. There is thus no need to refer to rules 11(b) and 11(g) in proposed rule 3025.2(b).

The Public Representative also suggests that participants in appeals be given 14 days to respond to Postal Service motions and briefs rather than the 7 days allowed by rule 3001.20(b) and proposed rule 3025.43. This is based on the expectation that many, if not most, participants will be corresponding with the Commission by mail rather than using the Internet. Seven days does appear to be inadequate. Most of the 7 days could easily be consumed in transit to and from a participant. However, the proposed rules are also intended to expedite Commission consideration of appeals. Order No. 814 at 5. A 14-day response time, especially for motions to dismiss, could necessitate revisions to the procedural schedule. Under the Public Representative's proposed change, responses to motions to dismiss would be due 14 days after their filing, while participant statements are due 20 days after the filing of such motions.

Proposed rule 3025.41. Ten days will be allowed for the response to Postal Service motions and briefs.

Definitions. The Public Representative suggests moving the definition of ''Petition for Review'' from proposed rule 3025.10(a) to the definitions section, proposed rule 3025.1. PR Comments at 6. That suggestion is adopted. The Public Representative also proposes additions to the definition of ''Petition for Review,'' such as permissible and impermissible modes of submission. This topic is covered in proposed rule 3025.11.

Applicability. Rule 3025.2, as proposed, explains when the rules in part 3025 apply. It also sets out rules in part 3001 that apply to appeals. The Postal Service suggests changing the phrase ''wants to appeal'' in proposed rule 3025.2(a)(2) to ''appeals.'' Postal Service Comments at 2–7, 13–19, 21. This change is adopted.

Petitions for Review. The Postal Service and the Public Representative suggest changes to proposed rule 3025.10. Postal Service Comments, Appendix at iv; PR Comments, Attachment A at 2–3. This rule explains what information must be included in a Petition for Review. The Public Representative suggests that a Petition for Review include a petitioner's phone number, the ZIP Code of the post office involved, and the final determination. The Postal Service suggests that a Petition for Review include the date on which the final determination was posted. One of the purposes of the proposed rules is to reduce the burden involved in filing an appeal. *See* Order No. 814 at 2. Consideration of these suggestions is deferred. Rule 3025.10 is adopted as proposed except for the addition of the word ''only'' between ''appealed'' and ''by.'' This tracks the statutory requirement that a petitioner be served by the office to be closed or consolidated.

Proposed rule 3025.11 explains how to submit a Petition for Review to the Commission. The Public Representative proposes changes to rule 11. PR Comments, Attachment A at 3. The Public Representative proposes that the means of submission of appeals set out in rule 11 apply to all documents submitted by participants other than the Postal Service. Rule 3025.11 is adopted as modified by the Public Representative.

Rule 3025.13, as proposed, explains when a Petition for Review is considered timely. The statutory deadline for an appeal is 30 days from a final determination's being made available to patrons. The exact deadline depends on whether a petition is mailed, filed electronically, or delivered by someone other than the Postal Service. The Postal Service and the Public Representative suggest changing the event that triggers the running of the 30 days from the day the final determination is made available, to the date of posting of the final determination. Postal Service Comments, Appendix at v; PR Comments at 3–4. The phrase ''made available'' is the statutory description. Consideration of this proposed change is deferred. Rule 13 is adopted as proposed.

Record on review. Rule 3025.20, as proposed, describes the material that the Commission considers when reaching a decision on an appeal. Rules 20(a)(1) through (4) are adopted as proposed and designated as paragraph (a). The Postal Service objects to proposed rule 20(a)(5) and to the sentence that follows, both of which concern the Commission's treatment of factual matters. Postal Service Comments at 17–18, 21–22. Consideration of those proposals is deferred. The sentence in current rule 3001.112 that limits the record to all and only evidence considered by the Postal Service is retained as paragraph (b).

Administrative record. Proposed rule 3025.21 requires the Postal Service to notify participants who do not use Filing Online when the administrative record is filed with the Commission. The Postal Service points out that the administrative record is available at affected post offices while a proposal to close is under consideration and when a final determination to close is under appeal. *Id.* at 26–27. The Postal Service suggests that the Commission include information on the location of administrative records in the orders establishing procedural schedules or in the letters transmitting Form 61 to participants. *Id.* at 27, n.18. Proposed rule 3025.21 is amended to make the

[3] *See* Initial Comments of the United States Postal Service, October 3, 2011, at 25 (Postal Service Comments).

[4] Comments of the Public Representative, October 3, 2011, at 7–8 (PR Comments).

[5] American Postal Workers Union, AFL–CIO Comments on Proposed Rules, October 5, 2011, at 2–4 (APWU Comments).

Secretary responsible for informing participants that the administrative record is available at the post office(s) where the final determination was posted.

Posting of filings during appeal. Proposed rule 3025.22 requires the Postal Service to maintain for public inspection copies of all filings related to an appeal at the post office whose closure or consolidation is under review. If the post office is suspended, the filings are to be maintained at the nearest open post office. Also, the Postal Service is to notify participants by mail where the filings may be inspected. The Postal Service points out that its own regulations require posting the filings in the same locations where the administrative record is available—*i.e.,* where the final determination was posted. *Id.* at 27. Rule 22 is amended to make the Secretary responsible for informing participants that all filings related to an appeal are available at the post office(s) where the final determination was posted.

IV. Easily Resolved Opposition

Participation by others. For the most part, the Commission is deferring consideration of proposed rules that generated opposition. One exception is proposed rule 3025.14(a), which defines the class of persons who may participate in an appeal initiated by someone else. This proposed rule is the analog of current rule 3001.111(b).

The purposes of rule 14(a), as proposed, are: (1) To remove the requirement for filing notices of intervention, and (2) to simplify language. The Postal Service reads proposed rule 14(a) as expanding the class of persons who may participate in an appeal. Postal Service Comments at 20 (as revised October 7, 2011). American Postal Workers Union (APWU) reads proposed rule 14 as narrowing the class of persons who may participate in an appeal.[6] In addition to persons served by a post office to be closed or consolidated, current rule 111(b) allows ''*any other interested person,* or any counsel, agent or other person authorized or recognized by the Postal Service as such interested person's representative or the representative of such interested person's recognized group, such as Postmasters'' to intervene in an appeal (emphasis added). Proposed rule 14(a) intended no change in the class of persons currently allowed to intervene. The language of current rule 3001.111(b) will be retained as rule 14(a).

Filing deadlines. Rules 3025.41 through 43, as proposed, set deadlines for participant statements, briefs, or comments. The Postal Service objects to categorizing participants as supporting either the Postal Service or the petitioner. It asks, ''[a]re participants supposed to decide what due date to use based on their alignment with or against the Postal Service regarding a particular issue, the ultimate issue, or some combination?'' Postal Service Comments at 23. The wording of these rules will be changed to categorize participants as either supporting or opposing a Commission order that the entire matter be returned to the Postal Service for further consideration.

Rule 3025.14(b), as proposed, is also changed to categorize comments as supporting or opposing an order returning the matter for further consideration.[7]

Oral argument. The proposed rules do not include a provision for oral argument. As was explained in the notice of proposed rulemaking, the Commission has never held oral argument in an appeal proceeding. Order No. 814 at 6. Oral argument would also extend the time needed to decide an appeal, which the new rules are intended to shorten. *See id.* at 5. APWU requests preservation of the right to appeal in unusual situations. APWU Comments at 4. Participants in appeal proceedings may request oral argument or any other relief pursuant to rule 3001.21(a) (Motions) when circumstances warrant.

V. Substantial Opposition—Consideration Deferred

Definitions. Rule 3025.1 (Definitions), as proposed, has been changed by removing definitions of the terms ''administrative record,'' ''post office,'' and ''relocate'' and by adding the definition of ''Petition for Review.'' Proposed rule 3025.1 defines ''administrative record'' as ''all documents and materials created by the Postal Service or made available by the public to the Postal Service for its review in anticipation of the action for which review is sought.'' It defines ''post office'' as ''a Postal Service operated retail facility.'' It defines ''relocate'' to mean a situation in which ''the location of a post office within a community changes, but the total number of post offices within the community remains the same or increases.''

The Postal Service objects to the definitions of ''administrative record'' and ''post office'' as overbroad and to the definition of ''relocate'' as too narrow. Postal Service Comments at 2–7, 13–19, 21. Valpak objects to the definition of ''post office'' as overbroad.[8] APWU objects to the definition of ''relocate'' as overbroad. APWU Comments at 1–2. Consideration of these proposed definitions is deferred.

Notice. Proposed rule 3025.3 requires the Postal Service to post notice of proposals and final determinations to close or consolidate a post office. It also requires the Postal Service to mail such notices to patrons of suspended offices. The Postal Service and Valpak object to this rule. They claim that the Commission has no authority to regulate Postal Service actions that occur before an appeal has been filed. Postal Service Comments at 7–11; Valpak Comments at 5–7. Consideration of proposed rule 3025.3 is deferred. Two sentences from current rule 3001.110 setting out existing notice requirements, with minor editorial corrections to accurately state statutory language are retained as rules 3025.3(a) through (b).

Automatic suspension. Rule 3025.30, as proposed, would replace current rule 3001.114 and automatically suspend a final determination to close or consolidate a post office when a timely appeal is filed. The Postal Service and Valpak object to this proposed rule as ultra vires. Postal Service Comments at 11–13; Valpak Comments at 7–8. Consideration of this proposal is deferred. The language of current rule 3001.114 related to suspension pending review is retained as rule 3025.30, except that a sentence referring to notices of intervention and a sentence referring to the filing of the record are deleted.

It is ordered:

1. Changes to part 3001 of title 39, chapter III, Code of Federal Regulations, as set forth below, are hereby adopted, effective 30 days after publication in the **Federal Register**.

2. A new part 3025 of title 39, chapter III, Code of Federal Regulations, as set forth below, is hereby adopted, effective 30 days after publication in the **Federal Register**.

3. The Secretary shall arrange for publication of this order in the **Federal Register**.

[6] *See* section 404(d)(5)—American Postal Workers Union, AFL–CIO Comments on Proposed Rules, October 5, 2011, at 2–4 (APWU Comments).

[7] *See* section 404(d)(5) (''The Commission may affirm the determination of the Postal Service or order that the entire matter be returned for further consideration, but the Commission may not modify the determination of the Postal Service.'')

[8] Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments Regarding Proposed Rules Applicable to Appeals of Post Office Closings, October 3, 2011, at 4–5 (Valpak Comments).

List of Subjects

39 CFR Part 3001

Administrative practice and procedure, Freedom of information, Postal Service, Sunshine Act.

39 CFR Part 3025

Administrative practice and procedure, Postal Service.

By the Commission.

Issued: January 25, 2012.

Ruth Ann Abrams,

Secretary.

For the reasons discussed in the preamble, the Postal Regulatory Commission amends chapter III of title 39 of the Code of Federal Regulations as follows.

PART 3001—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 3001 continues to read as follows:

Authority: 39 U.S.C. 404(d); 503; 504; 3661.

Subpart A—Rules of General Applicability

■ 2. In § 3001.5, revise paragraph (m) to read as follows:

Subpart A—Rules of General Applicability

§ 3001.5 Definitions.

* * * * *

(m) Petitioner means a person who as permitted by 39 U.S.C. 404(b) appeals to the Commission a determination of the Postal Service to close or consolidate a post office.

* * * * *

■ 3. In § 3001.7, revise paragraph (b) introductory text to read as follows:

§ 3001.7 Ex parte communications.

* * * * *

(b) *Prohibition.* In any agency proceeding that is required to be conducted in accordance with section 556 of Title 5 or a proceeding conducted pursuant to part 3025 of this chapter except to the extent required for the disposition of ex parte matters as authorized by law:

* * * * *

■ 4. In § 3001.9, revise paragraph (a) to read as follows:

§ 3001.9 Filing of documents.

(a) *Filing with the Commission.* The filing of each written document required or authorized by these rules or any applicable statute, rule, regulation, or order of the Commission, or by direction of the presiding officer, shall be made using the Internet (Filing Online) pursuant to § 3001.10(a) at the Commission's Web site (*http://www.prc.gov*), unless a waiver is obtained. If a waiver is obtained, a hard copy document may be filed either by mailing or by hand delivery to the Office of the Secretary, Postal Regulatory Commission, 901 New York Ave., NW., Suite 200, Washington, DC 20268–0001 during regular business hours on a date no later than that specified for such filing. The requirements of this section do not apply to participants other than the Postal Service in proceedings conducted pursuant to part 3025 of this chapter.

* * * * *

■ 5. In § 3001.10, revise paragraph (b) and add new paragraph (d) to read as follows:

§ 3001.10 Form and number of copies of documents.

* * * * *

(b) *Hard copies.* Each document filed in paper form must be produced on letter-size paper, 8 to 8½ inches wide by 10½ to 11 inches long, with left- and right-hand margins not less than 1 inch and other margins not less than .75 inches, except that tables, charts or special documents attached thereto may be larger if required, provided that they are folded to the size of the document to which they are attached. If the document is bound, it shall be bound on the left side. Copies of documents for filing and service must be printed from a text-based pdf version of the document, where possible. Otherwise, they may be reproduced by any duplicating process that produces clear and legible copies. Each person filing a hardcopy document with the Commission must provide an original and two fully conformed copies of the document required or permitted to be filed under this part, except for a document filed under seal, for which only the original and two (2) copies need be filed. The copies need not be signed but shall show the full name of the individual signing the original document and the certificate of service attached thereto.

* * * * *

(d) *Exception for appeals of post office closings and consolidations.* The requirements of this section do not apply to participants other than the Postal Service in proceedings conducted pursuant to part 3025 of this chapter.

■ 6. In § 3001.12, add new paragraph (a)(3) to read as follows:

§ 3001.12 Service of documents.

(a) * * *

(3) In proceedings conducted pursuant to part 3025 of this chapter, the Secretary will serve documents (except an administrative record) on participants who do not use Filing Online. Service will be by First-Class Mail.

* * * * *

■ 7. Revise § 3001.17 to read as follows:

§ 3001.17 Notice of proceeding.

(a) *When issued.* The Commission shall issue a notice of a proceeding to be determined on the record with an opportunity for any interested person to request a hearing whenever:

(1) The Postal Service files a request with the Commission to issue an advisory opinion on a proposed change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis;

(2) The Commission in the exercise of its discretion determines that an opportunity for hearing should be provided with regard to a complaint filed pursuant to part 3030 of this chapter; or

(3) The Commission in the exercise of its discretion determines it is appropriate.

(b) *Publication and service of notice.* Each notice of proceeding shall be published in the **Federal Register** and served on the Postal Service, and the complainant in a complaint proceeding.

(c) *Contents of notice.* The notice of a proceeding shall include the following:

(1) The general nature of the proceeding involved in terms of categories listed in paragraph (a) of this section;

(2) A reference to the legal authority under which the proceeding is to be conducted;

(3) A concise description of proposals for changes in rates or fees, proposals for the establishment of or changes in the mail classification schedule, proposals for changes in the nature of postal services and, in the case of a complaint, an identification of the complainant and a concise description of the subject matter of the complaint;

(4) The date by which notices of intervention and requests for hearing must be filed; and

(5) Such other information as the Commission may desire to include

Subpart H—[Removed and Reserved]

■ 8. Remove and reserve Subpart H, consisting of §§ 3001.110 through 3001.117.

■ 9. Add part 3025, to read as follows:

PART 3025—RULES FOR APPEALS OF POSTAL SERVICE DETERMINATIONS TO CLOSE OR CONSOLIDATE POST OFFICES

Sec.
3025.1 Definitions.
3025.2 Applicability.
3025.3 Notice by the Postal Service.
3025.10 Starting an appeal.
3025.11 Submitting an appeal and other documents.
3025.12 Duplicate appeals.
3025.13 Deadlines for appeals.
3025.14 Participation by others.
3025.20 The record on review.
3025.21 Filing of the administrative record.
3025.22 Making documents available for inspection by the public.
3025.30 Suspension pending review.
3025.40 Participant statement.
3025.41 Due date for participant statement.
3025.42 Due date for Postal Service response.
3025.43 Due date for replies to the Postal Service.

Authority: 39 U.S.C. 404(d).

§ 3025.1 Definitions.

The following definitions apply in this part:

(a) *Final determination* means the written determination and findings required by 39 U.S.C. 404(d)(3).

(b) *Petitioner* means a person who files a Petition for Review.

(c) *Petition for Review* means a written document that the Commission accepts as an appeal of a post office closing or consolidation.

§ 3025.2 Applicability.

(a) The rules in this part apply when:

(1) The Postal Service decides to close or consolidate a post office, and

(2) A patron of that post office appeals the closing or consolidation.

(b) The following sections in part 3001, subpart A of this chapter, apply to appeals of post office closings or consolidations: §§ 3001.1 through 3001.9 of this chapter; § 3001.11(a) of this chapter, § 3001.11(c) through (f) of this chapter; §§ 3001.12 through 3001.17 of this chapter; and §§ 3001.21 and 3001.22 of this chapter.

(c) Answers to motions filed by the Postal Service are due within 10 days.

§ 3025.3 Notice by the Postal Service.

(a) Pursuant to section 404(d) of title 39, United States Code, any decision to close or consolidate a post office must be preceded by 60 days' notice to persons served by such post office, the opportunity for such persons to present their views, and a written determination based upon consideration of each of the factors listed in section 404(d)(2) of title 39, United States Code.

(b) This notice must include a provision stating that, pursuant to section 404(d)(5) of title 39, United States Code, a final Postal Service determination to close or consolidate a post office may be appealed by any person served by such office to the Postal Regulatory Commission at 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, within 30 days after such determination is made available to such person by the Postal Service.

§ 3025.10 Starting an appeal.

(a) A Postal Service decision to close or consolidate a post office may be appealed only by a person served by that office. An appeal is commenced by submitting a Petition for Review to the Postal Regulatory Commission.

(b) The Petition for Review must state that the person(s) submitting it is/are served by the post office that the Postal Service has decided to close or consolidate. The petition should include the name(s) and address(es) of the person(s) filing it and the name or location of the post office to be closed or consolidated. A petitioner may include other information deemed pertinent.

§ 3025.11 Submitting an appeal and other documents.

Petitions for Review, comments, motions, answers, and other documents may be submitted by persons other than the Postal Service by mail, electronically through the Commission's Web site, *http://www.prc.gov,* or by delivery to the Commission's offices at 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

§ 3025.12 Duplicate appeals.

If the Commission receives more than one Petition for Review of the same post office closing or consolidation, the petitions will be considered in a single docket.

§ 3025.13 Deadlines for appeals.

(a) *In general.* If the Postal Service has issued a final determination to close or consolidate a post office, an appeal is due within 30 days of the final determination being made available in conformance with § 3025.3(b).

(b) *Appeals sent by mail.* If sent by mail, a Petition for Review must be postmarked no later than 30 days after the final determination has been made available.

(c) *Appeals sent by other physical delivery.* If sent by some other form of physical delivery, a Petition for Review must be received in the Commission's Docket Section no later than 4:30 p.m., eastern time, on the 30th day after the final determination has been made available.

(d) *Appeals sent electronically.* If submitted electronically, a Petition for Review must be received in the Commission's Docket Section no later than 4:30 p.m., eastern time, on the 30th day after the final determination has been made available.

§ 3025.14 Participation by others.

(a) A person served by the post office to be closed or consolidated pursuant to the Postal Service written determination under review who desires to intervene in the proceeding, or any other interested person, or any counsel, agent, or other person authorized or recognized by the Postal Service as such interested person's representative or the representative of such interested person's recognized group, such as Postmasters, may participate in an appeal by sending written comments to the Postal Regulatory Commission in the manner described in § 3025.11.

(b) Persons may submit comments supporting or opposing a Commission order returning the entire matter to the Postal Service for further consideration. Comments must be filed in accordance with the deadlines established in §§ 3025.41 through 3025.43. Commenters may use PRC Form 61, which is available on the Commission's Web site, *http://www.prc.gov.*

§ 3025.20 The record on review.

(a) The record on review includes:

(1) The final determination;

(2) The notices to persons served by the post office to be closed or consolidated;

(3) The administrative record; and

(4) All documents submitted in the appeal proceeding.

(b) The record shall contain all evidence considered by the Postal Service in making its determination and shall contain no evidence not previously considered by the Postal Service.

§ 3025.21 Filing of the administrative record.

The Postal Service shall file the administrative record within 10 days of the date of posting of a Petition for Review on the Commission's Web site. The Commission may alter this time for good cause. The Secretary will notify participants that they may view the administrative record at post offices where the final determination was posted.

§ 3025.22 Making documents available for inspection by the public.

Copies of all filings (including the administrative record) related to an appeal shall be available for public inspection at the post offices where the

final determination was posted. The Secretary will notify participants that they may view copies of filings at post offices where the final determination was posted.

§ 3025.30 Suspension pending review.

(a) *Application.* Application for suspension of a determination of the Postal Service to close or consolidate any post office pending the outcome of an appeal to the Postal Regulatory Commission shall be made at the time of the filing of a Petition for Review. The application shall show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the application shall be supported by affidavits or other sworn statements or copies thereof. The applicant must be a person served by the affected post office. Immediate notice of the application shall be given to all parties to the proceeding. The application shall be filed with the Secretary of the Commission.

(b) *Answer and filing of the relevant record by the Postal Service.* Within 10 days after the application for suspension is filed, the Postal Service shall file with the Secretary of the Commission and serve on the petitioners an answer to the application supported by affidavits or other sworn statements or copies thereof.

§ 3025.40 Participant statement.

(a) When a timely Petition for Review of a decision to close or consolidate a post office is filed, the Secretary shall furnish petitioner with a copy of PRC Form 61. This form is designed to inform petitioners on how to make a statement of his/her arguments in support of the petition.

(b) The instructions for PRC Form 61 shall provide:

(1) A concise explanation of the purpose of the form;

(2) A copy of section 404(d)(2)(A) of title 39, United States Code; and

(3) Notification that, if petitioner prefers, he or she may file a brief in lieu of or in addition to completing PRC Form 61.

§ 3025.41 Due date for participant statement.

The statement or brief of petitioner and of any other participant seeking to have the Commission return the entire matter to the Postal Service for further consideration, shall be filed not more than 20 days after the filing of the administrative record.

§ 3025.42 Due date for Postal Service response.

The statement or brief of the Postal Service, and of any other participant opposing return of the matter for further consideration, shall be filed not more than 14 days after the date for filing of petitioner's statement.

§ 3025.43 Due date for replies to the Postal Service.

Petitioner, and any other participant seeking to have the Commission return the matter for further consideration, may file a reply to the Postal Service response not more than 10 days after the date of the Postal Service response. Replies are limited to issues discussed in the responses of the Postal Service and other participants seeking affirmation of the Postal Service determination.

[FR Doc. 2012–2931 Filed 2–8–12; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2010–0392(a); FRL–9628–6]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; State of Florida; Control of Large Municipal Waste Combustor (LMWC) Emissions From Existing Facilities; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correcting amendment.

SUMMARY: On December 30, 2010, EPA published a final rule approving the Clean Air Act (CAA) section 111(d)/129 State Plan (the Plan) submitted by the Florida Department of Environmental Protection for the State of Florida on July 12, 2007, for implementing and enforcing the Emissions Guidelines (EGs) applicable to existing Large Municipal Waste Combustors (LMWCs). These EGs apply to municipal waste combustors with a capacity to combust more than 250 tons per day of municipal solid waste (MSW). This action corrects an error in the regulatory language in paragraph (a) of EPA's December 30, 2010, final rule.

DATES: This action is effective February 9, 2012.

ADDRESSES: Copies of the documentation used in the action being corrected are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Daniel Garver, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9839. Mr. Garver can also be reached via electronic mail at *garver.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION: This action corrects an error in the regulatory language for an entry that appears in paragraph (a) of Florida's Identification of Sources at 40 CFR 62.2355. The final action determined that EPA approved the CAA section 111(d)/129 Plan applicable to LMWCs in the State of Florida on December 30, 2010 (75 FR 82269). However, EPA inadvertently indicated in 40 CFR 62.2355(a) that ''the plan applies to existing facilities with a municipal waste combustor (MWC) unit capacity greater than 250 tons per day of MSW, and for which construction, reconstruction, or modification was commenced on or before July 12, 2007.'' The correct date is September 20, 1994. Therefore, EPA is correcting this error by deleting the date ''July 12, 2007'' and inserting the correct date ''September 20, 1994.''

EPA has determined that today's action falls under the ''good cause'' exemption in section 553(b)(3)(B) of the Administrative Procedure Act (APA) which, upon finding ''good cause,'' authorizes agencies to dispense with public participation where public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest. Public notice and comment for this action are unnecessary because today's action to correct an inadvertent error contained in paragraph (a) of 40 CFR 62.2355 of the rulemaking and has no substantive impact on EPA's December 30, 2010, approval. In addition, EPA can identify no particular reason why the public would be interested in being notified of the correction, or in having the opportunity to comment on the correction prior to this action being finalized, since this correction action does not change the meaning of EPA's analysis or action to approve the amendment in paragraph (a) to 40 CFR 62.2355.

EPA also finds that there is good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action.

Section 553(d)(3) of the APA allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). The purpose of the 30-day waiting period prescribed in APA section 553(d)(3) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's action merely corrects an error in paragraph (a) of a prior rulemaking by correcting the date as identified above in 40 CFR 62.2355 in a revision, which EPA approved on December 30, 2010. For these reasons, EPA finds good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action.

Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely corrects an error in paragraph (a) of a prior rulemaking by correcting the date as identified above in 40 CFR 62.2355, which EPA approved on December 30, 2010, and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule merely corrects an inadvertent error in paragraph (a) of a prior rule, and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This rule also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely corrects an error in paragraph (a) of a prior rulemaking by correcting the date as identified above in 40 CFR 62.2355, in a revision which EPA approved on December 30, 2010, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant. In addition, this rule does not involve technical standards, thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule also does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 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 rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 62

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

Dated: December 9, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 62 is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart K—Florida

■ 2. In § 62.2355, paragraph (a) is revised to read as follows:

§ 62.2355 Identification of sources.

(a) The plan applies to existing facilities with a municipal waste combustor (MWC) unit capacity greater than 250 tons per day of municipal solid waste (MSW), and for which construction, reconstruction, or modification was commenced on or before September 20, 1994.

* * * * *

[FR Doc. 2012–2884 Filed 2–8–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 110781394–2048–02]

RIN 0648–BB09

Marine Mammals; Subsistence Taking of Northern Fur Seals; Harvest Estimates

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

ACTION: Final estimates of annual fur seal subsistence needs.

SUMMARY: Pursuant to the regulations governing the subsistence taking of

northern fur seals, NMFS is publishing the annual fur seal subsistence harvests on St. George and St. Paul Islands (the Pribilof Islands) for 2008 to 2010, and the annual estimates for the fur seal subsistence needs for 2011 through 2013. Alaska Natives on St. Paul harvested 328, 341, and 357 fur seals from 2008, 2009 and 2010, respectively, and 170, 113, and 78 fur seals on St. George Island during the same period. NMFS estimates the annual subsistence needs are 1,645–2,000 seals on St. Paul and 300–500 seals on St. George.

DATES: Effective March 12, 2012.

FOR FURTHER INFORMATION CONTACT: Michael Williams, (907) 271–5117, email *Michael.Williams@noaa.gov;* Kim Rivera, (907) 586–7424, email *Kim.Rivera@noaa.gov;* or Shannon Bettridge, (301) 427–8402, email *Shannon.Bettridge@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Access

A Final Environmental Impact Statement, harvest reports, and other relevant information are available on the Internet at the following address: *http://www.alaskafisheries.noaa.gov/protectedresources/seals/fur.htm.*

The subsistence harvest from the depleted stock of northern fur seals, *Callorhinus ursinus,* on the Pribilof Islands, Alaska, is governed by regulations found in 50 CFR part 216, subpart F, Taking for Subsistence Purposes. The regulations require NMFS to publish every 3 years a summary of the harvest in the preceding 3 years, and to discuss the number of fur seals expected to be taken over the next 3 years to satisfy the subsistence requirements of residents of the Pribilof Islands (St. Paul and St. George). After a 30-day comment period, NMFS must publish a final notification of the expected annual harvest levels for the next 3 years.

On July 29, 2011 (76 FR 45499), NMFS published the summary of the 2008–2010 fur seal harvests and provided a 30-day comment period on the estimates of subsistence needs for the 2011–2013. No comments were received. Based on past studies, NMFS estimates the annual subsistence needs for Alaskan Natives for the next 3 years are 1,645–2,000 juvenile male fur seals on St. Paul Island, and 300–500 juvenile male fur seals on St. George Island. Background information related to these estimates was included in the proposed harvest estimates published in the **Federal Register** on July 29, 2011.

Classification

National Environmental Policy Act

NMFS prepared an Environmental Impact Statement (EIS) evaluating the impacts on the human environment of the subsistence harvest of northern fur seals. The Final EIS, which is available on the NMFS Web site (see Electronic Access) was subjected to public review (69 FR 53915, September 3, 2004), and the comments were incorporated into the final EIS (May 2005). Therefore, no further environmental impact analyses are required.

Executive Order 12866 and Regulatory Flexibility Act

This action has been determined not to be a significant rule under Executive Order (E.O.) 12866.

The Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy of the Small Business Administration that this action would not have a significant economic impact on a substantial number of small entities. The harvest of northern fur seals on the Pribilof Islands, Alaska, is for subsistence purposes only, and the estimate of subsistence need would not have an adverse economic impact on any small entities. Background information related to the certification was included in the proposed estimates published in the **Federal Register** on July 29, 2011. We received no comments on this certification; therefore a regulatory flexibility analysis is not required for this action, and none has been prepared.

Paperwork Reduction Act

This action does not require the collection of information.

Executive Order 13132—Federalism

This action does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 13132 because this action does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nonetheless, NMFS worked closely with local governments in the Pribilof Islands, and these estimates of subsistence needs were prepared by the local governments in St. Paul and St. George, with assistance from NMFS officials.

Executive Order 13175—Native Consultation

Executive Order 13175 of November 6, 2000 (25 U.S.C. 450 Note), the executive Memorandum of April 29, 1994 (25 U.S.C. 450 note), and the American Indian Native Policy of the U.S. Department of Commerce (March 30, 1995) outline the responsibilities of the National Marine Fisheries Service in matters affecting tribal interests. Section 161 of Public Law 108–100 (188 Stat. 452) as amended by section 518 of Public Law 108–447 (118 Stat. 3267), extends the consultation requirements of E.O. 13175 to Alaska Native corporations. NMFS has contacted the tribal governments of St. Paul and St. George Islands and their respective local Native corporations (Tanadgusix and Tanaq) about setting the next three years harvest estimates and received their input.

Dated: February 3, 2012.

Alan D. Risenhoover,

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

[FR Doc. 2012–3052 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126522–0640–2]

RIN 0648–XA988

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Vessels Using Pot Gear in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by vessels using pot gear in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2012 Pacific cod total allowable catch apportioned to vessels using pot gear in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 6, 2012, through 1200 hrs, A.l.t., September 1, 2012.

FOR FURTHER INFORMATION CONTACT: Obren Davis, (907) 586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of

Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 680.

The A season allowance of the 2012 Pacific cod total allowable catch (TAC) apportioned to vessels using pot gear in the Western Regulatory Area of the GOA is 4,100 metric tons (mt), as established by the final 2011 and 2012 harvest specifications for groundfish of the GOA (76 FR 11111, March 1, 2011), revision to the final 2012 harvest specifications for Pacific cod (76 FR 81860, December 29, 2011), and inseason adjustment to the final 2012 harvest specifications for Pacific cod (77 FR 438, January 5, 2012).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator) has determined that the A season allowance of the 2012 Pacific cod TAC apportioned to vessels using pot gear in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 4,090 mt and is setting aside the remaining 10 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by vessels using pot gear in the Western Regulatory Area of the GOA. After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the directed fishing closure of Pacific cod for vessels using pot gear in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 3, 2012.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: February 6, 2012.

Carrie Selberg,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–3023 Filed 2–6–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 27
Thursday, February 9, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0108; Directorate Identifier 2011–NM–049–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain The Boeing Company Model 767 airplanes. The existing AD currently requires an inspection to detect cracks and fractures of the outboard hinge fitting assemblies on the trailing edge of the inboard main flap, and follow-on and corrective actions if necessary. For certain airplanes, the existing AD also requires a one-time inspection to determine if a tool runout option has been performed in the area. Since we issued that AD, we have received reports of hinge assembly fractures found before the currently-required inspection cycle compliance times on certain airplanes. This proposed AD reduces compliance times for Model 767–400ER series airplanes. In addition, this proposed AD would revise the applicability to include an additional airplane. We are proposing this AD to prevent the inboard aft flap from separating from the wing and potentially striking the airplane, which could result in damage to the surrounding structure and potential personal injury.

DATES: We must receive comments on this proposed AD by March 26, 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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this 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 proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6577; fax: 425–917–6590; email: *berhane.alazar@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0108; Directorate Identifier 2011–NM–049–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On June 16, 2003, we issued AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003), for certain Model 767 airplanes. That AD requires an inspection to detect cracks and fractures of the outboard hinge fitting assemblies on the trailing edge of the inboard main flap, and follow-on and corrective actions if necessary. For certain airplanes, that AD also requires a one-time inspection to determine if a tool runout option has been performed in the area. That AD resulted from a report indicating that, during a routine maintenance inspection, fractured lugs were found on both hinge fittings of the outboard hinge assembly mounted to the inboard main flap on a Boeing Model 767–300 series airplane. We issued that AD to prevent the inboard aft flap from separating from the wing and potentially striking the airplane, which could result in damage to the surrounding structure and potential personal injury.

Actions Since Existing AD Was Issued

Since we issued AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003), we have determined that, due to hinge assembly fractures found before the currently-required inspection cycle compliance times on certain airplanes affected by that AD, compliance times need to be reduced for the initial and repetitive inspections for Model 767–400ER series airplanes.

In addition, we have determined that the airplane having line number 877 was inadvertently omitted from the applicability of AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003).

Relevant Service Information

AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003), referred to Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002, as

the appropriate source of service information for inspections and terminating actions for Model 767–400ER series airplanes. Boeing has since revised this service bulletin. We reviewed Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010. This service bulletin reduces the initial compliance time and repetitive intervals for inspections of the outboard hinge fitting assemblies on the trailing edge of the inboard main flap for Model 767–400ER series airplanes.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would retain certain requirements of AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003). This proposed AD would reduce the compliance times for Model 767–400ER series airplanes. In addition, this proposed AD would revise the applicability to include an additional airplane.

Changes to Existing AD

This proposed AD would retain certain requirements of AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003). Since AD 2003–13–01 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2003–13–01 Amendment 39-13201 (68 FR 37402, June 24, 2003)	Corresponding requirement in this proposed AD
paragraph (a)	paragraph (g)
paragraph (b)	paragraph (h)
paragraph (c)	paragraph (i)(1)
paragraph (d)	paragraph (i)(2)
paragraph (f)	paragraph (j)
paragraph (g)	paragraph (l)
paragraph (h)	paragraph (k)

Because there is no longer a need for inspection results, this proposed AD would also remove the reporting requirement from AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003).

Costs of Compliance

We estimate that this proposed AD affects 38 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Detailed inspection [retained from AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003)].	2 work-hours × $85 per hour = $170 per inspection cycle.	$0	$170 per inspection cycle.	$6,460 per inspection cycle.
Detailed and eddy current inspections [retained from AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003)].	5 work hours × $85 per hour = $425 per inspection cycle.	0	$425 per inspection cycle.	$16,150 per inspection cycle.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement [retained from AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003)].	24 work hours × $85 per hour = $2,040	$45,400	$47,440

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003), and adding the following new AD:

The Boeing Company: Docket No. FAA–2012–0108; Directorate Identifier 2011–NM–049–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by March 26, 2012.

(b) Affected ADs

This AD supersedes AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003).

(c) Applicability

The Boeing Company Model 767–200, –300, and –300F series airplanes, as specified in Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001; and Model 767–400ER series airplanes, as specified in Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010; certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of hinge assembly fractures found before the currently-required inspection cycle compliance times on certain airplanes. We are issuing this AD to prevent the inboard aft flap from separating from the wing and potentially striking the airplane, which could result in damage to the surrounding structure and potential personal injury.

(f) Compliance

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

Restatement of Certain Requirements of AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003), With Revised Service Information

(g) Inspection

Perform either a detailed inspection, or a detailed inspection plus an eddy current inspection, of the outboard hinge fitting assemblies on the trailing edge of the inboard main flap to detect cracks and fractures and evidence of a tool runout option, as applicable. For the purposes of this AD, a detailed inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

(1) For Model 767–200, –300, and –300F series airplanes identified in Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001: Inspect before the airplane accumulates 2,700 total flight cycles, or within 90 days after July 29, 2003 (the effective date of AD 2003–13–01, Amendment 39–13201 (68 FR 37402, June 24, 2003)), whichever occurs later, in accordance with Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001.

(2) For Model 767–400ER series airplanes identified in Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002: Inspect before the airplane accumulates 12,000 total flight cycles, except as required by paragraph (m) of this AD, in accordance with Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002; or Revision 1, dated May 6, 2010. As of the effective date of this AD, only Revision 1 may be used.

(h) Follow-on/Corrective Actions

Following the initial inspections required by paragraph (g) of this AD: Perform applicable follow-on and corrective actions at the times specified in Figure 1 of Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001 (for Model 767–200, –300, and –300F series airplanes); or Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002, or Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010 (for Model 767–400ER series airplanes); until the inspection required by paragraph (n) of this AD is accomplished. After the effective date of this AD, only Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010, may be used for Model 767–400ER series airplanes. Do the follow-on and corrective actions (including repetitive inspections and replacement of the fittings with new fittings), in accordance with Part 1 or Part 2 of Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001 (for Model 767–200, –300, and –300F series airplanes); or Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002, or Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010 (for Model 767–400ER series airplanes); except as required by paragraph (i)(2) of this AD. After the effective date of this AD, only Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010, may be used for Model 767–400ER series airplanes. For Model 767–200, –300, and –300F series airplanes: If the fitting has the tool runout, and no cracking or fracture is found during the inspection, this AD requires no further action for that hinge fitting.

(i) Exceptions to Service Bulletin Procedures

For this AD, the following exceptions apply:

(1) Where the terminating action in Part 3 of Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001; and Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002, and Revision 1, dated May 6, 2010; is specified as corrective action: This AD requires that the terminating action, if required, be accomplished before further flight.

(2) Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001, specifies to contact Boeing before the terminating action is done as corrective action for any cracking or fracture found on a Model 767–200, –300, or –300F series airplane with the tool runout. This AD requires that any such crack or fracture on those airplanes be repaired in accordance with Part 3 of Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001. This AD does not require a report.

(j) Optional Terminating Action

Unless required to do so by paragraph (h) of this AD: Operators may choose to accomplish the terminating action (including replacement of the fittings with new fittings, and reinstallation of existing upper skin access panels and fairing midsections on the trailing edge of the main flap) in accordance with Part 3 of the Work Instructions of Boeing Service Bulletin 767–57A0076, Revision 1, dated March 29, 2001; or Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002, or Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010; as applicable. After the effective date of this AD, only Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010, may be used for Model 767–400ER series airplanes. Accomplishment of the terminating action terminates the repetitive inspection requirements of paragraph (h) of this AD.

(k) Part Installation

As of July 29, 2003, no person may install on any airplane identified in Boeing Service Bulletin 767–57A0076, dated October 26, 2000; and Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002; a hinge fitting assembly that has any part number listed in table 1 of this AD, unless the applicable requirements of this AD have been accomplished for that fitting. As of the effective date of this AD, no person may install on any airplane identified in paragraph (c) of this AD, a hinge fitting assembly that has any part number listed in table 1 of this AD, unless the applicable requirements of this AD have been accomplished for that fitting.

TABLE 1—HINGE FITTING ASSEMBLY PART NUMBERS

113T2271–13	113T2271–14
113T2271–23	113T2271–24
113T2271–29	113T2271–30
113T2271–33	113T2271–34
113T2271–401	113T2271–402

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

Actions done before July 29, 2003, in accordance with Boeing Alert Service Bulletin 767–57A0076, dated October 26, 2000, are acceptable for compliance with the corresponding requirements of paragraphs (g), (h), (j), and (k) of this AD.

New Requirements of This AD

(m) Initial Inspection

For Model 767–400ER airplanes identified in Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010, on which the inspection required in paragraph (g) of this AD has not been done as of the effective date of this AD: Before the accumulation of 6,000 total flight cycles, or within 750 flight cycles after the effective date of this AD, whichever occurs later, perform either a detailed inspection or a detailed inspection plus an eddy current inspection to detect cracks or fractures of the outboard hinge fitting assemblies on the trailing edge of the inboard main flap, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010. Accomplishment of this inspection terminates the inspection requirement of paragraph (g)(2) of this AD.

(n) Repetitive Inspections

For Model 767–400ER airplanes: Repeat either inspection specified in paragraph (h) or (m) of this AD, as applicable, at the time specified in paragraph (n)(1) or (n)(2) of this AD, as applicable, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 767–57A0079, Revision 1, dated May 6, 2010.

(1) If the most recent inspection was a detailed inspection, repeat at intervals not to exceed 300 flight cycles after doing the detailed inspection.

(2) If the most recent inspections were a detailed inspection and an eddy current inspection, repeat at intervals not to exceed 750 flight cycles after doing the detailed inspection and eddy current inspection.

(o) Optional Terminating Action

For Model 767–400ER airplanes: Replacing the fittings with new fittings, in accordance with Part 3 of the Work Instructions of Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002; or Revision 1, dated May 6, 2010; terminates the repetitive inspections required by paragraphs (h) and (n) of this AD.

(p) Credit for Actions Accomplished in Accordance with Previous Service Information

Actions done before the effective date of this AD in accordance with Part 3 of the Work Instructions of Boeing Alert Service Bulletin 767–57A0079, dated June 20, 2002, are acceptable for compliance with the requirements of paragraph (h) and (n) of this AD.

(q) 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.

(r) Related Information

(1) For more information about this AD, contact Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6577; fax: 425–917–6590; email: *berhane.alazar@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; 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.

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

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–2976 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0109; Directorate Identifier 2010–NM–244–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain Bombardier Inc. Model CL–215–1A10 and CL–215–6B11 (CL–215T Variant) airplanes. The existing AD currently requires repetitive inspections to detect cracking of the lower cap of the wing front and rear spars at wing station (WS) 51.00, and the wing lower skin. Additional actions, if cracking is found, include reworking the lower cap of the front or rear spar, inspecting for cracking, and repairing any cracking. The existing AD also requires reporting inspection results. Since we issued that AD, we have received reports of cracking found outside the inspection area. This proposed AD would extend the inspection area of the rear spar lower cap from WS 51.00 to WS 49.50 and modify the ultrasonic inspection calibration procedure. We are proposing this AD to detect and correct cracking of the lower caps of the wing front spar and rear spar, and lower wing skin, which could result in reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by March 26, 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 Bombardier, Inc., 400 Côte-Vertu Road West, Dorval,

Québec H4S 1Y9, Canada; phone: 514–855–5000; fax: 514–855–7401; email: *thd.crj@aero.bombardier.com;* Internet: *http://www.bombardier.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: George Duckett, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Westbury, NY 11590; telephone (516) 228–7325; fax (516) 794–5531.

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–2012–0109; Directorate Identifier 2010–NM–244–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

On August 24, 2005, we issued AD 2005–18–05, Amendment 39–14245 (70 FR 52009, September 1, 2005). That AD required actions intended to address an unsafe condition on Bombardier, Inc. Model CL–215–1A10, CL–215–6B11 (CL–215T Variant), and CL–215–6B11 (CL–415 Variant) airplanes.

Since we issued AD 2005–18–05, Amendment 39–14245 (70 FR 52009, September 1, 2005) Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, has issued Airworthiness Directive CF–1992–26R2, dated September 1, 2010 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Cracks have been found in the rear spar of the left wing at Wing Station (WS) 51.00 on several aircraft in service. On some aircraft, the cracks propagated through the lower spar cap and fail-safe straps into the spar web and the lower wing skin. The cracks are not visible from outside the aircraft.
>
> * * * * *
>
> Revision 2 of this [TCCA] AD is issued as a result of cracks found outside the inspection area specified in Revision 1. This revision extends the inspection area of the rear spar lower cap from WS 51.00 to WS 49.50 and to modify the ultrasonic inspection calibration procedure.

Cracking of the lower caps of the wing front spar and rear spar, and lower wing skin, could result in reduced structural integrity of the airplane. You may obtain further information by examining the MCAI in the AD docket.

AD 2005–18–05, Amendment 39–14245 (70 FR 52009, September 1, 2005), specifies Model CL–215–6B11 (CL–415 Variant) airplanes in the applicability, but also specifies serial numbers 1001 though 1125. The serial numbers for Model CL–215–6B11 (CL–415 Variant) airplanes start at 2001. We have determined that Model CL–215–6B11 (CL–415 Variant) airplanes are not subject to the identified unsafe condition. Therefore, we have removed Model CL–215–6B11 (CL–415 Variant) airplanes from the applicability of this proposed AD.

Relevant Service Information

Bombardier Inc. has issued Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009. 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 7 products of U.S. registry.

The actions that are required by AD 2005–18–05, Amendment 39–14245 (70 FR 52009, September 1, 2005) and retained in this proposed AD take about 17 work-hours per product, at an average labor rate of $85 per work hour. Based on these figures, the estimated cost of the currently required actions is $1,445 per product.

We estimate that it would take about 6 work-hour per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,570, or $510 per product.

In addition, we estimate that any necessary follow-on actions would take about 480 work-hours for a cost of $40,800 per product. We have received no definitive data that would enable us to provide a parts cost estimate for the on-condition requirement specified in this proposed AD. 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 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 removing Amendment 39–14245 (70 FR 52009, September 1, 2005) and adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2012–0109; Directorate Identifier 2010–NM–244–AD.

(a) Comments Due Date

We must receive comments by March 26, 2012.

(b) Affected ADs

This AD supersedes AD 2005–18–05, Amendment 39–14245 (70 FR 52009, September 1, 2005).

(c) Applicability

This AD applies to the Bombardier Inc. airplanes; certificated in any category; as identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Model CL–215–1A10 (Water Bomber) airplanes, serial numbers 1001 through 1125 inclusive.

(2) Model CL–215–6B11 (CL215T Variant) airplanes, serial numbers 1056 through 1125 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 57: Wings.

(e) Reason

This AD was prompted by reports of cracking found outside the inspection area. We are proposing this AD to detect and correct cracking of the lower caps of the wing front spar and rear spar, and lower wing skin, which could result in reduced structural integrity 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.

Restatement of Certain Requirements of AD 98–04–08, Amendment 39–10321 (63 FR 7640, February 17, 1998), With New Service Information

(g) Initial Inspection of AD 98–04–08, Amendment 39–10321 (63 FR 7640, February 17, 1998), With New Threshold

At the time specified in paragraph (h) of this AD: Perform an ultrasonic inspection to detect cracking of the lower cap of the wing front and rear spars at wing station 51, in accordance with the Accomplishment Instructions of Canadair Alert Service Bulletin 215–A463, Revision 1, dated May 25, 1995, or Bombardier Alert Service Bulletin 215–A463, Revision 2, dated March 13, 2001 (for the front spar); and Canadair Alert Service Bulletin 215–A454, Revision 1, dated May 25, 1995, Bombardier Alert Service Bulletin 215–A454, Revision 2, dated January 27, 1999, Bombardier Alert Service Bulletin 215–A454, Revision 3, dated March 13, 2001, or Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009 (for the rear spar). As of the effective date of this AD, the inspection must be done in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A463, Revision 2, dated March 13, 2001 (for the front spar); and Bombardier Alert Service Bulletin 215–A454, Revision 3, dated March 13, 2001, or Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009 (for the rear spar).

(h) Compliance Times

Do the inspections required by paragraph (g) of this AD at the earlier of the times specified in paragraphs (h)(1) and (h)(2) of this AD.

(1) Prior to the accumulation of 3,000 total flight hours, or within 25 flight hours after March 4, 1998 (the effective date of AD 98–04–08, Amendment 39–10321 (63 FR 7640, February 17, 1998)), whichever occurs later.

(2) At the later of the times specified in paragraphs (h)(2)(i) and (h)(2)(ii) of this AD.

(i) Prior to the accumulation of 2,500 total flight hours, or 8,000 total water drops, whichever occurs first.

(ii) Within 50 flight hours or 150 water drops after October 6, 2005 (the effective date of AD 2005–18–05, Amendment 39–14245 (70 FR 52009, September 1, 2005), whichever occurs first.

(i) Repetitive Inspections With New Intervals

Repeat the ultrasonic inspection specified in paragraph (g) of this AD at the times specified in paragraph (i)(1) or (i)(2) of this AD, as applicable.

(1) For airplanes on which any ultrasonic inspection required by paragraph (a) of AD 98–04–08, Amendment 39–10321 (63 FR 7640, February 17, 1998), has been done before October 6, 2005: Within 600 flight hours after the last ultrasonic inspection, do the ultrasonic inspection specified in paragraph (g) of this AD. Repeat the ultrasonic inspection specified in paragraph (g) of this AD thereafter at intervals not to exceed 600 flight hours or 2,000 water drops, whichever occurs first.

(2) For airplanes on which the ultrasonic inspection required by paragraph (a) of AD 98–04–08, Amendment 39–10321 (63 FR 7640, February 17, 1998), has not been done before October 6, 2005: After accomplishing the initial ultrasonic inspection specified in paragraph (g) of this AD, repeat the ultrasonic inspection specified in paragraph (g) of this AD thereafter at intervals not to exceed 600 flight hours or 2,000 water drops, whichever occurs first.

Restatement of Requirements of AD 2005–18–05, Amendment 39–14245 (70 FR 52009, September 1, 2005), With New Service Information

(j) Ultrasonic Inspection

At the later of the times specified in paragraphs (j)(1) and (j)(2) of this AD, do an ultrasonic inspection for cracks of the wing lower skin, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A454, Revision 3, dated March 13, 2001; or Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009. Thereafter, do the ultrasonic inspection for cracks of the wing lower skin at the times specified for the ultrasonic inspection in paragraph (i) of this AD.

(1) Within 50 flight hours or 150 water drops after October 6, 2005, whichever occurs first.

(2) Before further flight after accomplishing the first ultrasonic inspection required by paragraph (g) or (i) of this AD after October 6, 2005.

(k) Cracking Detected

If any cracking is detected during any inspection required by paragraph (g), (i), or (j) of this AD, before further flight, accomplish paragraphs (k)(1) and (k)(2) of this AD.

(1) Rework the lower cap of the front or rear spar, as applicable, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A463, Revision 2, dated March 13, 2001 (for the front spar); and Bombardier Alert Service Bulletin 215–A454, Revision 3, dated March 13, 2001; or Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009 (for the rear spar).

(2) After doing the rework specified in paragraph (k)(1) of this AD, do a general visual inspection, from inside the wing box, to detect cracks of the front spar web or rear spar web, as applicable, and the lower skin area, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A463, Revision 2,

dated March 13, 2001 (for the front spar); and Bombardier Alert Service Bulletin 215–A454, Revision 3, dated March 13, 2001 (for the rear spar); or Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009 (for the rear spar). If any cracking is detected: Before further flight, repair in accordance with a method approved by the Manager, New York Aircraft Certification Office (ACO), FAA; or Transport Canada Civil Aviation (TCCA) (or its delegated agent).

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

(l) Actions accomplished before October 6, 2005, in accordance with Canadair Alert Service Bulletin 215–A463, dated April 8, 1993; Canadair Alert Service Bulletin 215–A463, Revision 1, dated May 25, 1995; Canadair Alert Service Bulletin 215–A454, dated October 13, 1993; Canadair Alert Service Bulletin 215–A454, Revision 1, dated May 25, 1995; Bombardier Alert Service Bulletin 215–A454, Revision 2, dated January 27, 1999; are considered acceptable for compliance with the corresponding actions specified in this AD.

(2) Actions accomplished before October 6, 2005, in accordance with Bombardier Alert Wire 215–A454, dated December 23, 1992; and Bombardier Alert Wire 215–A463, dated March 26, 1993; are considered acceptable for compliance with the corresponding actions specified in this AD.

(m) Reporting Requirement

For any inspection required by AD 2005–18–05, Amendment 39–14245 (70 FR 52009, September 1, 2005), that is accomplished after October 6, 2005, within 30 days after accomplishing the inspection, submit a report of any inspection results (both positive and negative findings) to Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada; or to Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* As of the effective date of this AD, submit reports to Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

New Requirements of This AD

(n) Ultrasonic Inspection of the Rear Spar Lower Cap

Within the compliance time specified in paragraph (p) of this AD: Perform an ultrasonic inspection to detect cracking of the right and left wing rear spar lower cap between wing station (WS) 51.00 and WS 49.50, in accordance with paragraph 2.C., ''Part A,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009. Repeat the ultrasonic inspection thereafter at intervals not to exceed 600 flight hours or 2,000 water drops, whichever comes first. Accomplishment of the actions in this paragraph terminates the inspection requirements of the lower cap of the wing rear spars at wing station 51.00 of paragraph (g) of this AD. Accomplishment of the actions in this paragraph does not terminate the inspection requirements of the lower cap of the front wing spars at wing station 51.00 required by paragraph (g) of this AD.

(1) If any crack is found in the rear spar lower cap, before further flight, do a general visual inspection for cracks from inside the wing box, of the areas of the rear spar web and the wing lower skin adjacent to the crack in the rear spar lower cap, in accordance with paragraph 2.C., ''Part A,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009.

(2) If any cracking is detected during any ultrasonic or general visual inspection required by paragraph (n) of this AD, before further flight, repair in accordance with a method approved by the Manager, New York ACO, FAA; or TCCA (or its delegated agent).

(o) Ultrasonic Inspection of the Lower Wing Skin

Within the compliance time specified in paragraph (p) of this AD: Perform an ultrasonic inspection to detect cracking of the wing lower skin underneath the drag angle between the front spar and the rear spar at the left and right WS 51.00, in accordance with paragraph 2.D., ''Part B,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009. Do the ultrasonic inspection thereafter at intervals not to exceed 600 flight hours or 2,000 water drops, whichever comes first. Accomplishment of the actions in this paragraph terminates the requirements of paragraph (j) of this AD.

(1) If any crack is found in the wing lower skin, before further flight, do a general visual inspection for cracks from inside the wing box, *i.e.,* the stringers adjacent to the skin crack in accordance with paragraph 2.D., ''Part B,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009.

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(2) If any cracking is detected during any ultrasonic or general visual inspection required by paragraph (o) of this AD, before further flight, repair in accordance with a method approved by the Manager, New York ACO, FAA; or TCCA (or its delegated agent).

(p) Compliance Times for Paragraphs (n) and (o) of This AD

At the later of the times specified in paragraphs (p)(1) and (p)(2) of this AD.

(1) Prior to the accumulation of 2,500 total flight hours, or 8,000 total water drops, whichever occurs first.

(2) Within 50 flight hours or 150 water drops after the effective date of this AD, whichever occurs first.

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

Inspections accomplished at WS 51.00 before the effective date of this AD in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin 215–A454, Revision 3, dated March 13, 2001, within the last 550 flight hours or 1,850 water drops, are considered acceptable for compliance with the corresponding action specified in paragraph (o) of this AD.

(r) Reporting Requirements With New Address

At the applicable time specified in paragraph (r)(1) or (r)(2) of this AD, submit a report of the findings (both positive and negative) of the inspection required by paragraphs (n) and (o) of this AD to Bombardier, Inc., in accordance with Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(s) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO, ANE–170, 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 ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; phone: 516–228–7300; fax: 516–794–5531. 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.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should

be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(t) Related Information

Refer to MCAI Airworthiness Directive CF–1992–26R2, dated September 1, 2010, and the following service information for related information.

(1) Bombardier Alert Service Bulletin 215–A463, Revision 2, dated March 13, 2001.

(2) Bombardier Alert Service Bulletin 215–A454, Revision 3, dated March 13, 2001.

(3) Bombardier Alert Service Bulletin 215–A454, Revision 4, dated November 18, 2009.

Issued in Renton, Washington, on January 26, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–3031 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0110; Directorate Identifier 2011–NM–148–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes equipped with analog transient suppression devices (ATSDs) installed in accordance with Supplemental Type Certificate number ST00146BO. This proposed AD was prompted by multiple reports of corrosion on ATSDs. This proposed AD would require revising the maintenance program to incorporate certain limitations. We are proposing this AD to detect and correct corrosion on ATSDs, which could result in the loss of high voltage transient protection (e.g., lightning protection) in the fuel tanks and consequent fuel tank explosion and loss of the airplane.

DATES: We must receive comments on this proposed AD by March 26, 2012.

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

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

For service information identified in this proposed AD, contact Goodrich Corporation, Sensors and Integrated Systems, 100 Panton Road, Vergennes, Vermont 05491; phone: 802–877–4580; fax: 802–877–4444; email: *les.blades@goodrich.com;* Internet: *http://www.goodrich.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Marc Ronell, Aerospace Engineer, Engine and Propeller Directorate, ANE–150, FAA, New England Aircraft Certification Office (ACO), 12 New England Executive Park, Burlington, Massachusetts 01803; phone: 781–238–7776; fax: 781–238–7170; email: *marc.ronell@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0110; Directorate Identifier 2011–NM–148–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received at least six reports of corrosion on the housings of ATSDs. This condition, if not corrected, could result in the loss of high voltage transient protection (*e.g.,* lightning protection) in the fuel tanks and consequent fuel tank explosion and loss of the airplane.

Relevant Service Information

We have reviewed Goodrich Principal Instructions for Continued Airworthiness Manual for the Analog Transient Suppression Device Installation Applicable to Boeing 737–100 through -500 Airplanes Supplemental Type Certificate—ST00146BO, Document T3044–0010–0101, Revision D, dated September 26, 2011, which describes various limitations, including Critical Design Control Limitations (CDCCL), inspections, and checks of the ATSD, ground straps, and safe-side harness.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD affects 384 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise maintenance program	1 work-hour × $85 per hour = $85	$0	$85	$32,640

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2012–0110; Directorate Identifier 2011–NM–148–AD.

(a) Comments Due Date

We must receive comments by March 26, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued before September 26, 2011, equipped with analog transient suppression devices (ATSDs) installed in accordance with Supplemental Type Certificate number ST00146BO.

Note 1 to paragraphs (c), (g), and (h): This AD requires revisions to certain operator maintenance documents to include new actions (e.g., inspections and/or Critical Design Configuration Control Limitations (CDCCLs). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (i) of this AD. The request should include a description of changes to the required actions that will ensure the continued operational safety of the airplane.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 2841, Fuel Quantity Indicator.

(e) Unsafe Condition

This AD was prompted by multiple reports of corrosion on ATSDs. We are issuing this AD to detect and correct corrosion on ATSDs, which could result in the loss of high voltage transient protection (*e.g.,* lightning protection) in the fuel tanks and consequent fuel tank explosion and loss of the airplane.

(f) Compliance

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

(g) Maintenance Program Revision

Within 3 months after the effective date of this AD, revise the maintenance program to incorporate the limitations specified in Goodrich Principal Instructions for Continued Airworthiness Manual for the Analog Transient Suppression Device Installation Applicable to Boeing 737–100 through –500 Airplanes Supplemental Type Certificate—ST00146BO, Document T3044–0010–0101, Revision D, dated September 26, 2011. The initial compliance time for accomplishing each task is at the applicable time specified in Goodrich Principal Instructions for Continued Airworthiness Manual for the Analog Transient Suppression Device Installation Applicable to Boeing 737–100 through –500 Airplanes Supplemental Type Certificate—ST00146BO, Document T3044–0010–0101, Revision D, dated September 26, 2011, or within 18 months after the effective date of this AD, whichever occurs later.

Note 2 to paragraph (g): Components that have been identified as airworthy or installed on the affected airplanes before the revision of the maintenance program, as required by paragraph (g) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the maintenance program has been revised, paragraph (g) of this AD requires that future maintenance actions on these components must follow the CDCCLs.

(h) No Alternative Actions Intervals, and/or Critical Design Configuration Control Limitations

After accomplishing the revision required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections), intervals, and/or CDCCLs may be used other than those specified in Goodrich Principal Instructions for Continued Airworthiness Manual for the Analog Transient Suppression Device Installation Applicable to Boeing 737–100 through –500 Airplanes Supplemental Type Certificate—ST00146BO, Document T3044–0010–0101, Revision D, dated September 26, 2011, unless the actions, intervals, and/or CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance

(1) The Manager, Boston 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

(1) For more information about this AD, contact Marc Ronell, Aerospace Engineer, Engine and Propeller Directorate, ANE–150, FAA, New England Aircraft Certification Office (ACO), 12 New England Executive Park, Burlington, Massachusetts 01803; phone: 781–238–7776; fax: 781–238–7170; email: *marc.ronell@faa.gov.*

(2) For service information identified in this AD, contact Goodrich Corporation, Sensors and Integrated Systems, 100 Panton Road, Vergennes, Vermont 05491; phone: 802–877–4580; fax: 802–877–4444; email: *les.blades@goodrich.com;* Internet: *http://www.goodrich.com/TechPubs.* 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.

Issued in Renton, Washington, on January 23, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–3036 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Chapter I

[Docket No. FAA–2011–0012]

Notice of Proposed Policy Clarification for the Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustors and Beneficiaries

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of Proposed FAA Policy.

SUMMARY: Notice is hereby given of the FAA's proposed policy regarding the registration of aircraft to U.S. Citizen Trustees in situations involving Non-U.S. citizen trustors and beneficiaries.

DATES: Written public comments regarding this FAA proposed policy should be submitted by March 31, 2012, via email to *ladeana.peden@faa.gov.*

FOR FURTHER INFORMATION CONTACT: LaDeana Peden at 405–954–3296, Office of Aeronautical Center Counsel, Federal Aviation Administration.

SUPPLEMENTARY INFORMATION: The FAA has been reviewing policies and practices regarding the registration of aircraft in the United States involving U.S. citizen trustees and non-U.S. citizen trustors and beneficiaries. Such arrangements are commonly referred to as non-citizen trusts. The FAA began its review in part because of problems the FAA has experienced in obtaining important operational and maintenance information concerning such aircraft from the registered owners, *i.e.,* the owner trustees. The problems in obtaining such information in turn affected the FAA's ability to conduct fully effective oversight of such aircraft when operated outside the United States, and to provide foreign civil aviation authorities with information on those operations in support of the safety oversight activities of those authorities. The FAA also undertook the review of non-citizen trusts because of concerns that some of those arrangements may not have complied with FAA requirements for non-citizen trusts.

As part of its review of non-citizen trusts, the FAA published a notice of public meeting inviting members of the public to discuss the use of non-citizen trusts to register aircraft in the United States. See 76 FR 23353 (April 26, 2011). In the notice, the FAA set forth several questions in order to elicit a robust discussion of the issues. Among other things, the FAA summarized the requirements in existing U.S. law that only an ''owner'' may register an aircraft, and that generally speaking only citizens of the United States that are owners are eligible to register aircraft. Thus, the FAA Aircraft Registry is an ''ownership'' registry. It is not an ''operator'' registry.

The FAA met with interested members of the public on June 1, 2011, in Oklahoma City. Representatives of trade associations, law firms, aircraft manufacturers, lenders, lessors, aircraft operators, trustees and others were present. The proceedings of that meeting were transcribed. The transcript is available for members of the public to read. Copies of the transcript (File No. A505180) may be purchased through Atkinson-Baker, Inc., Court Reporters, via email at *abi@depo.com* or by contacting Customer Service at 800–288–3376.

The FAA received a number of written comments from members of the public in response to the questions raised in the April 26, 2011 **Federal Register** notice. The FAA also received written comments in response to its request at the conclusion of the public meeting for additional input from the meeting participants and all others who had an interest in the issues surrounding non-citizen trusts. An organization (the Aviation Working Group) that represents a wide range of aviation industry participants on aviation regulatory and commercial issues submitted a document on May 26, 2011, in which its members and other supporting entities shared their views concerning the various questions posed by the FAA in its April 26, 2011 **Federal Register** notice. That organization also participated at the public meeting on June 1, 2011, and submitted additional written comments on June 30, 2011.

The discussion at the public meeting and the written comments received by the FAA have helped it to better understand the practices and concerns of the aviation industry with regard to the use of non-citizen trusts to register aircraft in the United States. In addition, the FAA gained a better understanding of the perceptions that exist with regard to the regulatory obligations on a trustee with regard to it registering an aircraft in the United States using a non-citizen trust. The FAA's improved understanding has allowed it to sharpen the focus of its review of non-citizen trusts. The FAA also believes that the public meeting was useful in helping members of the public to better understand the critical safety information that the FAA needs to communicate to aircraft operators, through owner trustees, and the critical information that the FAA needs to receive from them in order for the FAA to meet its safety oversight obligations under international and U.S. law.

The FAA will discuss the issues in terms of the law and safety since the two are greatly intertwined. International law and U.S. law impose safety oversight responsibilities on the FAA, existing law restricts aircraft registration in the U.S. to ''owners,'' and existing law imposes certain safety requirements on aircraft owners. After the FAA discusses the legal issues, the FAA will suggest which provisions in trust agreements may need to be changed and it will suggest language that would enable the FAA to facilitate the registration of aircraft in the future that are owned in trust. The suggested language and the reasons for the suggested language, if adopted as the FAA's final policy on this matter, will guide the FAA in the future in determining eligibility for registering non-U.S. citizen trusts. An example of a standard trust agreement with FAA-

suggested changes incorporated is attached at the end of this Notice.

State of Registry Responsibilities

Whenever an aircraft is registered in a country, that country becomes the State of Registry for that aircraft. Under U.S. law, the FAA has responsibility for the oversight of civil aircraft of the United States.

Under international law, a State of Registry has numerous responsibilities with regard to each aircraft on its registry. A number of these responsibilities, which are set forth in the Convention on International Civil Aviation (the Chicago Convention) and its annexes, relate to how a State registers an aircraft and manages its aircraft registry. Included among these responsibilities is the obligation to provide information on the registration and ownership of aircraft on its registry when requested by another contracting State or by the International Civil Aviation Organization.

Other responsibilities under the Chicago Convention relate to the regulation and oversight of the safety of the aircraft and its operations. The State of Registry of an aircraft is responsible for issuing certificates of competency and licenses for the crewmembers of those aircraft and issuing a certificate of airworthiness to each aircraft on its registry. The State of Registry also is responsible for overseeing the continuing airworthiness of each aircraft on its registry. Because the Chicago Convention provides for the registration of an aircraft in only one State at any given time, there can only be a single set of requirements for the airworthiness certification of a particular aircraft or for the licensing of an individual crewmember of that aircraft. Those requirements apply regardless of where the operator is incorporated or resides or the location of the operation.

With regard to the operation of aircraft, each contracting State to the Chicago Convention must require that every aircraft on its registry, when operated outside the territory of that State, comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Over international waters, the rules for the flight and maneuver of aircraft are set forth in Annex 2 to the Chicago Convention. (The FAA has incorporated these particular international requirements in Sections 91.703(a)(2) and Section 91.703(a)(3) of Title 14, Code of Federal Regulations.) Each contracting State also has undertaken to insure the prosecution of all persons violating the applicable rules for the flight and maneuver of aircraft. In order to execute its responsibilities as to compliance with, and enforcement of, flight and maneuver rules, the State of Registry must be able to obtain information about particular aircraft and operations in a timely manner and, in some cases, provide that information to other States.

Depending on the circumstances, the State of Registry also may be the State of the Operator of an aircraft if the operator's principal place of business is located in the State of Registry or, if there is no such place of business, the operator permanently resides in the State of Registry. The State of the Operator must oversee the operators of aircraft for which it is responsible in accordance with the standards set forth in Annex 6 to the Chicago Convention. Where the State of Registry and the State of the Operator are one and the same, the execution of safety oversight responsibilities is seamless because it occurs under a single regulatory system. However, the certification and oversight responsibilities of the State of the Operator are made more complicated when an operator uses an aircraft registered in another State. In those cases, the State of the Operator must consider and act consistently with certain State of Registry requirements—particularly with regard to the performance, equipage, and maintenance of the aircraft—when certifying and overseeing the operator. The effective execution of these responsibilities requires an ongoing exchange of information between the State of Registry and the State of the Operator.

In the course of its review of the use of non-citizen trusts to register aircraft, the FAA determined that the basing and operation of such aircraft outside the United States frequently gives rise to problems in the execution of the oversight responsibilities. The FAA's ability to carry out its State of Registry responsibilities for those aircraft is hampered by the fact that it has little or no presence in most foreign locations where the operations occur, and little or no information about the identity of the operators or the nature of the operations being conducted. Moreover, the United States is not the State of the Operator in many of those situations, inasmuch as the operators for the most part do not maintain their principal place of business or reside in the United States. The FAA's lack of information about the identity of the operators or the nature of the operations substantially diminishes the FAA's ability to provide information to the State that is either responsible for the oversight of the operator or the State where a flight operation actually occurs.

Aircraft Owner Responsibilities

1. Regulatory Obligations of the Owners of U.S.-Registered Aircraft Generally

In the laws and regulations that establish and govern the FAA Aircraft Registry of the United States, no distinction is made between types or categories of aircraft owners for purposes of regulatory compliance. All registered owners of aircraft on the FAA Aircraft Registry, whether they are individuals, partnerships, corporations, or associations, any of which may act in the capacity of owner trustees, have the same obligations when it comes to compliance with the applicable FAA regulations. Once the FAA completes the registration process, the person to whom the aircraft is registered is the owner for all purposes under the regulations whether or not it acts as owner trustee.

The owners of U.S.-registered aircraft have a substantial role in the FAA's system for overseeing the safety of those aircraft and their operation. For example, the regulations specify that the application for an airworthiness certificate must be submitted by the owner of the aircraft. 14 CFR 21.173. The regulations also impose certain maintenance responsibilities on owners of aircraft as well as the actual operators of the aircraft. 14 CFR 91.403(a) and 91.405.

The importance of the owner's role in the FAA's safety oversight system may be best illustrated by Airworthiness Directive (AD) process. In situations involving unsafe conditions or defects in an aircraft type, the FAA issues ADs—frequently on an emergency basis—to the registered owners of such aircraft. Sometimes in the interests of safety, those ADs, which are mandatory rules, require the grounding of the aircraft while critical airworthiness inspections are conducted or while important repairs or alterations are made to the aircraft. The FAA requires aircraft owners to comply with the requirements of an AD. All owners, including owner trustees, must be able to communicate critical safety information in an AD in a timely manner to those who can take appropriate action.

2. Treating an Owner as the Operator of an Aircraft in Certain Circumstances

The FAA may also communicate with the registered owner of aircraft when conducting an investigation about suspected operational or maintenance violations in situations where the identity of the pilot or operator of the aircraft is not readily apparent. Where a registered owner has caused or

authorized another person to operate his aircraft and where the owner has not cooperated with the FAA in providing information about such operation, the FAA has taken enforcement action against the owner as an ''operator'' using the broadly defined term ''operate'' in part 1 of the Federal Aviation Regulations.[1] In *In the Matter of Fenner,* FAA Order No. 96–17 (May 3, 1996) aff'd, *Fenner* v. *FAA,* 113 F.3d 1251 (11th Cir. 1997), the registered aircraft owner personally knew who had operated his aircraft dangerously, but refused to provide that person's name to the FAA. The FAA Administrator used the long-standing, broad definition of ''operate'' to find that the owner, by authorizing the use of the aircraft was responsible for the operation of the aircraft. The owner was assessed a $4000 civil penalty for the operation of the aircraft.

In *Fenner,* the FAA Administrator held that: ''While aircraft owners might not be held liable for all infractions committed in their aircraft, they can be held liable for infractions committed by a pilot who had permission to use their aircraft. The FAA has the statutory duty to protect the public from dangerous actions. Moreover, holding aircraft owners responsible in cases like this may help ensure that aircraft owners grant permission to use their aircraft only to persons they know to be responsible.'' *Fenner,* at p. 3

In a letter to Edward M. Plaza from Assistant Chief Counsel for Regulations and Enforcement Carl B. Schellenberg, March 28, 1979, the FAA stated that a lessor could be considered to have operated an aircraft and be considered in violation of [now section 91.13] when the lessee flew the aircraft in a careless or reckless manner.) (FAA Interpretation No. 1979–11)

In *In the Matter of Gatewood,* FAA Order No. 2001–1, (February 3, 2000), an aircraft owner was found to have ''operated'' an unairworthy aircraft where an inexperienced mechanic made an erroneous airworthiness finding and the mechanic/pilot flew the aircraft.

In most circumstances the FAA will prefer to focus on the actual operator of an aircraft when conducting an investigation or taking enforcement action. However, an aircraft owner is expected to cooperate fully in providing information in support of the FAA's investigatory and enforcement efforts.

[1] *Operate,* with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose (except as provided in § 91.13) of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).

3. Owners' Regulatory Compliance Obligations

In reviewing the issues surrounding the use of trusts to register aircraft, the FAA has focused attention on the role of the owner trustee of a U.S.-registered aircraft in ensuring compliance with the laws and regulations that relate to the operation of the aircraft. In particular, the FAA has considered whether the status of the trustee as the owner of the aircraft under a trust agreement affects its responsibilities for compliance issues related to the operation of the aircraft as compared to other owners of a U.S.-registered aircraft. After considering the comments submitted by the public, FAA has determined that there is nothing inherent in the status of a trustee owner of a U.S.-registered aircraft that would affect or limit its responsibilities for ensuring compliance with the laws and regulations that relate to the operation of the aircraft. The FAA is not aware of any basis for treating one type of owner—such as a trustee under a non-citizen trust—differently from any other owner of a civil aircraft on the U.S. registry when considering issues of regulatory compliance.

Several commenters indicated that a trustee could relieve itself of its regulatory compliance obligations if, in transferring the aircraft to another party for purposes of operating it, the trustee includes a contractual requirement that the operator fully comply with all applicable laws and regulations. The FAA disagrees. No commenter cited any legal authority in support of the proposition that a private party could somehow avoid a regulatory obligation imposed on it by the FAA simply by entering into a private contract with another party. The FAA in its regulations and policies does not recognize such a right.

The FAA also disagrees with the suggestion that 49 U.S.C. 44112 provides a basis for relieving owners of aircraft of their regulatory obligations. In its current form, section 44112, entitled ''Limitations on Liability,'' provides in part:

> A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage on land or water only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of
>
> (1) The aircraft, engine, or propeller; or
>
> (2) The flight of, or an object falling from, the aircraft, engine, or propeller.

The plain language of the statute makes clear that the intent is to protect lessors, owners, or secured parties from tort liability when they are not in actual possession or control of the aircraft. The legislative history indicates that the liability protection provided under section 44112 was necessary to encourage participation in the financing of aircraft purchases. H.R. Rpt. 802091, at 1–2 (Jun. 1, 1948). There is no indication, however, in either the language of the statute or the legislative history that the drafters of the provision meant to provide broader protection to lessors, owners, or secured parties by exempting them from regulatory compliance.

4. Due Diligence Reviews of Non-U.S. Citizen Trustors and Beneficiaries

Some of the commenters stated that, presently, most U.S. citizen owner trustees exercise due diligence when investigating the background of foreign trustors and beneficiaries before those U.S. citizen trustees enter into trust relationships or any other type of relationship with such non-U.S. citizens. As those commenters explained, those U.S. citizen trustees are endeavoring ''* * * to protect the interests of the United States * * *'', and do so by, among other things, exercising due diligence pursuant to the USA Patriot Act, the Department of Commerce export control regulations, and the Office of Foreign Asset Control economic sanction regulations.

The FAA acknowledges that the due-diligence reviews described by the commenters are important for purposes of protecting the interests of the U.S. as to issues of national security, export control, and economic sanctions. Those reviews do not, however, necessarily meet the needs of the FAA with regard to protecting U.S. interests concerning aviation safety inasmuch as they do not consider the technical aviation issues that drive a safety oversight system. The FAA is concerned with technical qualification and the ability to comply on an ongoing basis with technical, operating, and maintenance standards. Such issues are outside the scope of the due-diligence reviews for national security, export control, and economic sanction compliance purposes.

As indicated in the foregoing discussion, the FAA by regulation and practice imposes important safety obligations on all owners of aircraft. These obligations require that the information about the identity and whereabouts of the actual operators of aircraft and location and nature of operation be updated on an ongoing basis, thereby allowing owners to provide operators with safety critical information in a timely manner, and to obtain information responsive to FAA inquiries, including investigations of

alleged violations of FAA regulations. The FAA expects this level of due diligence from owners with regard to issues concerning aviation safety oversight. Moreover, the FAA believes such obligations are not unduly burdensome or beyond the capabilities of any owner of a U.S.-registered aircraft to meet.

Some commenters have suggested however that the FAA should not expect that U.S. owner trustee be able to identify the operator or be able to insure quick contact with the operator of the aircraft. We reject these suggestions. To accept such suggestions would result in the removal of existing obligations on U.S. citizen owner trustees that would otherwise continue to exist for all other owners.

5. FAA Policy Clarification: Information Requirements

For the majority of the aircraft on the FAA Aircraft Registry, including some aircraft registered to non-U.S. citizens under trusts, the FAA has adequate sources of information about the aircraft and their operations to effectively and efficiently carry out its State of Registry responsibilities under international law. However, for aircraft registered to non-U.S. citizens under trusts that are primarily or exclusively used in general aviation or aerial works operations outside the United States, the FAA has been less successful in accessing information necessary to the execution of its State of Registry responsibilities. In all cases, the FAA will look to the trustee, as the registered owner of the aircraft, for information about the aircraft and its operations when needed to comply with the United States' State of Registry obligations under the Chicago Convention. In particular, the FAA expects that within 2 business days a trustee will be able to provide to the FAA the following information about the aircraft and its operation:

- The identity of the person normally operating, or managing the operations of, the aircraft;
- Where that person currently resides or has its principal place of business;
- The location of maintenance and other aircraft records; and
- Where the aircraft is normally based and operated.

The FAA further expects that within 5 business days the trustee, as the registered owner of the aircraft, will be able to respond to FAA requests for more detailed information about the aircraft and its operations, including:

- Information about the operator, crew, and aircraft operations on specific dates;
- Maintenance and other aircraft records; and
- The current airworthiness status of the aircraft.

In the event of an emergency, the FAA may request a trustee to provide information more quickly than the timelines specified above.

Policy Clarifications Related to Non-Citizen Trusts and the Registration Process

1. Operating Agreements Between the Trustee Owner and the Trustor or Beneficiary

During the course of its review of non-citizen trusts, the FAA has had an opportunity to review a number of aircraft operating agreements between the trustee owners of aircraft and the trustors or beneficiaries of the trust.[2] The operating agreements reviewed had not been submitted to the FAA along with aircraft registration application and other required documents of the aircraft concerned.[3]

In its review, the FAA found that many operating agreements contained clauses that addressed issues not covered in the non-citizen trust agreement or that modified or contradicted provisions in the trust agreement, particularly as to enlarging the degree of control exercised by a non-U.S. citizen over the trustee. The ultimate impact of many operating agreements was to affect the relationship and balance established under the non-citizen trust between the trustor and/or beneficiary on one hand and the trustee on the other.

The FAA requires that a person holding legal title to an aircraft in trust must, when applying to register that aircraft in the United States, submit a ''copy of each document legally affecting a relationship under the trust. * * *'' 14 CFR 47.7(c)(2)(i). The fact that the operating agreements referenced above have not been routinely submitted to the FAA in conjunction with an application to register an aircraft held in trust troubles the FAA because of the effect of the operating agreements on the relationship established under the trust. The FAA concludes, contrary to the views of some commenters, that a relationship established under a trust agreement is necessarily affected by an operating agreement or similar side agreement or arrangement involving trustee and trustor which allows possession and use of the aircraft at all times to remain with the trustor. The operating agreement and the trust agreement are so intertwined that the operating agreement will always affect the relationship established under the trust.

A fundamental part of the registration process for aircraft held in trust is determining whether the underlying agreements meet the applicable requirements and therefore are sufficient to establish the trustee's eligibility to register the aircraft. The failure to submit required documents such as an operating agreement frustrates this objective. To avoid this result in the future, the FAA will require that all operating agreements or similar side agreements involving the trustee transferring custody and use of the aircraft held in trust to the trustor be submitted to the FAA along with other documents that affect a relationship under the trust pursuant to 14 CFR 47.7(c)(2)(i).

In cases where a non-citizen trust is used to establish eligibility for registration and no operating agreement or other similar side agreement or arrangement is submitted along with a registration application, the FAA will expect the applicant to provide sufficient assurances that no such operating agreement or other side agreement or arrangement exists between the trustee and the trustor. An adequate assurance might take the form of an additional declaration by the trustee in an affidavit submitted in support of a non-citizen trust registration that no such operating agreement or other side agreement or arrangement has been entered into by the trustee and the trustor and/or beneficiary. There may be other means by which the trustee could adequately assure the FAA that no operating agreement or other side agreement or arrangement exists between the trustee and the trustor and/or beneficiary; the FAA will consider alternate approaches. In the end, however, the FAA must be certain that it has the opportunity to review all documents that affect the relationship established under a non-citizen trust in order to insure the integrity of the registration process. Silence by the trustee with regard to this important issue will not be sufficient.

2. Trustee Removal or Resignation

In promulgating regulations to permit the use of a non-citizen trust to establish eligibility to register an aircraft in the U.S., the FAA imposed restrictions on

[2] The FAA also notes that it had previously unfavorably opined on whether a trustee could enter into operating agreements that permitted custody and use of the aircraft by the non-US citizen trustor. FAA now recognizes that such transactions are not uncommon.

[3] Pursuant to 14 CFR 47.7(c), in addition to the aircraft registration application and evidence of ownership, other required documents include a trust agreement and trustee affidavit of citizenship.

the ability of non-U.S. citizens or resident aliens to remove the trustee. Such restrictions, in the FAA's view, lend more meaningful status and permanence to the trustee as the owner of the aircraft held in trust.'' Section 47.7(c)(3) of the regulations provides:

> If persons who are neither U.S. citizens nor resident aliens have the power to direct or remove a trustee, either directly or indirectly through the control of another person, the trust instrument must provide that those persons together may not have more than 25 percent of the aggregate power to direct or remove a trustee. Nothing in this paragraph prevents those persons from having more than 25 percent of the beneficial interest in the trust.

The limitation on the ability of non-U.S. citizens or resident aliens to remove a trustee is in addition to what limitations, if any, exist under the laws of the state in which the trust is established.

a. Removal for Cause—Specificity

The FAA is concerned that non-citizen trusts being used to establish eligibility to register an aircraft do not adequately limit the ability of non-U.S. citizens to remove a trustee. In general, the agreements allow trustees to be removed for cause without specifying what constitutes a sufficient cause. The FAA's view is that such lack of specificity appears to provide a non-U.S. citizen beneficiary with virtually unconditional power to remove a trustee, since practically any cause for removal might be interpreted as sufficient.

Therefore, the FAA believes that a non-citizen trust agreement must describe with specificity what would be a sufficient cause for removal of a trustee by a non-U.S. citizen beneficiary. Some trust agreements on file with the FAA have loosely attempted to define what constitutes cause to remove consistent with the general law of trusts. The grounds for removal listed in the Third Restatement of Trusts at Section 37 are illustrative of possible (but not always relevant) grounds for removing a trustee that might be included in a non-citizen trust agreement.

b. Removal for Cause—Aggregate Power

Section 47.7(c)(3) of the Federal Aviation Regulations provides that non-U.S. citizens or non-resident aliens may not have more than 25% of the aggregate power to direct or remove a trustee. In those cases where a non-citizen trustor appears to have 100% of such power (not just 25%), the FAA needs to be assured in writing (in the trust agreement, trust affidavit of citizenship, or elsewhere) how and why it is that such non-citizens will not be able to exercise such aggregate power in excess of 25%.[4]

In summary, the FAA believes that without a description of the causes that might justify removal, and without the power to remove by non-U.S. citizen or non-resident aliens being clearly limited to 25% of the aggregate power, that a clause that simply vests a non-U.S. citizen trustor with the power to remove a trustee for cause is insufficient.

c. Termination of the Trust and Trustee Resignation

Finally, the FAA would note that none of the restrictions on the power of non-U.S. citizen to control or remove a trustee affect the ability of a non-U.S. citizen beneficiary or trustor otherwise to terminate a trust in accordance with its terms. With regard to the registration of the aircraft, the FAA expects that the likely effect of a termination, not involving removal of the trustee, would be to end registration or render the registration ineffective under 14 CFR 47.41(a). The aircraft could be re-registered in the United States if ownership were transferred to a person eligible to register it, whether under a non-citizen trust or some other mechanism recognized under the FAA's regulations.

Likewise, the FAA does not have any restrictions on the ability of a trustee to resign without first being replaced by a successor trustee. Contrary to the suggestion of at least one commenter, the FAA does not have any regulation or policy that requires the inclusion of a requirement in the non-citizen trust agreement that a resignation may take effect only upon the appointment of a successor trustee. The FAA allows the parties to the non-citizen trust to address that issue as they see fit. The FAA believes the consequences of a resignation by a trustee without the prior appointment of an eligible successor trustee would be the same as a termination of the trust as described above.

3. Proposed Changes to a Standard Trust Agreement

A standard non-citizen trust agreement has developed over the years. The FAA believes it is useful to offer suggestions to that document.[5] In some instances we recommend striking language that we believe is ambiguous or perhaps contrary to law. We also suggest some new language that we believe might be included in trust agreements (*e.g.,* in paragraph 3.02, illustrative language has been added regarding for cause removal). That language reflects what the FAA might deem acceptable for aircraft registration purposes and that the owner trustee applicant is making a bona fide effort to comply with existing legal requirements imposed on all aircraft owners. Below is a discussion of significant suggested revisions to a standard trust agreement.

a. Specification of Owner Trustee's Duties in the Non-Citizen Trust Agreement Should Reflect Aspects of Duties Imposed by the FAA on Owners and Should Reflect That the Owner Trustee May Need To Rely on the Assistance of the Trustor and/or Beneficiary To Meet Those Duties

We propose new paragraphs (e) and (f) to Section 4.01 of the standard trust agreement. As discussed earlier in this document, foreign civil aviation authorities and others come to the FAA with information that a U.S.-registered aircraft may have conducted an unsafe operation or that it is presently in an unairworthy condition. Trustee aircraft owners, just like non-trustee aircraft owners, must be able to provide the FAA with information about who normally operates and maintains the aircraft.[6] We feel that 2 business days is enough time for the trustee, with the cooperation of the trustor, to provide the FAA with information about those who normally operate the aircraft and about the usual location of aircraft maintenance records and other records. We also believe that it is reasonable to expect that within 5 business days of an FAA request, that a trustee, with the cooperation of the trustor should be able

[4] In a related vein, the FAA notes that some trust agreements contain a provision designating a foreign court to adjudicate disputes between the trustor and trustee. Such designations are not acceptable to the FAA.

[5] Attached as Exhibit 1 is an example of a standard trust agreement with FAA-suggested changes incorporated. The revised standard trust agreement showing the FAA's additions and deletions also is available on the FAA's Web site.

[6] Some have suggested that the FAA impose a new requirement on the various and potentially vast number of operators of these trust aircraft. The suggestion has been made that FAA require those that actually operate the aircraft under a lease or other arrangement whereby they get possession, control and use of the aircraft, submit reports to Flight Standards District Offices (FSDO) identifying themselves as the operators of the aircraft. The suggestion is that the FAA apply the operator-reporting provisions found in a long-standing exemption issued to the NBAA in 1972. *See* Exemption 1637. Adoption of a similar exemption would have the effect of not requiring an owner trustee to be the conduit for important communications to the operator/users of the aircraft or the conduit or provider of important information and documents about the past or current condition and use of the aircraft to the FAA. In terms of conveying important safety information or in terms of gathering important safety information and evidence, FAA believes trustee owners should be treated just like any other registered aircraft owners.

to provide the FAA with: (i) Information about the actual operator, crew, and aircraft operations for specified dates; (ii) information about where the aircraft will be on specified dates in order for the FAA to conduct direct oversight inspections and investigations regarding the condition of the aircraft or the manner in which the aircraft is being operated; and (iii) maintenance and other records in order to identify the current airworthiness status of the aircraft, who performed maintenance on the aircraft, and the manner and methods used to perform that maintenance.

We note that proposed new paragraphs (e) and (f) includes language to address emergency situations identified by the FAA. If an emergency arises, the FAA may issue an emergency order to the owner trustee requiring the production of information and documents in a shorter time frame. In an emergency situation, the nonemergency time frames specified in draft paragraphs (e) and (f) would not apply.

We are proposing a new paragraph (g) to Section 4.01 of the trust agreement in order for the parties to recognize that it is the owner trustee's duty to expeditiously communicate emergency airworthiness directives concerning the aircraft to the Trustor and/or Lessee of the aircraft. Again, the FAA through the appropriate Aircraft Certification Office uses the information about aircraft owners, which is listed in the FAA Aircraft Registry, to communicate time-critical safety requirements and restrictions to aircraft owners, who under the regulations are primarily responsible for the airworthiness of the aircraft. *See* § 91.403. Similarly, a situation could develop where the FAA may already have sufficient evidence about an aircraft's condition or misuse to warrant the issuance of a Cease and Desist Order or some other type of order immediately grounding the aircraft.

In regard to draft paragraph (h), the United States has an interest in being informed by the most expeditious means possible of the resignation of a trustee or the ''for cause'' removal of a trustee. Among other things, the agency needs that information in order to determine whether to de-register the aircraft.

b. Proposed Revisions to Article 9 of the Trust Agreement

Much of the language in the existing Article 9 is ambiguous or problematic. For example, subsection 9.01(a) beginning at line 2 states:

''* * * the Trustor will have no rights or powers to direct, influence or control the Owner Trustee in the performance of the Owner Trustee's duties under this Agreement *in connection with matters involving the ownership and operation of the Aircraft by the Owner Trustee.''* (italicized emphasis added).

In that regard FAA is concerned that most non-citizen trusts involve situations where the U.S. Citizen Trustee never possesses or operates the aircraft which is rarely operated in U.S. airspace. Therefore the italicized language might be interpreted as only limiting a Trustor's rights and powers do direct, limit, or influence an Owner Trustee's duties on those rare occasions when the Owner Trustee is the actual operator.

In the proposed rewrite of subsection 9.01(a) FAA has tried to make it clear that the Trustor may not control the Owner Trustee's duties under the Agreement including, but not limited to, matters involving ownership or the operation of the aircraft.

Request for Comments

FAA is seeking comment on the proposed policy clarifications and trust agreement revisions, and invites interested parties to visit its Web site for background information. The FAA will consider the comments and other information received in formulating a final notice of policy clarification, or in determining whether a new policy or rule should be developed to address FAA safety and oversight concerns with non-citizen trust registrations. The FAA also will consider whether an additional public meeting is required to ensure an adequate airing of the public's views on the use of non-citizen trusts to register aircraft in the United States.

Issued in Washington, DC, on February 3, 2012.

Kathryn B. Thomson,

Chief Counsel, Federal Aviation Administration.

TRUST AGREEMENT

THIS TRUST AGREEMENT (XXX), dated as of XXX, (the ''Agreement'') by and between XXX, a [corporation organized and existing] [limited liability company formed] [7] under the laws of XXX (''Trustor''), and XXX, a XXX organized and existing under the laws of the XXX (''Owner Trustee'');

WITNESSETH:

WHEREAS, Trustor desires to cause title to the Aircraft (as hereinafter defined) to be conveyed to Owner Trustee;

WHEREAS, Trustor desires to create a trust (the ''Trust'') and contribute the Aircraft thereto in order to ensure the eligibility of the Aircraft for United States registration with the Federal Aviation Administration (the ''FAA'');

WHEREAS, this Agreement is designed to create a Trust in order that the Owner Trustee may hold title to the Aircraft until such time as Trustor directs the Owner Trustee to distribute the Aircraft in accordance with Trustor's written instructions; and

WHEREAS, Owner Trustee is willing to accept the trusts as herein provided;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, Trustor and Owner Trustee agree as follows:

ARTICLE 1

DEFINITIONS

Capitalized terms used in this Agreement shall have the respective meanings assigned thereto below, unless such terms are otherwise defined herein or the context hereof shall otherwise require. The terms ''hereof'', ''herein'', ''hereunder'' and comparable terms refer to this Agreement, as amended, modified or supplemented from time to time, and not to any particular portion hereof. References in this Agreement to sections, paragraphs and clauses are to sections, paragraphs and clauses in this Agreement unless otherwise indicated.

''*Affidavit''* means the Affidavit of Owner Trustee pursuant to Section 47.7(c)(2)(iii) of Part 47 of the Federal Aviation Regulations.

''*Aircraft*'' means the XXX Aircraft, serial number XXX, FAA Registration Number N XXX together with the XXX engines, bearing manufacturer's serial numbers XXX and XXX, which are transferred to the Owner Trustee in trust under this Trust Agreement.

''*Aircraft Registration Application*'' means AC Form 8050–1 Aircraft Registration Application by Owner Trustee covering the Aircraft.

''*Citizen of the United States*'' means ''citizen of the United States'' as that term is defined in Section 40102(a)(15) of Title 49 of the United States Code.

''*FAA*'' means the Federal Aviation Administration of the United States or any Government Entity succeeding to the functions of such Federal Aviation Administration.

''*FAA Bill of Sale*'' means an AC Form 8050–2 Bill of Sale for the Aircraft from Trustor to Owner Trustee.

''*Lessee*'' means any lessee under any Lease, or any operator under any Operating Agreement.

''*Lease*'' means any agreement from time to time entered into with respect to the Aircraft by the Owner Trustee, as Lessor, and a third party Lessee,

[7] Choose the appropriate phrase depending on whether Trustor is an LLC or a corporation.

whether or not at the direction of the Trustor.

''*Operating Agreement*'' means any agreement entered into between the Owner Trustee and the Trustor, or between a third party Lessee and the Trustor, transferring to the Trustor the right to possess, use, operate or manage the Aircraft.

''*Trust Estate*'' means all estate, right, title and interest of Owner Trustee in and to the Aircraft, the Lease, the Warranty Bill of Sale and the FAA Bill of Sale, including, without limitation, all amounts of the rentals under any Lease, insurance proceeds (other than insurance proceeds payable to or for the benefit of Owner Trustee, for its own account or in its individual capacity, or Trustor), and requisition, indemnity or other payments of any kind for or with respect to the Aircraft, (other than amounts owing to Owner Trustee, for its own account or in its individual capacity, Trustor or any Lessee of the Aircraft).

''*Warranty Bill of Sale*'' means a full warranty bill of sale for the Aircraft, executed by Trustor in favor of Owner Trustee and specifically referring to each engine installed on the Aircraft.

ARTICLE 2

CREATION OF TRUST

Section 2.01 *Transfer of Control.* Trustor shall cause title to the Aircraft to be conveyed to Owner Trustee.

Section 2.02 *Acceptance and Declaration of Trust.* Owner Trustee accepts the Trust created hereby, and declares that it will hold the Trust Estate upon the trusts hereinafter set forth for the use and benefit of Trustor, in accordance with and subject to all of the terms and conditions contained in this Agreement, and agrees to perform the same, including without limitation the actions specified in Section 4.01 hereof, and agrees to receive and disburse all moneys constituting part of the Trust Estate, all in accordance with the terms hereof.

ARTICLE 3

THE OWNER TRUSTEE

Section 3.01 *Status.* Owner Trustee hereby represents and warrants that it is a Citizen of the United States.

Section 3.02 *Removal.* Owner Trustee may be removed at any time, but for cause only, by a written instrument or instruments signed by Trustor, subject to the regulatory limitation that a non-U.S. citizen not hold more than 25 percent of the aggregate power to remove a trustee. [For purposes of this Section, ''for cause'' shall mean willful misconduct or gross neglect so as to endanger the [Trust estate]. Mere disagreements between Owner Trustee and Trustor shall not constitute a cause warranting removal.] Such removal shall take effect immediately upon the appointment of a successor Owner Trustee pursuant to Section 3.04, whereupon all powers, rights and obligations of the removed Owner Trustee under this Agreement (except the rights set forth in Section 3.08) shall cease and terminate. Without any affirmative action by Trustor, any Owner Trustee shall cease immediately to be an Owner Trustee at such time as it ceases to be a Citizen of the United States or at such time as it for any reason is not free from control by Trustor as described in Article 9, and shall give immediate notice thereof to Trustor. Any Owner Trustee shall also give Trustor notice of a possible change of citizenship at the later of (i) 90 days prior to a change in citizenship and (ii) actual knowledge by Owner Trustee that such a change in citizenship is probable.

Section 3.03 *Resignation.* Owner Trustee may resign at any time upon giving 30 days prior written notice of such resignation to Trustor. Such resignation shall take effect only upon the appointment of a successor Owner Trustee pursuant to Section 3.04, whereupon all powers, rights and obligations of the resigning Owner Trustee under this Agreement (except the rights set forth in Section 3.08) shall cease and terminate.

Section 3.04 *Successor Owner Trustee.* Promptly upon receipt of a notice of resignation from the Owner Trustee in accordance with Section 3.03, a successor trustee shall be appointed by a written instrument signed by a duly authorized officer of Trustor and the successor trustee shall execute and deliver to the predecessor Owner Trustee an instrument accepting such appointment. Such successor trustee shall be a Citizen of the United States and shall assume all powers, rights and obligations of such Owner Trustee hereunder immediately upon the resignation of such Owner Trustee becoming effective. Such successor, concurrently with such appointment, shall file an Affidavit with the FAA and all other documents then required by law to be filed in connection therewith. If the Trustor shall not have so appointed a successor Owner Trustee within 30 days after such resignation or removal, the Owner Trustee may apply to any court of competent jurisdiction to appoint a successor Owner Trustee to act until such time, if any, as a successor or successors shall have been appointed by the Trustor as above provided. Any successor Owner Trustee so appointed shall immediately and without further act be superseded by any successor Owner Trustee appointed by the Trustor as above provided.

Section 3.05 *Merger.* Any corporation into which Owner Trustee may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which Owner Trustee shall be a party, or any corporation to which substantially all the corporate trust business of Owner Trustee may be transferred, shall, subject to the terms of Section 3.04, be Owner Trustee without further act.

Section 3.06 *Tax Returns.* The Owner Trustee shall keep all appropriate books and records relating to the receipt and disbursement by it of all monies under this Agreement or any agreement contemplated hereby. The Trustor will prepare all tax returns required to be filed with respect to the trust hereby and the Owner Trustee, upon request, will furnish the Trustor with all such information as may be reasonably required from the Owner Trustee in connection with the preparation of such tax returns. The Owner Trustee will execute and file the tax returns as prepared by the Trustor.

Section 3.07 *Vacancies.* If any vacancy shall occur in the position of Owner Trustee for any reason, including, without limitation, removal, resignation, loss of United States citizenship or the inability or refusal of such Owner Trustee to act as Owner Trustee, the vacancy shall be filled in accordance with Section 3.04.

Section 3.08 *Fees; Compensation.* The Owner Trustee shall receive from the Trustor as compensation for the Owner Trustee's services hereunder such fees as may heretofore and from time to time hereafter be agreed upon by the Owner Trustee and the Trustor and shall be reimbursed by the Trustor for all reasonable costs and expenses incurred or made by it in accordance with any of the provisions of this Agreement. If an event of default under any Lease shall occur, the Owner Trustee shall be entitled to receive reasonable compensation for its additional responsibilities, and payment or reimbursement for its expenses. Owner Trustee shall have a lien on the Trust Estate, prior to any interest therein of the Trustor, to secure payment of such fees and expenses.

Section 3.09 *No Duties.* Owner Trustee shall not have any duty (i) to see to any insurance on the Aircraft or maintain any such insurance, (ii) to see to the payment or discharge of any tax, assessment or other governmental charge or any lien or encumbrance of

any kind owing with respect to, assessed or levied against, the Aircraft (*provided, however,* that Owner Trustee shall not create, permit or suffer to exist any lien or encumbrance on any part of the Aircraft which results from claims against Owner Trustee unrelated to its capacity as Owner Trustee hereunder), (iii) to confirm or verify any notices or reports, (iv) to inspect the Aircraft at any time or ascertain the performance or observance by either of any Lessee or Trustor of its covenants under any Lease, or (v) except as set forth herein, to see to any recording or see to the maintenance of any such recording or filing with the FAA or other government agency.

Section 3.10 *Status of Moneys Received.* All moneys received by Owner Trustee under or pursuant to any provisions of this Agreement shall constitute trust funds for the purpose for which they are paid or held, and shall be segregated from any other moneys and deposited by Owner Trustee under such conditions as may be prescribed or permitted by law for trust funds.

Section 3.11 *Owner Trustee May Rely.* Owner Trustee shall not incur any liability to anyone in acting or refraining from acting upon any signature, instrument, notice, resolution, request, consent, order, certificate, report, opinion, bond or other document or paper reasonably believed by it to be genuine and reasonably believed by it to be signed by the proper party or parties. As to any fact or matter, the manner or ascertainment of which is not specifically described herein, Owner Trustee may for all purposes hereof rely on a certificate, signed by or on behalf of the party executing such certificate, as to such fact or matter, and such certificate shall constitute full protection of Owner Trustee for any action taken or omitted to be taken by it in good faith in reliance thereon. In the administration of the Trust, Owner Trustee may, at the reasonable cost and expense of Trustor, seek advice of counsel, accountants and other skilled persons to be selected and employed by them, and Owner Trustee shall not be liable for anything done, suffered or omitted in good faith by it in accordance with the actions, advice or opinion of any such counsel, accountants or other skilled persons.

Section 3.12 *Owner Trustee Acts as Trustee.* In accepting the Trust, Owner Trustee acts solely as trustee hereunder and not in any individual capacity (except as otherwise expressly provided in this Agreement or any Lease), and all persons other than Trustor having any claim against the Owner Trustee by reason of the transactions contemplated hereby shall not have any recourse to Owner Trustee in its individual capacity.

Section 3.13 *No Expenses for Owner Trustee.* Owner Trustee shall not have any obligation by virtue of this Agreement to expend or risk any of its own funds, or to take any action which could, in the reasonable opinion of Owner Trustee, result in any cost or expense being incurred by Owner Trustee. Owner Trustee shall not be required to take any action or refrain from taking any action under this Agreement unless it shall have been indemnified by Trustor in a manner and form satisfactory to Owner Trustee against any liability, cost or expense (including reasonable attorneys' fees) which may be incurred in connection therewith. No provisions of this Agreement shall be deemed to impose any duty on Owner Trustee to take any action if Owner Trustee shall have been advised by counsel that such action would expose it to personal liability, is contrary to the terms hereof or is contrary to law.

Section 3.14 *Notice of Event of Default.* In the event that a responsible officer in the Corporate Trust Department of the Owner Trustee shall have actual knowledge of a default or an event of default under any Lease, the Owner Trustee shall give or cause to be given prompt notice of such default or event of default to the Trustor. The Owner Trustee shall take such action with respect to such default or event of default as shall be specified in written instructions from the Trustor. For all purposes of this Agreement and any Lease, in the absence of actual knowledge of a responsible officer in the Corporate Trust Department of the Owner Trustee, the Owner Trustee shall not be deemed to have knowledge of a default or event of default unless notified in writing by the Trustor.

Section 3.15 *Certain Duties and Responsibilities of Owner Trustee.*

(a) Owner Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Agreement and in any Lease or Operating Agreement or as required by law and no implied duties, covenants or obligations shall be read into this Agreement or any Lease or Operating Agreement against Owner Trustee. Owner Trustee agrees that it will deal with the Aircraft or any other part of the Trust Estate in accordance with the terms of this Agreement and any Lease or Operating Agreement or as required by law.

(b) Whether or not herein expressly so provided, every provision of this Trust Agreement [relating to the conduct or] affecting the liability of or affording protection to Owner Trustee shall be subject to the provisions of this Section 3.15.

Section 3.16 *No Representations or Warranties as to the Aircraft or Documents.* OWNER TRUSTEE MAKES (i) NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AS TO THE VALUE, CONDITION, DESIGN, OPERATION, MERCHANTABILITY OR FITNESS FOR USE OF THE AIRCRAFT OR AS TO THE TITLE THERETO, OR ANY OTHER REPRESENTATION OR WARRANTY WITH RESPECT TO THE AIRCRAFT WHATSOEVER, except that XXX, in its individual capacity warrants that on the date on which the Aircraft is transferred to the Trust contemplated by this TRUST AGREEMENT, Owner Trustee shall have received whatever title was conveyed to it, and (ii) no other representations or warranties are made by the Owner Trustee other than to the extent expressly made herein by Owner Trustee, except that Owner Trustee represents and warrants that it has full right, power and authority to enter into, execute, deliver and perform this Agreement and that this Agreement constitutes the legal, valid and binding obligation of the Owner Trustee.

ARTICLE 4

THE TRUST ESTATE

Section 4.01 *Authorization and Direction to Owner Trustee.* Trustor hereby authorizes and directs Owner Trustee, not individually but solely as Owner Trustee hereunder, and Owner Trustee covenants and agrees:

(a) to execute and deliver each agreement, instrument or document to which Owner Trustee is a party in the respective forms thereof in which delivered from time to time by Trustor for execution and delivery and, subject to the terms hereof, to exercise its rights and perform its duties under any Lease in accordance with the terms thereof, including without limitation, accepting title to, and delivery of, the Aircraft and leasing the Aircraft to any Lessee or, subject to the provisions of Section 7 hereof, distributing the Aircraft to Trustor pursuant to the specific written instructions of Trustor;

(b) to effect the registration of the Aircraft with the FAA by duly executing and filing or causing to be filed with the FAA (i) the Aircraft Registration Application, (ii) the Affidavit, (iii) the FAA Bill of Sale, (iv) an executed counterpart of this Agreement, and (v) any other document or instrument required therefore including any Operating Agreement;

(c) to execute and deliver each other document referred to in any Lease or which Owner Trustee is required to deliver pursuant to any Lease or this Agreement; and

(d) subject to the terms of this Agreement, to perform the obligations and duties and exercise the rights of Owner Trustee under any Lease.

(e) upon request by FAA, and with the cooperation of Trustor, to provide the FAA with the following information within 2 business days of the request (or immediately in an emergency identified by the FAA): (i) the identity and contact information (address, phone number, email) of person or entity normally operating, or maintaining the operations of the aircraft; (ii) where that person or entity resides or is incorporated and has its principal place of business; (iii) the location of the aircraft maintenance and other records; and; (iv) where the aircraft is normally based and operated.

(f) upon request by FAA, and with the cooperation of Trustor, to provide the FAA with the following information within 5 business days of the request (or immediately in an emergency identified by the FAA): (i) information about the operator, crew (names and pilot certificate numbers) and aircraft operations on specific dates; (ii) information about where the aircraft will be on a specific date in the future and (iii) maintenance and other aircraft records.

(g) upon receipt of an emergency airworthiness directive from the FAA, to immediately forward the emergency airworthiness directive to the Trustor and or Lessee by the most expeditious means available.

(h) to notify the FAA Aircraft Registry by the most expeditious means available of the trustee's resignation under Article 3.03 or removal under 3.02, or of the termination of the trust under 7.01.

(i) to authorize U.S. and foreign government officials to inspect the aircraft.

Section 4.02 *Supplier Warranties.* Trustor hereby assigns to Owner Trustee any and all warranties and indemnities of, and other claims against, any supplier relating to the Aircraft.

Section 4.03 *Advances by Trustor.* Trustor shall make advances to Owner Trustee in such amounts and at such times as may be necessary to permit Owner Trustee to satisfy its obligations under any Lease and this Trust Agreement.

ARTICLE 5

DISTRIBUTIONS

Section 5.01 *Receipts.* Except as otherwise provided in this Agreement, any payment received by Owner Trustee for which provision as to the application thereof is made in any Lease shall be applied promptly to the purpose for which such payment shall have been made in accordance with the terms of such Lease; and any payment received by Owner Trustee for which no provision as to the application thereof is made in any Lease or in this Article 5 shall, unless Trustor shall have otherwise instructed Owner Trustee in writing, be distributed promptly to Trustor.

Section 5.02 *Manner of Making Distributions.* Owner Trustee shall make all distributions to Trustor under this Agreement and any Lease promptly upon the receipt of proceeds available for distribution, but shall not be obligated to make any distributions until the funds therefor have been received by Owner Trustee. All distributions to Trustor hereunder shall be made to such account and in such manner as Trustor shall from time to time direct in writing.

ARTICLE 6

INDEMNIFICATION OF OWNER TRUSTEE BY TRUSTOR

Section 6.01 *Indemnification.* Trustor hereby agrees, whether or not any of the transactions contemplated hereby shall be consummated, to assume liability for, and does hereby indemnify, protect, save and keep harmless XXX, in its individual capacity and its successors, assigns, legal representatives, agents and servants, from and against any and all liabilities, obligations, losses, damages, penalties, taxes (excluding any taxes payable by XXX in its individual capacity on or measured by any compensation received by XXX in its individual capacity for its services hereunder), claims, actions, suits, costs, expenses or disbursements (including, without limitation, reasonable ongoing fees of Owner Trustee and reasonable attorneys' fees and expenses) of any kind and nature whatsoever which may be imposed on, incurred by or asserted against XXX in its individual capacity (whether or not also indemnified against by a Lessee under any Lease or also indemnified against by any other person) in any way relating to or arising out of this Agreement or any Lease or the enforcement of any of the terms hereof or thereof, or in any way relating to or arising out of the manufacture, purchase, acceptance, nonacceptance, rejection, ownership, delivery, lease, possession, use, operation, condition, sale, return or other disposition of the Aircraft (including, without limitation, latent and other defects, whether or not discoverable, and any claim for patent, trademark or copyright infringement), or in any way relating to or arising out of the administration of the Trust Estate or the action or inaction of Owner Trustee or XXX in its individual capacity hereunder, except (a) in the case of willful misconduct or gross negligence on the part of Owner Trustee or XXX in its individual capacity in the performance or nonperformance of its duties hereunder, or (b) those resulting from the inaccuracy of any express representation or warranty of XXX in its individual capacity (or from the failure of XXX in its individual capacity to perform any of its covenants) contained in this Agreement or any Lease, or (c) in the case of the failure to use ordinary care on the part of Owner Trustee or XXX in its individual capacity in the disbursement of funds. The indemnities contained in this Article 6 extend to XXX only in its individual capacity and shall not be construed as indemnities of the Trust Estate. The Indemnities contained in this Article 6 shall survive the termination of this Agreement. In addition, and to secure the foregoing indemnities, Owner Trustee shall have a lien on the Trust Estate, which shall be prior to any interest therein of Trustor.

ARTICLE 7

TERMINATION

Section 7.01 *Termination Date.* The Trust shall terminate without any notice or other action of Owner Trustee upon the earlier of (a) such date as may be directed by Trustor and the sale or other final disposition by the Owner Trustee of all property constituting the Trust Estate or (b) twenty one years less one day after the earliest execution of this Trust Agreement by any party hereto.

Section 7.02 *Distribution of Trust Estate Upon Termination.* Upon any termination of the Trust pursuant to the provisions of Section 7.01 hereof, Owner Trustee shall convey the Trust Estate to Trustor or its nominee.

ARTICLE 8

MISCELLANEOUS

Section 8.01 *Nature of Title of Trustor.* Trustor shall not have legal title to any part of the Trust Estate. No transfer, by operation of law or otherwise, of the right, title and interest of Trustor in and to the Trust Estate or the trusts hereunder, in accordance with the terms hereof, shall operate to terminate this Agreement or the trusts hereunder or entitle any successor or transferee of Trustor to an accounting or

to the transfer of it of legal title to any part of the Trust Estate.

Section 8.02 *Power of Owner Trustee to Convey.* Any assignment, sale, transfer or other conveyance by Owner Trustee of the interest of Owner Trustee in the Aircraft or any part thereof made pursuant to the terms of this Agreement or any Lease shall bind Trustor and shall be effective to transfer or convey all right, title and interest of Owner Trustee and Trustor in and to the Aircraft or such part thereof. No permitted purchaser or other permitted grantee shall be required to inquire as to the authorization, necessity, expediency or regularity of such assignment, sale, transfer or conveyance or as to the application of any sale or other proceeds with respect thereto by Owner Trustee.

Section 8.03 *Trust Agreement for Benefit of Certain Parties Only.* Nothing herein, whether expressed or implied, shall be construed to give any person other than Owner Trustee and Trustor any legal or equitable right, remedy or claim under or in respect of this Agreement; but this Agreement shall be held to be for the sole and exclusive benefit of Owner Trustee and Trustor.

Section 8.04 *Notices.* Unless otherwise expressly provided herein, all notices, instructions, demands and other communications hereunder shall be in writing and shall be delivered personally or sent by registered or certified mail, postage prepaid and return receipt requested, or sent by facsimile transmission, with a confirming copy sent by air mail, postage prepaid, and the date of personal delivery or facsimile transmission or 7 business days after the date of mailing (other than in the case of the mailing of a confirming copy of a facsimile transmission), as the case may be, shall be the date of such notice, in each case addressed (i) if to the Owner Trustee, to XXX at its office at XXX, Attention: XXX and (ii) if to the Trustor, to XXX, Attention: XXX.

Section 8.05 *Co-Trustee and Separate Trustees.* If at any time it shall be necessary or prudent in order to conform to any law of any jurisdiction in which all or any part of the Trust Estate is located, or Owner Trustee being advised by counsel shall determine that it is so necessary or prudent in the interest of Trustor or Owner Trustee, or Owner Trustee shall have been directed to do so by Trustor, Owner Trustee and Trustor shall execute and deliver an agreement supplemental hereto and all other instruments and agreements necessary or proper to constitute another bank or trust company or one or more persons (any and all of which shall be a Citizen of the United States) approved by Owner Trustee and Trustor, either to act as co-trustee jointly with Owner Trustee, or to act as separate trustee hereunder (any such co-trustee or separate trustee being herein sometimes referred to as ''additional trustee''). In the event Trustor shall not have joined in the execution of such agreements supplemental hereto within 10 days after the receipt of a written request from Owner Trustee so to do, or in case an event of default, as defined in any Lease, shall have occurred and be continuing, Owner Trustee may act under the foregoing provisions of this Section 8.05 without the concurrence of Trustor; and Trustor hereby appoints Owner Trustee its agent and attorney-in-fact to act for it under the foregoing provisions of this Section 8.05 in either of such contingencies.

Every additional trustee hereunder shall, to the extent permitted by law, be appointed and act, and Owner Trustee and its successors shall act, subject to the following provisions and conditions:

(a) all powers, duties, obligations and rights conferred upon Owner Trustee in respect of the custody, control and management of moneys, the Aircraft or documents authorized to be delivered hereunder or under any Lease shall be exercised solely by Owner Trustee;

(b) all other rights, powers, duties and obligations conferred or imposed upon Owner Trustee shall be conferred or imposed upon and exercised or performed by Owner Trustee and such additional trustee jointly, except to the extent that under any law of any jurisdiction in which any particular act or acts are to be performed (including the holding of title to the Trust Estate) Owner Trustee shall be incompetent or unqualified to perform such act or acts, in which event such rights, powers, duties and obligations shall be exercised and performed by such additional trustee;

(c) no power given to, or which it is provided hereby may be exercised by, any such additional trustee shall be exercised hereunder by such additional trustee, except jointly with, or with the consent in writing of, Owner Trustee;

(d) no trustee hereunder shall be personally liable by reason of any act or omission of any other trustee hereunder;

(e) Trustor, at any time, by an instrument in writing may remove any such additional trustee. In the event that Trustor shall not have executed any such instrument within 10 days after the receipt of a written request from Owner Trustee so to do, Owner Trustee shall have the power to remove any such additional trustee without the concurrence of Trustor; and Trustor hereby appoints Owner Trustee its agent and attorney-in-fact for it in such connection in such contingency; and

(f) no appointment of, or action by, any additional trustee will relieve the Owner Trustee of any of its obligations under, or otherwise affect any of the terms of, this Agreement or any Lease.

Section 8.06 *Situs of Trust; Applicable Law.* The Trust has been accepted by Owner Trustee and will be administered in the State of Utah. The validity, construction and enforcement of this Agreement shall be governed by the laws of the State of Utah without giving effect to principles of conflict of law. If any provision of this Agreement shall be invalid or unenforceable, the remaining provisions hereof shall continue to be fully effective, provided that such remaining provisions do not increase the obligations or liabilities of Owner Trustee.

Section 8.07 *Amendment.* This Agreement may not be amended, modified, supplemented, or otherwise altered except by an instrument in writing signed by the parties thereto.

Section 8.08 *Successors and Assigns.* In accordance with the terms hereof, this Agreement shall be binding upon and shall inure to the benefit of, and shall be enforceable by, the parties hereto and their respective successors and permitted assigns, including any successive holder of all or any part of Trustor's interest in the Trust Estate.

Section 8.09 *Headings.* The headings of the Articles and Sections of this Agreement are inserted for convenience only and shall not affect the meaning or construction of any of the provisions hereof.

Section 8.10 *Counterparts.* This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, and such counterparts together shall constitute and be one and the same instrument.

ARTICLE 9

CERTAIN LIMITATIONS

Section 9.01 *Limitations on Control, Exceptions.*

(a) *Limitation on Control.* Notwithstanding any other provision of this Agreement, but subject to paragraph (b) of this Section 9.01, the Trustor will have no rights or powers to direct, influence or control the Owner Trustee in the performance of the Owner Trustee's duties under this Agreement, including matters involving the ownership and operation of the Aircraft. In all matters arising under the Agreement, including the ownership and operation of the Aircraft the Owner

Trustee shall have absolute and complete discretion in connection therewith and shall be free of any kind of influence or control whatsoever by the Trustor. The Owner Trustee shall exercise its duties under this Agreement in connection with matters involving the ownership and operation of the Aircraft, as the Owner Trustee, in its discretion, shall deem necessary to protect the interests of the United States, notwithstanding any countervailing interest of any foreign power which, or whose citizens, may have a direct or indirect interest in the Trustor and any such action by the Owner Trustee shall not be considered malfeasance or in breach of any obligation which the Owner Trustee might otherwise have to the Trustor; *provided, however,* that subject to the foregoing limitations, the Owner Trustee shall exercise this discretion in all matters arising under the Agreement, including the ownership and operation of the Aircraft with due regard for the interests of the Trustor. In exercising any of its rights and duties under this Agreement in connection with matters which may arise not relating to the ownership and operation of the Aircraft, the Owner Trustee shall be permitted to seek the advice of the Trustor before taking, or refraining from taking, any action with respect thereto. The Owner Trustee shall notify the Trustor of its exercise of rights and duties under this Agreement in connection with matters involving the ownership and operation of the Aircraft.

(b) *Certain Exceptions.* Subject to the requirements of the preceding paragraph (a), the Owner Trustee agrees that it will not, without the prior written consent of the Trustor, sell, mortgage, pledge or otherwise dispose of the Aircraft or other assets held in the Trust Estate relating thereto except as otherwise expressly provided for herein.

(c) *Purpose.* The purpose of this Section 9.01 is to assure that (i) the Aircraft shall be controlled with respect to such matters by a Citizen of the United States and (ii) the Trustor shall have no power to influence or control the exercise of the Owner Trustee's authority with respect to such matters and (iii) Owner Trustee shall be able to give the affidavit required by Section 47.7(c)(2)(iii) of the Federal Aviation Regulations, 14 CFR 47.7 (c)(2)(iii). Section 9.01 shall be construed in furtherance of the foregoing purpose.

Section 9.02 *General.* Notwithstanding anything to the contrary in this Agreement, the Owner Trustee and the Trustor hereby agree as follows:

If persons who are neither U.S. citizens or resident aliens have the power to direct or remove the Owner Trustee, either directly or indirectly through the control of another person, those persons together shall not have more than twenty five (25%) percent of the aggregate power to direct or remove the Owner Trustee.

Section 9.03 *Priority.* In creating and accepting the Trust, Trustor, and Owner Trustee each acknowledges that in case of conflict, the limitations in Article 9 of this Agreement are paramount and superior to any other terms and conditions in this Agreement; or in any other document or documents to which trustor/beneficiary and trustee are a party.]

ARTICLE 10

COMPLIANCE WITH LAWS

Section 10.1 *Covenant to Comply with Export Restrictions and U.S. Laws.* Trustor acknowledges that the Aircraft may be subject to restrictions involving the export and re-export of the same pursuant to the laws and regulations of the United States, that the laws and regulations of the United States restrict the transfer of any interest in the Aircraft to certain persons (collectively, the ''Export Restrictions'') and that such Export Restrictions may apply to the Aircraft even after the Aircraft has been physically removed or transferred from the United States. Trustor also acknowledges that the Owner Trustee, as a U.S. regulated financial institution, is subject to the laws and regulations of the United States, including, without limitation, those promulgated by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the Financial Crimes Enforcement Network (FinCEN) (collectively, the ''U.S. Laws''). Trustor agrees that it will comply with, and will not knowingly permit the Aircraft to be used in a manner that is contrary to, Export Restrictions and U.S. Laws applicable to (1) the Trustor; (2) the Owner Trustee; or (3) the Aircraft, including the acquisition, possession, operation, use, maintenance, leasing, subleasing, or other transfer or disposition thereof.

Section 10.2 *Approval of Transfer.* Trustor agrees that it will not permit the assignment of this Agreement, any transfer of the beneficial interest of the Trustor created by this Agreement, or a lease or sublease of the Aircraft (collectively, a ''Transfer'') without Owner Trustee's prior written approval of such Transfer. Owner Trustee shall not unreasonably delay its decision on a request for approval from Trustor nor shall it unreasonably withhold its approval to such request. To facilitate Owner Trustee's evaluation of the Transfer, Trustor agrees that it will use reasonable efforts to provide Owner Trustee with any information reasonably requested by the Owner Trustee regarding the Transfer, the proposed transferee and/or the ownership of the proposed transferee. Owner Trustee's decision to approve or disapprove the proposed Transfer shall not be deemed to have been unreasonably delayed if Owner Trustee has not obtained the information it needs to make the decision, and Owner Trustee's approval of the proposed Transfer shall not be deemed to have been unreasonably withheld if Owner Trustee has determined that the Transfer will or may reasonably be expected to put Owner Trustee at risk of violating any laws or regulations applicable to Owner Trustee including, without limitation, the Export Restrictions and/or U.S. Laws. If Owner Trustee withholds approval of a Transfer as set forth herein, then: (i) subject to the terms of this Agreement, Owner Trustee may resign; and (ii) Owner Trustee shall have no obligation to consent to or facilitate a Transfer while Owner Trustee's resignation is pending.

IN WITNESS WHEREOF, Owner Trustee and Trustor have caused this Agreement to be duly executed all as of the date first above written.

TRUSTOR:

By: _____

Title: _____

OWNER TRUSTEE:

By: _____

Title: _____

[FR Doc. 2012–2930 Filed 2–7–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Parts 4 and 122

[Docket No. USCBP–2012–0003]

RIN 1651–AA89

Exemptions From Entry Requirements and Report of Arrival Requirements for Certain Department of Defense Vessels and Aircraft

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: Certain vessels and aircraft owned or chartered by the Department

of Defense (DoD) are exempt from entry requirements and, in some cases, reporting requirements upon their arrival in the United States from a foreign place. This rule proposes to expand those exemptions to include additional DoD-owned or chartered vessels and aircraft when transporting certain cargo or passengers.

DATES: Comments must be received on or before April 9, 2012.

ADDRESSES: You may submit comments, identified by *docket number,* by *one* of the following methods:

■ *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2012–0003.

■ *Mail:* U.S. Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attention: Border Security Regulations Branch, 799 9th St. NW., 5th floor, Washington, DC 20229–1179.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to: *https://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at U.S. Customs and Border Protection, Office of International Trade, Regulations and Rulings, Attention: Border Security Regulations Branch, 799 9th St. NW., 5th floor, Washington, DC 20229–1179. To inspect submitted comments, make arrangements in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Michel Chausse, CBP Office of Field Operations, telephone (202) 344–3656.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects on the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

Vessels and aircraft arriving in the United States from a foreign place are generally required to report their arrival to CBP and make entry. Under current regulations, certain vessels and aircraft owned or chartered by the Department of Defense (DoD) are exempt from entry requirements and, in some cases, reporting requirements upon their arrival in the United States from a foreign place. The exemptions generally apply when the vessel or aircraft is transporting cargo that is solely the property of DoD or when it is transporting passengers traveling on official business of the United States. This rule proposes to expand the exemptions to entry requirements and, to a lesser extent, arrival reporting requirements to improve the flow of cargo and passengers that support DoD missions.

Reporting Requirements

Section 433 of the Tariff Act of 1930, as amended, requires vessels and aircraft arriving in the United States from a foreign place to report their arrival. 19 U.S.C. 1433. The statute authorizes the Secretary of Homeland Security (Secretary) to promulgate regulations concerning the manner and timing of reporting arrival for vessels and aircraft. Two regulatory provisions govern the method of reporting arrival to CBP for vessels and aircraft. First, concerning vessels, CBP regulations require that the master of a vessel arriving in the United States from a foreign port or place immediately report the arrival to the nearest CBP facility or other location designated by the port director. *See* 19 CFR 4.2. Second, regarding aircraft, CBP regulations require all aircraft entering the United States to provide advance notice of arrival, subject to certain exceptions. *See* 19 CFR 122.31.

Entry Requirements

In contrast to reporting arrival, making entry is a more formal process and typically involves filing certain necessary information with CBP. Separate statutes provide for vessel and aircraft entry requirements and separate regulatory provisions implement them.

First, sections 434 and 441 of the Tariff Act of 1930, as amended, govern vessel entry requirements. 19 U.S.C. 1434 and 1441. Section 434 describes the vessels that are subject to formal entry requirements and authorizes the Secretary to promulgate regulations relating to the manner, format, and timeframe regarding the filing of the entry. Section 441 describes the types of vessels that are not required to make entry under section 434. CBP regulations require certain vessels, including vessels arriving in the United States from a foreign place, to make formal entry within 48 hours after the arrival at any port or place in the United States, unless specifically excepted by law. *See* 19 CFR 4.3.

Second, concerning aircraft, 19 U.S.C. 1644a grants the Secretary discretion to apply the laws and regulations of vessel entry and clearance to civil air navigation. Accordingly, CBP regulations provide that all aircraft coming into the United States from a foreign place are required to make entry, subject to specified exemptions. *See* 19 CFR 122.41.

Current DoD Exemptions From Entry Requirements and Arrival Reporting

Under existing regulations, certain vessels and aircraft owned or chartered by the DoD are exempt from entry requirements and, in some cases, reporting requirements upon their arrival in the United States from a foreign place. These exemptions generally apply when the vessel or aircraft is transporting cargo that is solely the property of DoD or when it is transporting passengers traveling on official business of the United States.

Vessels

Pursuant to 19 U.S.C. 1441, certain public vessels and vessels of war are not subject to formal entry requirements. CBP regulations provide that neither a report of arrival nor entry is required of any vessel that is:

- Owned by, or under the complete control and management of the United States or any of its agencies;
- Manned by members of the uniformed armed services of the United States, by personnel in the civil service of the United States, or by both; and
- Transporting only property of the United States, or passengers traveling on official business of the United States, or is in ballast.

19 CFR 4.5(a). DoD vessels that satisfy these criteria are exempt from report of arrival and entry requirements. CBP regulations further provide that a DoD-chartered vessel will be exempt from entry, when it is manned entirely by the civilian crew of the vessel carrier under contract to DoD and transporting only cargo that is DoD property.

Aircraft

CBP regulations provide exemptions for certain public and private aircraft and DoD-chartered aircraft from making entry. These regulations, however, do not provide exemptions from arrival reporting requirements. ''Public aircraft'' is defined as a government-owned aircraft that is carrying only property of the government or passengers traveling on official business of the government. *See* 19 CFR 122.1. CBP regulations provide an exemption from entry for DoD-chartered aircraft, but only if it is carrying cargo that is solely DoD property. 19 CFR 122.41(b). Thus, under both the public aircraft exemption and the DoD-chartered aircraft exemption, the cargo being transported must be the exclusive property of the government. In the case of passengers traveling on official business of the government, the entry exemption applies only if the aircraft is owned by the government.

Advance Cargo Information

CBP regulations require vessels (19 CFR 4.7) and aircraft (19 CFR 122.48a) arriving in the United States, to provide advance cargo information when the vessel or aircraft is required to make entry. Therefore, vessels and aircraft that are exempt from entry requirements are also exempt from the requirement to present advance cargo information.

Currently, DoD-owned or DoD-chartered vessels and aircraft that are exempt from entry requirements are also exempt from advance cargo information requirements. Under this proposed rule, those additional vessels and aircraft that would be exempt from entry requirements would also be exempt from the advance cargo information requirements in 19 CFR 4.7 and 122.48a.

Effect of Current Entry and Reporting Exemptions on DoD Missions

Many vessels and aircraft that are under DoD's control and used to support DoD's missions do not fit within the current exemptions, either because the cargo is not the property of DoD or because the vessel or aircraft is a chartered vessel or aircraft. Therefore, formal entry, advance reporting, and, in some cases, reports of arrival are required. These requirements can impede the flow of cargo and passengers moved in support of the U.S. government's and DoD's missions.

DoD transports all goods and passengers supporting its missions under DoD's control through its own transportation system, the Defense Transportation System (DTS). The DTS, administered pursuant to the DoD directive on Transportation and Traffic Management (DoD Directive 4500.09E), is the system by which DoD manages the secure shipment of cargo and personnel in peace and in war. Although the cargo that is transported in the DTS is under the strict control of DoD, much of this cargo is not owned by DoD. The controlling DoD directive requires that any non-DoD traffic transported in the DTS be in support of the mission of DoD or the United States or be of an emergency, lifesaving nature (DoD Directive 4500.09E E4.3.1). Vessels and aircraft often carry, for example, defense contractor owned cargo used to support DoD missions, personal property (household goods) of military members, humanitarian cargo, or security assistance cargo. These conveyances are not covered by the current entry exemptions, even though this cargo is normally transported under DoD's control through the DTS. In fact, much of the cargo that moves in the DTS renders the conveyance on which it is transported ineligible for an entry exemption. These conveyances are currently subject to entry requirements and thus also subject to advanced electronic presentation of cargo information requirements.

Under current regulations, although DoD-owned vessels and aircraft that transport passengers traveling on official U.S. business are exempt from entry, DoD-chartered vessels and aircraft are not exempt and must make entry if transporting any passengers. DoD often utilizes chartered vessels and aircraft to transport, for example, DoD personnel, personnel of the Red Cross or the United Service Organizations (USO), or DoD contractor employees, in addition to cargo. Even though all passengers transported on DoD conveyances must be approved to travel in the DTS, regardless of whether the conveyance is owned or chartered by DoD, the chartered vessel or aircraft would be subject to entry and advance cargo information requirements if transporting passengers, while DoD-owned vessels would not.

Proposed Changes to Entry and Reporting Requirements

Based on the above considerations, CBP is proposing to revise the exemptions to better address the manner in which cargo and passengers are moved in support of DoD missions. CBP is proposing to relate the DoD exemptions from entry and reporting to the DTS. Specifically, CBP is proposing to add a general definition of the DTS in the relevant parts of the CBP regulations (part 4 for vessels and part 122 for aircraft). CBP also proposes to revise the current DoD exemptions to cover vessels and aircraft owned by, or under the complete control and management of DoD, or chartered by DoD, which transport only cargo and/or passengers that have been approved for carriage in the DTS. The proposed exemptions would only apply to those chartered vessels or aircraft that are chartered in their entirety by DoD. Those vessels and aircraft that would be exempt under this proposal would also be exempt from the advance cargo information requirements in 19 CFR 4.7 and 122.48a. The proposed changes would help ensure the unimpeded flow of cargo and passengers moved in support of the U.S. government's missions and ensure that cargo and passengers supporting the defense of our nation are not unnecessarily delayed.

The proposed rule would not pose any new security risks for several reasons. First, DoD has strict security protocols for the conveyances it owns, controls, or charters and for the cargo and passengers those conveyances carry. Second, DoD has indicated that non-DoD owned cargo approved for carriage in the DTS undergoes the same stringent security protocols for transportation as DoD-owned cargo and that DoD has absolute control over non-DoD cargo carried in the DTS. Therefore, non-DoD-owned cargo approved for carriage in the DTS poses no greater security threat than DoD-owned cargo that currently qualifies for the entry exemption. Likewise, DTS-approved passengers traveling on DoD-chartered vessels and aircraft must undergo the same security protocols as those passengers traveling on conveyances owned by DoD. When CBP provided the initial exemption for DoD vessels and aircraft carrying only DoD property, neither DoD nor CBP fully appreciated the negative impact this restriction would have for DoD conveyances. The proposed expanded exemptions for cargo and passengers are intended to make CBP's exemptions more suitable to actual DoD transportation needs without posing security risks.

The proposed exemptions concern only the formal entry, clearance, and, in some cases, reporting requirements of the conveyance under the CBP regulations in title 19 of the CFR. All other requirements would still be applicable unless exempt under the relevant authorities. For example, persons on board the conveyance would still be subject to all applicable inspection and immigration controls pursuant to title 8 of the CFR, even if the conveyance is exempt from the title 19 entry requirements. Similarly, the

title 7 agricultural regulations and relevant reporting requirements would still apply. This proposed rulemaking would not affect the scope or definition of the term ''public vessel'' in 19 U.S.C. 1441.

Additional, Non-Substantive Amendments

In addition to the substantive amendments described above, CBP also proposes several non-substantive amendments to 19 CFR parts 4 and 122.

To provide clearer organization, in sections 4.5 (''Government vessels''), CBP proposes to give headings to paragraphs (a), (b), and (c). CBP proposes to divide paragraph (a) of section 4.5 (''*Exemptions from reports of arrival and entry*'') into lower paragraphs that are headed ''*Vessels owned by the United States,*'' ''*Additional DoD-owned vessels,*'' and ''*DoD-chartered vessels.*'' These paragraphs would be further subdivided for additional clarity and ease of reading.

In 4.5(a), CBP proposes to change the current phrase ''it is ballast'' to ''in ballast'' to reflect proper use of the term. Additionally, ''Department of Defense'' is to be abbreviated ''DoD'' in all but its first occurrence in 4.5(a). The phrase ''be entered'' in paragraph (b) would be changed to the proper phrase ''make formal entry,'' and paragraph (c) would include a reference to newly designated paragraph (a)(1) to eliminate ambiguity. With regard to the cargo declaration requirement in section 4.5 for DoD-chartered vessels (which can be found in proposed new paragraph (a)(3)(iii)), CBP proposes to include language to clarify that the duplicate cargo declaration form must be made available to the officer at the pier upon arrival. Finally, CBP proposes to replace the word ''shall'' where it appears in section 4.5 with ''will'' or ''must,'' as applicable.

CBP also proposes to divide paragraph (b) of section 122.41 to include lower paragraphs (b)(1) and (b)(2).

Executive Order 12866

Executive Order 12866, as supplemented by Executive Order 13563, requires Federal agencies to assess the benefits and costs of regulatory action, recognizing that some costs and benefits are difficult to quantify. Significant regulatory actions include those that may ''(1) [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) [c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) [m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.'' The proposed rule is not a ''significant regulatory action'' under Executive Order 12866. As such, the Office of Management and Budget has not reviewed this rule under that Order.

The proposed rule, if finalized, would extend the existing exemption for cargo and passengers transported by DoD to include all vessels and aircraft chartered by, owned by, or under the complete control and management of DoD that transport cargo and/or passengers that have been approved for carriage in the DTS. Extending the existing exemption facilitates the operations of another government agency, thus conveying a benefit to that agency. Because it merely extends the exemption to cargo and passengers approved for carriage in the DTS, the proposed regulation will not impose any costs or confer any benefits to private citizens or businesses. CBP welcomes comments on this conclusion.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires federal agencies to examine the impact a rule would have on small entities. A small entity may be a small business (defined as any independently owned an operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

This rule proposes to extend the current DoD exemption to entry to include vessels and aircraft chartered by, owned by, or under the complete control and management of DoD when they are transporting cargo and/or that are approved for carriage in the DTS. Because this proposed exemption does not impose any new costs on small entities, it will not have a significant economic impact on a substantial number of small entities. We welcome comments on this conclusion. If we do not receive any comments contradicting our findings, we will certify that this rule will not have a significant economic impact on a substantial number of small entities at the final rule stage.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1955 (44 U.S.C. 3507 *et seq.*), this document contains no new information and collection requirements that require Office of Management and Budget approval.

Signing Authority

This notice of proposed rulemaking is being issued in accordance with 19 CFR 0.2(a). Accordingly, this notice of proposed rulemaking is signed by the Secretary of Homeland Security.

List of Subjects

19 CFR Part 4

Customs duties and inspection, Exports, Freight, Harbors, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements, Vessels.

19 CFR Part 122

Administrative practice and procedure, Air carriers, Aircraft, Airports, Alcohol and alcoholic beverages, Cigars and cigarettes, Cuba, Customs duties and inspection, Drug traffic control, Freight, Penalties, Reporting and recordkeeping requirements, Security measures.

Proposed Amendments to the Regulations

For the reasons set forth in the preamble, CBP proposes to amend 19 CFR parts 4 and 122 as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 and specific citations for § 4.5 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

* * * * *

Section 4.5 is also issued under 19 U.S.C. 1441;

* * * * *

2. Amend § 4.0 by adding paragraph (h) to read as follows:

§ 4.0 General definitions.

* * * * *

(h) *Defense Transportation System (DTS).* The Defense Transportation System (DTS) is the transportation system controlled by the Department of Defense (DoD) under which DoD manages the secure shipment of cargo and personnel in peace and war. It is administered pursuant to DoD Directive 4500.09E.

3. Revise § 4.5 to read as follows:

§ 4.5 Government vessels.

(a) *Exemptions from reports of arrival and entry.*—(1) *Vessels owned by the United States.* No report of arrival or entry will be required of any vessel:

(i) Owned by or under the complete control and management of the United States or any of its agencies;

(ii) Manned wholly by members of the uniformed services of the United States, or by personnel in the civil service of the United States, or by both; and

(iii) Either in ballast or transporting only property of the United States and/or passengers traveling on official business of the United States.

(2) *Additional DoD-owned vessels.* For DoD-owned vessels not meeting the requirements of paragraph (a)(1) of this section, no report of arrival or entry will be required if the vessel is:

(i) Owned by or under the complete control and management of the U.S. Department of Defense (DoD);

(ii) Manned wholly by members of the uniformed services of the United States, or by personnel in the civil service of the United States, or by both; and

(iii) Either in ballast or transporting only passengers and/or cargo approved for carriage in the Defense Transportation System (DTS), as defined in § 4.0(h) of this part.

(3) *DoD-chartered vessels.* (i) *Entry exemption.* Entry will not be required of any vessel chartered by DoD, manned entirely by the civilian crew of the vessel carrier under contract to DoD, and carrying only passengers and/or cargo approved for carriage in the DTS.

(ii) *Clearance requirement.* Notwithstanding § 4.60(b)(3) of this part, no DoD-chartered vessel operated as provided in this paragraph (a)(3) is exempt from vessel clearance requirements.

(iii) *Cargo declaration requirement upon arrival.* If any cargo is on board a DoD-chartered vessel, the master or commander of the DoD-chartered vessel arriving from abroad must file a Cargo Declaration, CBP Form 1302, or an equivalent form issued by DoD, in duplicate. The original of each Cargo Declaration or equivalent form required under this paragraph must be filed with the port director within 48 hours after the arrival of the vessel. The other copy must be made available for use by the discharging officer at the pier and must be presented upon arrival of the vessel. See § 148.73 of this chapter with respect to baggage on carriers operated by DoD.

(b) *Non-exempt vessels.* The arrival of every vessel owned or controlled and manned as described in paragraph (a) of this section but transporting property or passengers other than property of the United States, passengers traveling on official business of the United States, or passengers and/or cargo approved for carriage in the DTS, and every vessel so owned or controlled, but not so manned, whether in ballast or transporting cargo or passengers, must be reported in accordance with § 4.2 and the vessel must make formal entry in accordance with § 4.9.

(c) *Foreign government vessels.* Every vessel owned by, or under the complete control and management of, any foreign nation will be exempt from or subject to the laws relating to report of arrival and entry under the same conditions as a vessel owned by or controlled by the United States, as described in paragraph (a)(1) of this section.

PART 122—AIR COMMERCE REGULATIONS

4. The general authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

5. Amend § 122.1 by adding paragraph (n) to read as follows:

§ 122.1 General definitions.

* * * * *

(n) *Defense Transportation System (DTS).* The Defense Transportation System (DTS) is the transportation system controlled by the Department of Defense (DoD) under which DoD manages the secure shipment of cargo and personnel in peace and war. It is administered pursuant to DoD Directive 4500.09E.

6. Amend § 122.41 as follows:

a. Revise paragraph (b);

b. Redesignate paragraph (c) as paragraph (d); and

c. Add new paragraph (c).

The revision and addition read as follows:

§ 122.41 Aircraft required to enter.

* * * * *

(b) Aircraft owned by or under the complete control and management of the U.S. Department of Defense (DoD), if the aircraft is:

(1) Manned entirely by members of the armed forces or civil service of the United States; and

(2) Transporting only passengers and/or cargo approved for carriage in the Defense Transportation System (DTS), as defined in § 122.1(n) of this part.

(c) Aircraft chartered by DoD, if the aircraft is:

(1) Manned entirely by the civilian crew of the air carrier under contract to DoD; and

(2) Transporting only passengers and/or cargo approved for carriage in the DTS.

* * * * *

Dated: February 3, 2012.

Janet Napolitano,

Secretary.

[FR Doc. 2012–2925 Filed 2–8–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–1176]

RIN 1625–AA08

Special Local Regulations for Marine Events; Potomac River, Charles County, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish special local regulations during the ''Potomac River Sharkfest Swim'' amateur swim, a marine event to be held on the waters of the Potomac River on June 2, 2012. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of the Potomac River during the event.

DATES: Comments and related material must be received by the Coast Guard on or before March 12, 2012. Requests for public meetings must be received by the Coast Guard on or before February 27, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2011–1176 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 Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, email *Ronald.L.Houck@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–2011–1176), 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–2011–1176'' 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–2011–1176'' 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 on or before the end of the comment period, 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

On June 2, 2012, Enviro-Sports Productions, Inc. of Stinson Beach, California, will sponsor an amateur swim across the Potomac River between Newburg, Maryland and King George, VA. The event consists of up to 500 swimmers on a course located upriver and parallel to the Governor Harry W. Nice Memorial (US–301) Bridge. The swimmers will be supported by sponsor-provided watercraft. The start will be located along the shore at the Aqua-Land Marina and the finish will be located along the shore at Dahlgren Wayside Park. A portion of the swim course will cross the federal navigation channel. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels.

Discussion of Proposed Rule

The Coast Guard proposes to establish temporary special local regulations on specified waters of the Potomac River. The regulations will be in effect from 7 a.m. to 12:30 p.m. on June 2, 2012. The regulated area, approximately 3,800 yards in length and 900 yards in width, extends across the entire width of the Potomac River between the Maryland and Virginia shorelines and includes all waters of the Potomac River, within lines connecting the following positions: from latitude 38°22′05″ N, longitude 076°59′03″ W, thence to latitude 38°21′50″ N, longitude 077°00′54″ W, and from latitude 38°21′29″ N, longitude 077°00′54″ W to latitude 38°21′45″ N, longitude 076°58′59″ W. The effect of this proposed rule will be to restrict general navigation in the regulated area during the event. Vessels intending to transit the Potomac River through the regulated area will only be allowed to safely transit the regulated area when the Coast Guard Patrol Commander has deemed it safe to do so. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting 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, 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. We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this regulation will prevent traffic from transiting a portion of the Potomac River during the event, the effect of this regulation will not be significant due to

the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners and marine information broadcasts, so mariners can adjust their plans accordingly. Additionally, the regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic will be able to transit safely through a portion of the regulated area, but only after the last participant has cleared that portion of the regulated area and when the Coast Guard Patrol Commander deems it safe to do so.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the effected portions of the Potomac River during the event.

Although this regulation prevents traffic from transiting a portion of the Potomac River near the Governor Harry W. Nice Memorial (US–301) Bridge during the event, this proposed rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This proposed rule would be in effect for only a limited period. Though the regulated area extends across the entire width of the river, vessel traffic may be permitted to safely transit a portion of the regulated area, but only after all participants have safely cleared that portion of the regulated area and when the Coast Guard Patrol Commander deems it safe for vessel traffic to do so. All Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz). Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

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 Coast Guard Sector Baltimore, MD. 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 would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which 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 which do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves implementation of regulations within 33 CFR Part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing. 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 100—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 a temporary section, § 100.35T05–1176 to read as follows:*

§ 100.35T05–1176 Special Local Regulations for Marine Events; Potomac River, Charles County, MD.

(a) *Regulated area.* The following location is a regulated area: All waters of the Potomac River, within lines connecting the following positions: from latitude 38°22′05″ N, longitude 076°59′03″ W, thence to latitude 38°21′50″ N, longitude 077°00′54″ W, and from latitude 38°21′29″ N, longitude 077°00′54″ W to latitude 38°21′45″ N, longitude 076°58′59″ W. All coordinates reference Datum NAD 1983.

(b) *Definitions:* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations:* (1) The Coast Guard Patrol Commander may forbid and control the movement of all vessels and persons in the regulated area. When hailed or signaled by an official patrol vessel, a vessel or person in the regulated area shall immediately comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(2) Persons desiring to transit the regulated area must first obtain authorization from the Captain of the Port Baltimore or his designated representative. To seek permission to transit the area, the Captain of the Port Baltimore and his designated representatives can be contacted at telephone number 410–576–2693 or on Marine Band Radio, VHF–FM channel 16 (156.8 MHz). All Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz).

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue a marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

(d) Enforcement period: This section will be enforced from 7 a.m. until 12:30 p.m. on June 2, 2012.

Dated: January 30, 2012.

Mark P. O'Malley,

Captain, U.S. Coast Guard, Captain of the Port Baltimore.

[FR Doc. 2012–2939 Filed 2–8–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2008–0633; FRL–9628–5]

Approval and Promulgation of Implementation Plans; Arkansas; Infrastructure Requirements for the 1997 Ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS and Interstate Transport Requirements for the 1997 Ozone NAAQS and 2006 $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to partially approve and partially disapprove submittals from the state of Arkansas pursuant to the Clean Air Act (CAA or Act) that address the infrastructure elements specified in the CAA section 110(a)(2), necessary to implement, maintain, and enforce the 1997 8-hour ozone and the 1997 and 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or standards). We are proposing to find that the current Arkansas State Implementation Plan (SIP) meets the following infrastructure elements for the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS: 110(a)(2)(A), (B), (E), (F), (G), (H), (K), (L), (M), and portions of (C), (D)(ii) and (J). We are proposing to find that the current Arkansas SIP does not meet the infrastructure requirements for the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2) for portions of (C), (D)(ii), and (J) because the EPA-approved SIP prevention of significant deterioration (PSD) program does not apply to greenhouse gas (GHG) emitting sources. We also are proposing to find that the current Arkansas SIP does not meet the infrastructure requirements for the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2) for portions of (C), (D)(ii), and (J) because Arkansas has not submitted the PSD SIP revision required by EPA's Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (73 FR 28321, May 16, 2008). Further, we are proposing to partially approve and partially disapprove the provisions of SIP submissions that emissions from sources in Arkansas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, with regard to the 1997 8-hour ozone NAAQS and the 2006 $PM_{2.5}$ NAAQS. The partial disapprovals herein are because Arkansas cannot

issue permits for GHG emissions and because the State did not submit the required $PM_{2.5}$ PSD SIP revision. Finally, for purposes of the 1997 8-hour ozone NAAQS, EPA is proposing to approve SIP revisions that modify the Arkansas PSD SIP to include nitrogen oxides (NO_X) as an ozone precursor.

This action is being taken under section 110 and part C of the Act. Finally, EPA is also proposing to make a correction to the attainment status table in 40 CFR 81.304 to accurately reflect the redesignation date of Crittenden County, Arkansas to attainment for the 1997 8-hour ozone standard.

DATES: Comments must be received on or before March 12, 2012.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2008–0633, by one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *U.S. EPA Region 6 ''Contact Us'' Web site: http://epa.gov/region6/r6comment.htm.* Please click on ''6PD (Multimedia)'' and select ''Air'' before submitting comments.
- *Email:* Mr. Guy Donaldson at *donaldson.guy@epa.gov.* Please also send a copy by email to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.
- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2008–0633. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202.

The State submittal is also available for public inspection during official business hours by appointment: Arkansas Department of Environmental Quality (ADEQ), Planning and Air Quality Analysis Branch, 5301 Northshore Drive, North Little Rock, Arkansas 72118.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey Riley, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–8542; fax number 214–665–6762; email address *riley.jeffrey@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' means EPA.

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I. Background

A. What are the National Ambient Air Quality Standards?

Section 109 of the Act requires EPA to establish NAAQS for pollutants that ''may reasonably be anticipated to endanger public health and welfare,'' and to develop a primary and secondary standard for each NAAQS. The primary standard is designed to protect human health with an adequate margin of safety, and the secondary standard is designed to protect public welfare and the environment. EPA has set NAAQS for six common air pollutants, referred to as criteria pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. These standards present state and local governments with the minimum air quality levels they must meet to comply with the Act. Also, these standards provide information to residents of the United States about the air quality in their communities.

B. What is a SIP?

The SIP is a set of air pollution regulations, control strategies, other means or techniques, and technical analyses developed by the state, to ensure that the state meets the NAAQS. The SIP is required by section 110 and other provisions of the Act. These SIPs can be extensive, containing state

regulations or other enforceable documents and supporting information such as emissions inventories, monitoring networks, and modeling demonstrations. Each state must submit these regulations and control strategies to EPA for approval and incorporation into the federally-enforceable SIP. Another important aspect of the SIP is to ensure that emissions from within the state do not have certain prohibited impacts upon the ambient air in other states through interstate transport of pollutants. This SIP requirement is specified in section 110(a)(2)(D) of the CAA. Pursuant to that provision, each state's SIP must contain provisions adequate to prevent, among other things, emissions that interfere with measures required to be included in the SIP of any other state to prevent significant deterioration of air quality in any other state. Each federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin.

C. What is the background for this rulemaking?

Under sections 110(a)(1) and (2) of the Act, states are required to submit SIPs that provide for the implementation, maintenance, and enforcement (the infrastructure) of a new or revised NAAQS within three years following the promulgation of the NAAQS, or within such shorter period as EPA may prescribe. Section 110(a)(2) lists the specific infrastructure elements that must be incorporated into the SIPs, including for example, requirements for emission inventories, NSR, air pollution control measures, and monitoring that are designed to assure attainment and maintenance of the NAAQS. Table 1, displayed in Section D of this rulemaking, lists all 14 infrastructure elements.[1] EPA refers to the requirements of section 110(a)(2)(A)–(C), (D)(ii), (E)–(H), and (J)–(M) as the ''infrastructure'' SIPs. Additionally, EPA refers to the requirements of section 110(a)(2)(D)(i) as the ''interstate transport'' SIPs. EPA provided separate guidance to states on each type of SIP, infrastructure and interstate transport, and these actions are on separate tracks and timelines.

1. Section 110(a)(1) and (2) Infrastructure SIP Elements

On July 18, 1997, we published new and revised NAAQS for ozone (62 FR 38856) and PM (62 FR 38652). For ozone, we set an 8-hour standard of 0.08 parts per million (ppm) to replace the 1-hour standard of 0.12 ppm. For PM, we set a new annual and a new 24-hour NAAQS for particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (denoted $PM_{2.5}$). The annual $PM_{2.5}$ standard was set at 15 micrograms per cubic meter ($\mu g/m^3$). The 24-hour $PM_{2.5}$ standard was set at 65 $\mu g/m^3$. On October 17, 2006, we published revised standards for PM (71 FR 61144). For $PM_{2.5}$ the annual standard of 15 $\mu g/m^3$ was retained and the 24-hour standard was revised to 35 $\mu g/m^3$. For PM_{10} the annual standard was revoked and the 24-hour standard (150 $\mu g/m^3$) was retained. For more information on these standards, please see the 1997 and 2006 **Federal Register** notices (62 FR 38856, 62 FR 38652, and 71 FR 61144).

Thus, states were required to submit such SIPs for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS to EPA no later than June 2000.[2] However, intervening litigation over the 1997 8-hour ozone and $PM_{2.5}$ NAAQS created uncertainty about how to proceed and many states did not provide the required ''infrastructure'' SIP submission for these newly promulgated NAAQS.

On March 4, 2004, Earthjustice submitted a notice of intent to sue related to EPA's failure to issue findings of failure to submit related to the infrastructure requirements for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. EPA entered into a consent decree with Earthjustice which required EPA, among other things, to complete a **Federal Register** notice announcing EPA's determinations pursuant to section 110(k)(1)(B) of the Act as to whether each state had made complete submissions to meet the requirements of section 110(a)(2) for the 1997 8-hour ozone NAAQS by December 15, 2007. Subsequently, EPA received an extension of the date to complete this **Federal Register** notice until March 17, 2008, based upon agreement to make the findings with respect to submissions made by January 7, 2008. In accordance with the consent decree, EPA made completeness findings for each state based upon what the Agency received from each state as of January 7, 2008. With regard to the 1997 $PM_{2.5}$ NAAQS, EPA entered into a consent decree with Earthjustice which required EPA, among other things, to complete a **Federal Register** notice announcing EPA's determinations pursuant to section 110(k)(1)(B) of the Act as to whether each state had made complete submissions to meet the requirements of section 110(a)(2) for the 1997 $PM_{2.5}$ NAAQS by October 5, 2008.

On March 27, 2008, and October 22, 2008, we published findings concerning whether states had made the 110(a)(2) submissions for the 1997 ozone (73 FR 16205) and $PM_{2.5}$ standards (73 FR 62902). In the March 27, 2008 action, we found that Arkansas had made a submission that addressed some, but not all of the section 110(a)(2) requirements of the Act necessary to implement the 1997 8-hour ozone NAAQS.[3] In the October 22, 2008 action, we found that Arkansas had made a complete submission intended to provide for the basic program elements specified in section 110(a)(2) of the Act necessary to implement the 1997 $PM_{2.5}$ NAAQS.

On October 2, 2007, we issued ''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 from William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards (OAQPS).[4] On September 25, 2009, we issued ''Guidance on SIP Elements Required Under Sections 110(a)(l) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS),'' Memorandum also from William T. Harnett, Director, AQPD, OAQPS. Each of these guidance memos addresses the SIP elements found in 110(a)(2). In each of these guidance memos, the guidance states that to the extent that existing SIPs for ozone and PM already meet the requirements, states need only certify that fact to us.

On December 17, 2007, March 28, 2008, and September 16, 2009, the State of Arkansas submitted letters certifying that Arkansas has addressed any potential infrastructure issues associated with ozone and $PM_{2.5}$ and

[1] 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 are due at the time the nonattainment area plan requirements are due 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. Therefore, this action does not cover these specific SIP elements.

[2] EPA issued a revised 8-hour ozone standard on March 27, 2008 (73 FR 16436). This rulemaking does not address the 2008 ozone standard.

[3] In the March 27, 2008 action we found that Arkansas had not submitted a SIP revision that modified Arkansas' Prevention of Significant Deterioration (PSD) SIP for the 1997 8-hour ozone NAAQS to include NO_X as an ozone precursor, which is necessary for approval of elements 110(a)(2)(C) and the PSD and visibility portion of element 110(a)(2)(J). On February 17, 2010, Arkansas submitted the necessary PSD SIP revision.

[4] This and any other guidance documents referenced in this action are in the docket for this rulemaking.

fulfilled its infrastructure SIP obligations. The letters provided information on how the current Arkansas SIP provisions meet the 110(a)(2) requirements. These letters are in the docket for this rulemaking.

Additional information: 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.[5] Those 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 80186 (December 31, 2002), as amended by 72 FR 32526 (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 submittals for the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS submissions from Arkansas.

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 these infrastructure SIP submittals for Arkansas.

Unfortunately, the commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the 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

[5] 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.

required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.[6] 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.[7]

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).[8] 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.[9] 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.[10]

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 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.[11] 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.'' [12] 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.'' [13] 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.'' [14] 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

[6] 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.

[7] 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 25162 (May 12, 2005) (defining, among other things, the phrase ''contribute significantly to nonattainment'').

[8] See, *e.g., Id.,* 70 FR 25162, at 63—65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

[9] 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.

[10] 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.

[11] 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'').

[12] *Id.,* at page 2.

[13] d., at attachment A, page 1.

[14] *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.

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.[15] 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 infrastructure SIP submittals for Arkansas.

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 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.[16] Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.[17] Significantly, EPA's determination that an action on the infrastructure SIP submittal 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.[18]

2. What elements are required under Section 110(a)(2)?

Pursuant to the October 2, 2007 ''EPA guidance for addressing the SIP infrastructure elements required under sections 110(a)(1) and (2) for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS,'' there are 14 essential components that must be in the SIP. These are listed in Table 1 below.

[15] 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'').

[16] 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,'' 76 FR 21639 (April 18, 2011).

[17] 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 82536 (December 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 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

[18] 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 42342 at 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

TABLE 1—SECTION 110(A)(2) ELEMENTS REQUIRED IN SIPS

Clean Air Act Citation	Brief description
Section 110(a)(2)(A)	Enforceable emission limits and other control measures.
Section 110(a)(2)(B)	Ambient air quality monitoring/data system.
Section 110(a)(2)(C)	Program for enforcement of control measures.
Section 110(a)(2)(D)	International and interstate transport.
Section 110(a)(2)(E)	Adequate resources.
Section 110(a)(2)(F)	Stationary source monitoring system.
Section 110(a)(2)(G)	Emergency power.
Section 110(a)(2)(H)	Future SIP revisions.
Section 110(a)(2)(J) [19]	Consultation with government officials.
Section 110(a)(2)(J)	Public notification.
Section 110(a)(2)(J)	Prevention of significant deterioration (PSD) and visibility protection.
Section 110(a)(2)(K)	Air quality modeling/data.
Section 110(a)(2)(L)	Permitting fees.
Section 110(a)(2)(M)	Consultation/participation by affected local entities.

3. 110(a)(2)(D)(i) Interstate Transport SIP Elements

Section[19] 110(a)(2)(D)(i) pertains to interstate transport of certain emissions. On August 15, 2006, EPA issued its ''Guidance for State Implementation Plan (SIP) Submission 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'' (2006 Guidance). EPA developed the 2006 Guidance to make recommendations to states for making submissions to meet the requirements of section 110(a)(2)(D)(i) for the 1997 8-hour ozone standards and the 1997 $PM_{2.5}$ standards. As identified in the 2006 Guidance, the ''good neighbor'' provisions in section 110(a)(2)(D)(i) require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated in the statute. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. The SIP must prevent sources in the state from emitting pollutants in amounts that will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; and (4) interfere with efforts to protect visibility in other states.

On December 17, 2007, we received a certification from the State of Arkansas intended to address the requirements of section 110(a)(2)(D)(i) for both the 1997 8-hour ozone and 1997 $PM_{2.5}$ standard. On March 28, 2008, we received a certification[20] from the State intended to address the requirements of section 110(a)(2)(D)(i) for the 2006 $PM_{2.5}$ NAAQS. In this rulemaking, for the 1997 ozone and 2006 $PM_{2.5}$ NAAQS, we are addressing only the 110(a)(2)(D)(i) requirement that pertains to preventing sources in Arkansas from emitting pollutants that will interfere with measures required to prevent significant deterioration of air quality in other states.[21] In its submission, Arkansas indicated that its current PSD New Source Review (NSR) SIP is adequate to prevent such interference.

4. Revisions to the Arkansas PSD SIP

To meet the infrastructure requirements of section 110(a)(2)(C) of the Act for the 1997 ozone standard, EPA believes the State must have updated its rules for PSD to treat NO_X as a precursor to ozone (70 FR 71612, November 29, 2005). PSD rules to treat NO_X as a precursor to ozone are also required to meet the third 110(a)(2)(D)(i) interstate transport prong, interference with provisions to prevent significant deterioration of air quality in other states. On February 17, 2010, Arkansas submitted revisions that provided for NO_X to be treated as a precursor to ozone formation in its PSD program. We are proposing action on this revision to the PSD program that implements the provisions for NO_X as a precursor because EPA believes that this is a necessary provision for implementation of the 1997 ozone standard.

5. Greenhouse Gas (GHG) Component of PSD Programs

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part distinct from one another, establish the overall framework for today's proposed action on the Arkansas infrastructure SIP. Four of these actions include, as they are commonly called, the ''Endangerment Finding'' and ''Cause or Contribute Finding,'' which EPA issued in a single final action,[22] the ''Johnson Memo Reconsideration,''[23] the ''Light-Duty Vehicle Rule,''[24] and the ''Tailoring Rule.''[25] Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs

[19] Section 110(a)(2)(I) pertains to the nonattainment planning requirements of part D, Title I of the Act. This section is 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 are due at the time the nonattainment area plan requirements are due pursuant to section 172. Thus this action does not cover section 110(a)(2)(I).

[20] This is the same submittal that addresses the 110(a)(2) infrastructure SIP elements for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS.

[21] EPA published a finding on April 25, 2005 (70 FR 21147) that all states had failed to submit SIPs addressing interstate transport for the 1997 ozone and $PM_{2.5}$ standards, as required by section 110(a)(2)(D)(i). EPA proposed a FIP on August 2, 2010 (75 FR 45210) to limit emissions of ozone precursors and PM that contribute significantly to nonattainment of the 1997 ozone and 1997 and 2006 PM NAAQS in other states and interfere with maintenance of these three NAAQS in other states. EPA finalized the FIP on July 6, 2011; known as the Cross-State Air Pollution Rule, it requires that Arkansas (and 26 other states in the eastern half of the United States) must significantly improve air quality by reducing power plant emissions that cross state lines and contribute to ground-level ozone and fine particle pollution in other states. See 76 FR 48208 (published August 8, 2011) and *www.epa.gov/crossstaterule.* On December 30, 2011, the U.S. Court of Appeals for the DC Circuit issued its ruling to stay the Cross-State Air Pollution Rule, pending judicial review. See *http://www.epa.gov/airtransport/pdfs/CourtDecision.pdf.*

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

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

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

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

emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. EPA took this last action in the Tailoring Rule, which, more specifically, established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources.

The approved Arkansas SIP contained errors that resulted in its failure to address, or provide adequate legal authority for, the implementation of a GHG PSD program in Arkansas. On this basis, on December 13, 2010, EPA issued a finding that Arkansas' SIP was substantially inadequate to meet CAA requirements because it did not apply PSD requirements to GHG emitting sources (75 FR 77698). This rulemaking also issued a ''SIP call'' to Arkansas, requiring the state to revise its SIP as necessary to correct the inadequacies. The SIP call established a deadline of December 22, 2010 for Arkansas to submit its corrective SIP revision. In response to EPA's proposal of the SIP call (75 FR 53892), the state declined the 12-month deadline for SIP revision following the finding of substantial inadequacy in order to ensure that PSD permitting authorities for newly constructed or modified sources remain in place.[26] As required following the SIP call, EPA promulgated a Federal Implementation Plan (FIP), which established EPA as the permitting authority for GHG-emitting sources in Arkansas (75 FR 82246). EPA took these actions through final rulemaking, effective upon publication, to ensure the availability of a permitting authority—EPA—in Arkansas for GHG-emitting sources when they became subject to PSD on January 2, 2011. The FIP allowed those sources to proceed with plans to construct or expand.

As we discuss further in this proposal and in the TSD, the current EPA-approved SIP PSD program does not apply to GHG-emitting sources that emit at or above the levels of emissions set in the Tailoring Rule, or at other appropriate levels. Thus, the Arkansas SIP does not satisfy portions of elements within the infrastructure and transport requirements as they pertain to GHGs. However, EPA's disapproval of those elements does not engender an additional statutory obligation, because EPA has already promulgated a FIP for the Arkansas PSD program to address permitting GHGs at or above the Tailoring Rule thresholds.

[26] See letter from Teresa Marks to Lisa P. Jackson, dated October 1, 2010, in the docket for this rulemaking.

6. $PM_{2.5}$ SIP Revisions

To implement the PSD NSR component of section 110(a)(2)(C) for the 1997 and 2006 $PM_{2.5}$ standards, states were required to submit the necessary SIP revisions to EPA by May 16, 2011 under EPA's Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (73 FR 28321, May 16, 2008). At present, Arkansas has not submitted revisions to satisfy this requirement, and therefore the Arkansas federally-approved PSD NSR SIP does not fully implement the PSD NSR program for the 1997 and 2006 $PM_{2.5}$ NAAQS. Although the State has indicated that regulations are currently being developed to address section 110(a)(2)(C) for the implementation of the NSR program for the 1997 and 2006 $PM_{2.5}$ standards, the state-level rulemaking process is anticipated to proceed on a timeline that will prevent Arkansas from adopting these regulations before EPA is required to take final action on the State's 110(a)(2) infrastructure SIP. Therefore, we are proposing to find that the current Arkansas PSD SIP does not meet the requirements of section 110(a)(2)(C) with respect to the 1997 and 2006 $PM_{2.5}$ NAAQS because the State failed to submit the PSD SIP revision required by the May 16, 2008 rulemaking.

II. What action is EPA proposing?

A. Section 110(a)(1) and (2)

EPA is proposing to partially approve and partially disapprove the Arkansas SIP submittals that identify where and how the 14 basic infrastructure elements are in the EPA-approved SIP as specified in CAA section 110(a)(2). The Arkansas submittals do not include revisions to the SIP, but do document how the current Arkansas SIP already includes the required infrastructure elements. In today's action, we are proposing to find that the following infrastructure elements are contained in the current Arkansas SIP regarding implementation of the 1997 ozone and 1997 and 2006 $PM_{2.5}$ standards: emission limits and other control measures (section 110(a)(2)(A)); ambient air quality monitoring/data system (section 110(a)(2)(B)); program for enforcement of control measures, except for the portion that addresses GHGs and $PM_{2.5}$ emissions (section 110(a)(2)(C)); international and interstate pollution abatement, except for the portion that addresses GHGs and $PM_{2.5}$ emissions (section 110(a)(2)(D)(ii)); adequate resources (section 110(a)(2)(E)); stationary source monitoring system (section 110(a)(2)(F)); emergency power (section 110(a)(2)(G)); future SIP revisions (section 110(a)(2)(H)); consultation with government officials (section 110(a)(2)(J)); public notification (section 110(a)(2)(J)); PSD and visibility protection, except for the PSD portion that addresses GHGs and $PM_{2.5}$ emissions (section 110(a)(2)(J)); air quality modeling/data (section 110(a)(2)(K)); permitting fees (section 110(a)(2)(L)); and consultation/participation by affected local entities (section 110(a)(2)(M)).

As discussed in section I.C.6 of this proposal, we are proposing to find that the current Arkansas SIP does not meet the infrastructure requirements for the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2) for portions of (C), (D)(ii), and (J) because Arkansas failed to submit the PSD SIP revision required by EPA's Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (73 FR 28321, May 16, 2008). We are also proposing to find that the current Arkansas SIP does not meet the infrastructure requirements for the 1997 8-hour ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS at 110(a)(2) for portions of (C), (D)(ii), and (J) because the Arkansas SIP PSD program does not apply to GHG-emitting sources.

We are proposing to approve severable portions of the December 17, 2007 and the March 28, 2008 submissions from Arkansas, demonstrating that Arkansas has adequately addressed one of the four required prongs of the 110(a)(2)(D)(i) interstate transport element, specifically the prong that requires that the SIP prohibit air emissions from sources within a state from interfering with measures required to prevent significant deterioration of air quality in any other state.[27] We are proposing to determine that emissions from sources in Arkansas do not interfere with measures to prevent significant deterioration of air quality in any other state for the 1997 8-hour ozone NAAQS (CAA section 110(a)(2)(D)(i)(II)), except for the portion that addresses GHG emissions. We are proposing to disapprove the portion of the Arkansas interstate transport SIP element that prohibits GHG emissions from sources within Arkansas from interfering with measures required to prevent significant deterioration of air quality in any other state (section 110(a)(2)(D)(i)). We are proposing to determine that $PM_{2.5}$ emissions from

[27] As noted in Section I.C.2 of this action, the December 17, 2007 submittal addresses the 1997 ozone and $PM_{2.5}$ standards; it does not address the 2006 $PM_{2.5}$ standard. The March 28, 2008 submittal addresses the 110(a)(2) infrastructure and interstate transport elements for the 2006 $PM_{2.5}$ NAAQS.

sources in Arkansas do interfere with measures to prevent significant deterioration of air quality in any other state for the 2006 $PM_{2.5}$ NAAQS. Therefore, we are proposing to disapprove the portion of the Arkansas interstate transport SIP element that prohibits $PM_{2.5}$ emissions from sources within Arkansas from interfering with measures required to prevent significant deterioration of air quality in any other state (section 110(a)(2)(D)(i)) for the 2006 $PM_{2.5}$ NAAQS. We are not addressing in this action the 1997 $PM_{2.5}$ NAAQS nor the three remaining prongs of section 110(a)(2)(D)(i) [28] for the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. We will take action on the three remaining prongs in separate rulemakings.

In conjunction with our proposed finding that the Arkansas SIP meets the section 110(a)(1) and (2) infrastructure SIP elements listed above, we are also proposing to fully approve four severable portions of a SIP revision submitted by the ADEQ to EPA on February 17, 2010. This submittal contains rule revisions by ADEQ to (1) Regulate NO_X emissions in its PSD permit program as a precursor to ozone; (2) add NO_X to the PSD definitions for *Major Modification* and *Major Stationary Source;* (3) under the PSD definition for *Significant,* add the emission rate for NO_X, as a precursor to ozone, as 40 tpy; and (4) under the PSD requirements, allow for an exemption with respect to ambient air quality monitoring data for a source with a net emissions increase less than 100 tpy of NO_X. The actions proposed herein are described in greater detail in Section III of this rulemaking and in the TSD. At this time, EPA is not taking action on other portions of the February 17, 2010 SIP revision submitted by ADEQ; EPA intends to act on the other revisions at a later date.

B. Why is EPA proposing a partial approval, partial disapproval?

Section 110(k)(3) of the Act states that EPA may partially approve and partially disapprove a SIP submittal if it finds that only a portion of the submittal meets the requirements of the Act. We believe that the Arkansas SIP meets a majority of the requirements of section 110(a)(2) of the Act and that specific portions of three elements of section 110(a)(2) are not met.[29] Because the portions proposed for disapproval are independent from those proposed for approval, we believe that the Arkansas Infrastructure SIP can be partially approved and partially disapproved.

C. What are the implications of a partial approval, partial disapproval?

Enforcement of a state regulation (or rule) before and after it is incorporated into the federally approved SIP is primarily a state responsibility. However, after the rule is federally approved, we are authorized to take enforcement action against violators. Citizens are also offered legal recourse to address violations as described in section 304 of the Act. If a state rule is disapproved, it is not incorporated into the federally approved SIP, and is not enforceable by EPA or by citizens under section 304. Disapproval of any of the Arkansas infrastructure SIP elements would not trigger sanctions under section 179 of the Act, because the submittals are not required by part D of Title I of the Act and are not required by a call for a SIP revision under section 110(k)(5) of the Act.

Under section 110(c) of the Act, disapproval of a SIP in whole or in part requires EPA to promulgate a Federal implementation plan (FIP) at any time within two years following final disapproval, unless the State submits a plan or plan revision that corrects the deficiency—and the EPA approves the plan or plan revision—before the EPA promulgates such FIP. This two-year period is commonly referred to as the ''FIP clock.'' Here, based on Arkansas's failure to submit the required $PM_{2.5}$ PSD SIP revision, and because Arkansas cannot issue permits for GHG emissions, we are proposing to partially disapprove certain severable elements of the Arkansas infrastructure SIP. Accordingly, EPA is required by law to promulgate a FIP at any time within two years of the final rulemaking, unless Arkansas submits and we approve a new SIP or SIP revisions that correct the deficiencies, or unless EPA has already fulfilled its FIP obligation.

III. How has Arkansas addressed the elements of Section 110(a)(2)?

The Arkansas submittals address the elements of Section 110(a)(2) as described below. We provide a more detailed review and analysis of the Arkansas infrastructure and transport SIP elements in the TSD.

Enforceable emission limits and other control measures, pursuant to section 110(a)(2)(A): Section 110(a)(2)(A) requires that all measures and other elements in the SIP be enforceable. This provision does not require the submittal of regulations or emission limits developed specifically for attaining the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ standards. Those regulations are due later as part of attainment demonstrations.

The Arkansas Water and Air Pollution Control Act (AWAPCA), found in Title 8, Chapter 4 of the Arkansas Code Annotated (A.C.A.) names the Arkansas Department of Environmental Quality (ADEQ) as the state's air pollution control agency and provides enforcement authority to the ADEQ (37 FR 10841, May 31, 1972). ADEQ was originally created by the Arkansas General Assembly as the Arkansas Water Pollution Control Commission by Act 472 of 1949. Act 183 of 1965 changed the Commission's name to the Arkansas Pollution Control Commission (APCC) and gave it the power to regulate air pollution. A reorganization of state government in 1971 renamed the APCC to the Arkansas Pollution Control and Ecology Commission (APCEC), and created the Department of Pollution Control and Ecology as a cabinet-level agency headed by a director appointed by the Commission. In 1996, the Arkansas General Assembly voted to rename the Department of Pollution Control and Ecology to the Arkansas Department of Environmental Quality, effective March 31, 1999. The Department is responsible for the day-to-day administration of the Commission's regulations for a variety of environmental programs.

The APCEC has promulgated rules to limit and control emissions of, among other things, particulate matter (PM), sulfur dioxide (SO_2), nitrogen oxides (NO_X), and volatile organic compounds (VOCs).[30] These rules include emission limits, control measures, permits, fees, and compliance schedules and are found in APCEC Regulation 19, Regulation 26, and Regulation 31: Regulation 19, Chapters 1, 3–5, 7, 8, 10, 13–15; Regulation 26, Chapters 1, 3 and 7; and Regulation 31, Chapters 1, 3, 4 and 8.

In this proposed action, EPA has not reviewed and is not proposing to take any action to approve or disapprove any existing Arkansas SIP provisions with regard to excess emissions during

[28] The remaining three prongs pertain to prohibiting air emissions within Arkansas from: (1) Significantly contributing to nonattainment in any other state, (2) interfering with maintenance of the relevant NAAQS in any other state, and (3) interfering with measures required to protect visibility in any other state. We proposed action on the visibility prong on October 17, 2011 at 76 FR 64186.

[29] The three elements refer to the infrastructure and interstate transport SIP elements discussed in section II above.

[30] NO_X and VOCs are precursors to ozone. PM can be emitted directly and secondarily formed; the latter is the result of NO_X and SO_2 precursors combining with ammonia to form ammonium nitrate and ammonium sulfate.

startup, shutdown, or malfunction (SSM) of operations at a facility. EPA believes that a number of states have SSM SIP provisions that are contrary to the Act and inconsistent with existing EPA guidance,[31] and the Agency plans to conduct a SIP call in the future to address such SIP regulations. In the meantime, EPA encourages any state having an SSM SIP provision that is contrary to the Act and inconsistent with EPA guidance to take steps to correct the deficiency as soon as possible before a SIP call is implemented. Similarly, this proposed action does not include a review of, nor does it propose to, take any action to approve or disapprove any existing SIP rules with regard to director's discretion or variance provisions. EPA believes that a number of SIPs have such provisions that are contrary to the Act and not consistent with existing EPA guidance (52 FR 45044, November 24, 1987) [32] and the Agency plans to take action in the future to address such SIP regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision in its SIP that is contrary to the Act and inconsistent with EPA guidance to take steps to correct the deficiency as soon as possible.

A detailed list of the applicable Regulation 19, Regulation 26, and Regulation 31 chapters discussed above are provided in the TSD. Arkansas' SIP clearly contains enforceable emission limits and other control measures, which are in the federally enforceable SIP. EPA is proposing to find that the Arkansas SIP meets the requirements of section 110(a)(2)(A) of the Act with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Ambient air quality monitoring/data analysis system, pursuant to section 110(a)(2)(B): Section 110(a)(2)(B) requires SIPs to include provisions 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. EPA approved Regulation 19, Chapter 3 into the SIP that makes ADEQ responsible for conducting ambient air monitoring in any area of the state that can be expected to be in excess of the NAAQS (65 FR 61103, October 16, 2000). The ADEQ operates and maintains a statewide network of air quality monitors—data are collected, results are quality assured, and the data are submitted to EPA's Air Quality System [33] on a regular basis. Arkansas' Statewide Air Quality Surveillance Network was approved by EPA on August 6, 1981 (46 FR 40005), and consists of stations that measure ambient concentrations of the six criteria pollutants, including ozone and $PM_{2.5}$. The Air Quality Surveillance Network undergoes annual review by EPA. On June 29, 2010, ADEQ submitted its 2010 Annual Air Monitoring Network Plan (AAMNP) that included the plans for the 1997 ozone and $PM_{2.5}$ NAAQS. EPA approved the AAMNP on January 20, 2011.[34] The ADEQ Web site provides the ozone and $PM_{2.5}$ monitor locations (*http://www.adeq.state.ar.us/air/branch_planning/monitoring.htm*), as well as current data including air quality indices and concentrations for 8-hour ozone and $PM_{2.5}$ for the past 90 days (*http://www.adeq.state.ar.us/techsvs/dailyaqidata.asp#AQI*).

In summary, Arkansas meets the requirement to establish, operate, and maintain an ambient air monitoring network; collect and analyze the monitoring data; and make the data available to EPA upon request. EPA is proposing to find that the current Arkansas SIP meets the requirements of section 110(a)(2)(B) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Program for enforcement of control measures and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that NAAQS are achieved, including a permit program, as required by Parts C and D, pursuant to section 110(a)(2)(C). As discussed previously, the AWAPCA provides the ADEQ with authority to enforce the state's environmental quality rules. The ADEQ established rules governing emissions of the NAAQS and their precursors throughout the state, and these rules are in the federally-enforceable SIP. The rules in Regulation 19, Chapters 1, 3–5, 7–10, 13 and 14; Regulation 26, Chapter 3; and Regulation 31, Chapters 1, 3, 4 and 8 include allowable rates, compliance, control plan requirements, actual and allowable emissions, monitoring and testing requirements, recordkeeping and reporting requirements, and control schedules. These rules clarify the boundaries beyond which regulated entities in Arkansas can expect enforcement action.

To meet the requirement for having a program for the regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved—including a permit program as required by Parts C and D—generally, the state is required to have SIP-approved PSD, Nonattainment, and Minor NSR permitting programs adequate to implement the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. We are not evaluating nonattainment-related provisions—such as the Nonattainment NSR program required by part D in 110(a)(2)(C) and measures for attainment required by section 110(a)(2)(I), as part of the infrastructure SIPs for these NAAQS—because these submittals are required beyond the date (3 years from NAAQS promulgation) that section 110 infrastructure submittals are required (see footnotes 1 and 19).

PSD programs apply in areas that are meeting the NAAQS, referred to as attainment areas, or in areas that are unclassifiable, referred to as unclassifiable/attainment areas. PSD applies to new major sources and major modifications at existing sources. EPA's PSD permitting regulations are found at 40 CFR 51.166 and 40 CFR 52.21. PSD requirements for SIPs are found in 40 CFR 51.166 and 40 CFR part 51 appendix W. Similar PSD requirements for SIPs incorporating EPA's regulations by reference are found in 40 CFR 52.21.

The Arkansas' PSD program was initially approved into the SIP on January 14, 1982 (47 FR 02112). Subsequent revisions to Arkansas' PSD program were approved into the SIP on February 10, 1986 (51 FR 04910), May 2, 1991 (56 FR 20137), October 16, 2000 (65 FR 61103), and April 12, 2007 (72 FR 18394). To meet the requirements of 110(a)(2)(C) for the 1997 ozone standard, EPA believes the state must have updated its PSD rules to treat NO_X as a precursor for ozone (70 FR 71612, November 29, 2005). On February 17, 2010, Arkansas submitted the provisions for NO_X as a precursor consistent with EPA's November 29, 2005 Phase 2 rule for the 1997 8-hour ozone NAAQS (70 FR 71612) as part of

[31] "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, dated September 20, 1999.

[32] The section addressing exemptions and variances is found on p. 45109 of the 1987 rulemaking.

[33] The Air Quality System (AQS) is EPA's repository of ambient air quality data. AQS stores data from over 10,000 monitors, 5,000 of which are currently active. State, Local and Tribal agencies collect the data and submit it to AQS on a periodic basis.

[34] A copy of our approval letter is in the docket for this rulemaking. At the time of this writing, the review of the 2011 AAMNP has not been completed.

its revisions to address NSR reform. EPA proposes to approve the following portions of the February 17, 2010 SIP revision to Regulation 19, Chapter 9: 1) the substantive change adding NO_X to the definition of *Major Modification* through incorporation by reference of 40 CFR 52.21(b) and 40 CFR 51.301 as of November 29, 2005; 2) the substantive change adding NO_X to the definition of *Major Stationary Source* through incorporation by reference of 40 CFR 52.21(b) and 40 CFR 51.301 as of November 29, 2005; 3) the substantive change adding NO_X as a precursor to the table's criteria and other pollutants listing for ozone through incorporation by reference of 40 CFR 52.21(b)(23)(i); and 4) the substantive change allowing for an exemption with respect to ozone monitoring for a source with a net emissions increase less than 100 tpy of NO_X through incorporation by reference of 40 CFR 52.21(i)(5)(i).

The February 17, 2010 revisions to the definitions in the Arkansas rules for ''major modification'' and ''major stationary source'' meet the Federal definition in 40 CFR 52.21(b) to identify a major source of NO_X as a major source for ozone. The February 17, 2010 revisions to the Arkansas rules also meet the Federal definition in 40 CFR 52.21(b)(50)(i) for inclusion of NO_X as an ozone precursor. The February 17, 2010 revisions to the emissions rate for NO_X under the definition for *Significant* in the Arkansas rules also meet the Federal requirements in 40 CFR 52.21(b)(23)(i), which establishes these emission thresholds as 40 tpy.[35] The February 17, 2010 revisions allowing for an exemption for ozone monitoring for a source with a net emissions increase less than 100 tpy of NO_X also meet the Federal requirement on monitoring exemptions under the footnote for 40 CFR 52.21(i)(5)(i). Because of their consistency with 40 CFR 52.21, which provides the requirements for an approvable PSD program, EPA believes these revisions are consistent with 110(l) and the revisions would not interfere with any applicable standard. Therefore, EPA is proposing to approve these revisions as meeting the requirements of section 110 of the Act and 40 CFR 52.21 for establishing NO_X emissions as a precursor for ozone.

[35] In a November 23, 2010 submission (received by EPA on December 1, 2010), Arkansas proposed revisions to its SIP that include, among other things, raising its emissions threshold for NO_X from 25 tpy to 40 tpy. It is important to note that EPA is not proposing action at this time on that proposed revision, nor on any other part of Arkansas's November 23, 2010 submittal. We will take action on it in a separate rulemaking.

The revisions to Regulation 19, Chapter 9, and EPA's evaluation of these revisions are discussed in greater detail in the TSD. The provisions that address NO_X as a precursor are severable from the remaining portions of the February 17, 2010 submittal, and EPA is proposing to approve these revisions in today's action.

To implement section 110(a)(2)(C) for the 1997 and 2006 $PM_{2.5}$ standards, states were required to submit SIP revisions for the implementation of the PSD and nonattainment NSR program for the $PM_{2.5}$ standard by May 16, 2011 (see 73 FR 28321, May 16, 2008). Because the State has failed to adopt and submit the required $PM_{2.5}$ PSD rules, we are proposing to find that the current Arkansas PSD SIP does not meet the requirements of section 110(a)(2)(C) with respect to the implementation of the PSD NSR program for the 1997 and 2006 $PM_{2.5}$ NAAQS.

Section 110(a)(2)(C) creates ''a general duty on States to include a program in their SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved'' (70 FR 71612, 71677). This duty is often referred to as ''minor NSR.'' EPA provides states with a ''broad degree of discretion'' in implementing their minor NSR programs (71 FR 48696, 48700). The ''considerably less detailed'' regulations for minor NSR are provided in 40 CFR 51.160 through 51.164. EPA has determined that Arkansas' minor NSR program, adopted pursuant to section 110(a)(2)(C) of the Act, regulates emissions of ozone and its precursors and PM. Arkansas' minor source permitting requirements are contained in Regulation 19, Chapter 4, and portions of Chapters 3 and 5, and were approved at 65 FR 61108.

It is important to stress that EPA is not proposing to approve or disapprove the state's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. 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.

As explained in section I.C.5 of this proposal, the current EPA-approved SIP PSD program does not apply to GHG-emitting sources that emit at or above the levels of emissions set in the Tailoring Rule, or at other appropriate levels. Thus, the Arkansas SIP does not satisfy this portion of section 110(a)(2)(C). We are proposing to disapprove this portion of the Arkansas SIP for failing to meet the infrastructure requirements for the 1997 ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS with respect to the GHG requirement of section 110(a)(2)(C). EPA's disapproval here does not engender an additional statutory obligation, because EPA has already promulgated a FIP for the Arkansas PSD program to address permitting GHGs at or above the Tailoring Rule thresholds (75 FR 82246).

Interstate transport, pursuant to section 110(a)(2)(D): Section 110(a)(2)(D) has two components, 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Section 110(a)(2)(D)(i) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, 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. Section 110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement.

PSD and interstate transport, pursuant to section 110(a)(2)(D)(i): One of the four prongs in section 110(a)(2)(D)(i) requires a SIP to contain adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality. This is the only element of 110(a)(2)(D)(i) for which EPA is proposing action in this rulemaking.

EPA's 2006 Guidance made recommendations for SIP submissions to meet this requirement with respect to both the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS.

The 2006 Guidance states that the PSD permitting program is the primary measure that each state must include to prevent interference with any other state's required measures to prevent significant deterioration of its air quality in accordance with section 110(a)(2)(D)(i)(II). EPA believes that Arkansas' December 17, 2007 and March 28, 2008 submissions, when

considered in conjunction with the State's PSD program and other PSD program revisions that EPA is proposing to approve in this action address, in part, the requirements of 110(a)(2)(D)(i)(II). The submittal states that all major sources in Arkansas are subject to PSD and nonattainment NSR permitting programs. As discussed previously in our analysis of section 110(a)(2)(C) and in the TSD, the State's PSD program is in the SIP (47 FR 02112, 51 FR 04910, 56 FR 20137, 65 FR 61103, and 72 FR 18394). We also note in our discussion of 110(a)(2)(C) that Arkansas does not have a PSD program to address permitting GHG emissions and Arkansas has not adopted necessary revisions to properly address permitting of $PM_{2.5}$ emissions. Please see the attached TSD and refer to our discussion of section 110(a)(2)(C) in this rulemaking for additional information.

Consistent with EPA's November 29, 2005 rulemaking, ''Final Rule to Implement the 8-hour Ozone National Ambient Air Quality Standards—Phase 2'' (70 FR 71612), Arkansas submitted SIP revisions to modify its PSD provisions to address NO_X as an ozone precursor. For the same reasons discussed in our analysis of section 110(a)(2)(C) of this proposed action, EPA believes that the PSD revision for the 1997 8-hour ozone NAAQS that makes NO_X a precursor for ozone for PSD purposes, taken together with the PSD SIP and the interstate transport SIP, partially satisfies the requirements of the third prong of section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS, *i.e.,* there will be no interference with any other state's required PSD measures. Arkansas only partially satisfies the requirements because of the deficiencies in its ability to permit sources of GHG emissions. Therefore, EPA is proposing partial approval and partial disapproval of the Arkansas SIP as it applies to section 110(a)(2)(D)(i) under the 1997 8-hour ozone NAAQS. EPA's disapproval here for the GHG emissions does not engender an additional statutory obligation, because EPA has already promulgated a FIP for the Arkansas PSD program to address permitting GHGs at or above the Tailoring Rule thresholds (75 FR 82246).

We are proposing to find that Arkansas does not meet the third prong of section 110(a)(2)(D)(i), because the current Arkansas PSD SIP does not meet the requirements of section 110(a)(2)(C) with respect to the implementation of the PSD NSR program for the 2006 $PM_{2.5}$ NAAQS because the state has not submitted the required PSD SIP revision to fully implement the PSD NSR program for the 1997 and 2006 $PM_{2.5}$ NAAQS.

Interstate and international pollution abatement, pursuant to section 110(a)(2)(D)(ii):

Section 110(a)(2)(D)(ii) of the Act requires compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement. Section 115 addresses endangerment of public health or welfare in foreign countries from pollution emitted in the United States. Pursuant to section 115(a), the Administrator has neither received nor issued a formal notification that emissions from Arkansas are endangering public health or welfare in a foreign country.

Section 126(a) of the Act requires new or modified sources to notify neighboring states of potential impacts from such sources. Regulation 26, Chapter 6 requires that each major proposed new or modified source provide such notification and is in the federally enforceable SIP (see 66 FR 51312). The State also has no pending obligations under section 126 of the Act. For additional detail, please refer to the TSD. However, as previously noted in this rulemaking, Arkansas does not have a current EPA-approved SIP PSD program that applies to GHG-emitting sources that emit at or above the level of emissions set in the Tailoring Rule, or at other appropriate levels. Also, the State has failed to submit the required PSD NSR SIP revisions for the 1997 and 2006 $PM_{2.5}$ NAAQS. Therefore, EPA is not proposing to approve Arkansas' interstate pollution abatement provisions in full because Arkansas cannot require each major proposed or modified new source to notify neighboring states of potential impacts from $PM_{2.5}$ and GHGs emitted by such sources.

Adequate personnel, funding, and authority, pursuant to section 110(a)(2)(E): The duties, powers and structure of the ADEQ (described in A.C.A. section 8–1–202) provide that the director is empowered to administer all activities ''including, but not limited to the employment and supervision of such technical, legal, and administrative staff, within approved appropriations, as is necessary to carry out the responsibilities vested within the department''. The AWAPCA provides the ADEQ adequate authority with the powers and duties, in part, ''to administer and enforce all laws and regulations relating to pollution of the air.'' A.C.A. section 8–4–311(7). Furthermore, the ADEQ has the power and duty to ''cooperate with and receive moneys from the Federal government or any other source for the study and control of air pollution.'' A.C.A. section 8–4–311(9)(A).

There are Federal sources of funding for the implementation of the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, through, for example, CAA sections 103 and 105 grant funds. The ADEQ receives Federal funds on an annual basis, under sections 103 and 105 of the Act, to support its air quality programs. Fees collected for the NSR permit programs, and other inspections, maintenance and renewals required of other air pollution sources also provide necessary funds to help implement the State's air programs. More specific information on permitting fees is provided in the discussion of section 110(a)(2)(L) below and in the TSD.

Section 110(a)(2)(E)(ii) requires that the state comply with section 128. Section 128 requires: (1) that the majority of members of the state body that approves permits or enforcement orders do not derive any significant portion of their income from entities subject to permitting or enforcement orders under the CAA; and (2) any potential conflicts of interest by such body be adequately disclosed. In 1982, the EPA approved the state's submittal to demonstrate compliance of the SIP with Section 128 of the CAA (47 FR 19136). The submittal cited AWAPCA Section 82–1901 as demonstrating compliance with CAA Section 128(a)(1), and cited Arkansas Code of Ethics Law, Act 570 of 1979 as addressing CAA Section 128(a)(2). See Arkansas Code of Ethics Law, Act 570 of 1979, Section 3: Use of Public Office to Obtain Special Privilege Prohibited; Section 4: Use and Disclosure of Information Acquired by Reason of Office—Activities Requiring Disclosure; Section 5: Requirement to File Statement; and Section 6: Statements—Period Retained—Public Access—Signature Required.

EPA is proposing to find that the current Arkansas PSD SIP meets section 110(a)(2)(E) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Stationary source monitoring system, pursuant to section 110(a)(2)(F): Regulation 19, chapters 2–4, 7–10, and 13 require that stationary sources monitor for compliance, provide recordkeeping and reporting, and provide for enforcement of ozone standards, $PM_{2.5}$ standards, and precursors to these pollutants (*e.g.,* NO_X, SO_2, and VOCs). These source monitoring requirements also generate data for these pollutants.

Under the Arkansas SIP, the ADEQ is required to analyze the emissions data from point, area, mobile, and biogenic (natural) sources. The ADEQ uses this

data to track progress toward maintaining the NAAQS, develop control and maintenance strategies, identify sources and general emission levels, and determine compliance with Arkansas and EPA requirements. The State's emissions data are available on the ADEQ Web site (*http://www.adeq.state.ar.us*) and EPA's AirData Web site (*www.epa.gov/air/data/index.html*).[36] These rules are in the federally-approved SIP. A list of the chapters and **Federal Register** citations is provided in the TSD.

EPA is proposing to find that the Arkansas SIP meets the requirements of section 110(a)(2)(F) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Emergency power, pursuant to section 110(a)(2)(G): 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. The AWAPCA, pursuant to A.C.A. sections 8–1–202(b)(2)(C) and 8–4–202(e)(1), provides the ADEQ with authority to address environmental emergencies, and the ADEQ has contingency plans to implement emergency episode provisions in the SIP. The ADEQ promulgated the ''Prevention of Air Pollution Emergency Episodes,'' which includes contingency measures, and these provisions were approved into the SIP on May 31, 1972 (37 FR 10850). The criteria for ozone are based on a 1-hour average ozone level. These episode criteria and contingency measures are adequate to address ozone emergency episodes and are in the federally-approved SIP.

The 2009 Infrastructure SIP Guidance for $PM_{2.5}$ recommends that a state with at least one monitored 24-hour $PM_{2.5}$ value exceeding 140.4 μg/m^3 since 2006 establishes an emergency episode plan and contingency measures to be implemented if such level is exceeded again. The 2006–2010 ambient air quality monitoring data[37] for Arkansas do not exceed 140.4 μg/m^3. The $PM_{2.5}$ levels have consistently remained below 140.4 μg/m^3. Furthermore, the State has appropriate general emergency powers to address $PM_{2.5}$ related episodes to protect the environment and public health. Given the State's low monitored $PM_{2.5}$ levels, EPA is proposing the State is not required to submit an emergency episode plan and contingency measures at this time for the 1997 and 2006 $PM_{2.5}$ standards. Additional detail is provided in the TSD.

EPA is proposing to find that the Arkansas SIP meets the requirements of section 110(a)(2)(G) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Future SIP revisions, pursuant to section 110(a)(2)(H): The AWAPCA, Section 82–1935(1), empowers the APCEC to ''formulate and promulgate, amend, repeal, and enforce rules and regulations implementing or effectuating the powers and duties of the Commission [* * *] to control air pollution''. In addition, A.C.A. 8–4–202(d)(4)(A) authorizes the Commission to ''refer to the CFR for regulations and standards identical to those sanctioned by EPA.'' Thus, Arkansas has the authority to revise its SIP from time to time as may be necessary to take into account revisions of primary or secondary NAAQS, or the availability of improved or more expeditious methods of attaining such standards. Furthermore, Arkansas also has the authority under these AWAPCA provisions to revise its SIP in the event the EPA pursuant to the Act finds the SIP to be substantially inadequate to attain the NAAQS.

EPA is proposing to find that the Arkansas SIP meets the requirements of section 110(a)(2)(H) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Consultation with government officials, pursuant to section 110(a)(2)(J):[38] The AWAPCA, as codified under A.C.A. section 8–1–203 provides that the APCEC ''shall meet regularly in publicly noticed open meetings to discuss and rule upon matters of environmental concern'' prior to the adoption of any rule or regulation implementing the substantive statutes charged to the ADEQ for administration. In addition, A.C.A. section 8–4–311 provides that the ADEQ or its successor shall have the power and duty ''to advise, consult, and cooperate with other agencies of the state, political subdivisions, industries, other states, the Federal government, and with affected groups in the furtherance of the purposes of this chapter.'' Further, Regulation 19.904(D) provides that ADEQ shall make determinations that a source may affect air quality or visibility in a mandatory Class I Federal area based on screening criteria agreed upon by the Department and the Federal Land Manager (see 72 FR 18394). These rules are in the federally approved SIP. EPA is proposing to find that the Arkansas SIP meets the requirements of this portion of section 110(a)(2)(J) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Public notification if NAAQS are exceeded, pursuant to section 110(a)(2)(J): Public notification begins with the air quality forecasts, which advise the public of conditions capable of exceeding the 8-hour ozone[39] and $PM_{2.5}$ NAAQS. The air quality forecasts can be found on the ADEQ Web site: for 8-hour ozone and $PM_{2.5}$, the forecast includes 2 regions[40] in the State. Ozone forecasts are made daily during the ozone season for each of the forecast areas.[41] The ozone forecasts are made, in most cases, a day in advance by 2 p.m. local time and are valid for the next day. When the forecast indicates that ozone levels will be above the 8-hour ozone standard, the ADEQ and the Arkansas Department of Health issue an Ozone Health Advisory.

In addition, the State implements an Ozone Action Day (OAD) program[42] and will issue an ozone alert in the afternoon on the day before an elevated level of ozone is expected to occur. Announcements for an OAD will be broadcast through television and other news media, and to employers participating in the OAD program. The OAD program includes examples of actions that can be implemented by individuals and organizations to reduce ozone levels and exposure to ozone. Also through the Metroplan Web site, the public can subscribe to an electronic information system that provides air quality forecast and ozone alert information via email. Ozone data are posted on the ADEQ Web site; current, regional hourly and regional 8-hour ozone data are posted hourly (see *http://www.adeq.state.ar.us/techsvs/ozonemonitors.asp*). EPA is proposing

[36] The AirData Web site provides access to air pollution data for the entire United States and produces reports and maps of air pollution data based on criteria specified by the user.

[37] The ozone and PM data are available through AQS. The AQS data for PM are provided in the docket for this rulemaking.

[38] Section 110(a)(2)(J) is divided into three segments: Consultation with government officials; public notification; and PSD and visibility protection.

[39] The ADEQ forecasts for 8-hour ozone are based on the 2008 ozone standard, which is 75 ppb.

[40] The 2 forecast areas for 8-hour ozone and $PM_{2.5}$ are Little Rock and Springdale. *See www.adeq.state.ar.us/techsvs/default.htm.*

[41] Ozone is a gas composed of three oxygen atoms. Ground level ozone is generally not emitted directly from a vehicle's exhaust or an industrial smokestack, but is created by a chemical reaction between NO_X and VOCs in the presence of sunlight and high ambient temperatures. Thus, ozone is known primarily as a summertime air pollutant. For Arkansas, the ozone season runs from March 1 through November 31 (see 40 CFR 58, Appendix D, Table D–3). The Arkansas air quality control regions are defined at 45 FR 6571 (January 29, 1980).

[42] For coordinating agencies, participating counties and other information, please see *http://www.adeq.state.ar.us/air/ozone/ozonedays.asp.*

to find that the Arkansas SIP meets this portion of section 110(a)(2)(J) with respect to the 1997 8-hour ozone 1997 and 2006 $PM_{2.5}$ NAAQS.

PSD and visibility protection, pursuant to section 110(a)(2)(J): This portion of section 110(a)(2)(J) in part requires that a state's SIP meet the applicable requirements of section 110(a)(2)(C) as relating to PSD programs. As discussed in our section 110(a)(2)(C) analysis and in the TSD, the State's PSD program is in the SIP (47 FR 02112, 51 FR 04910, 56 FR 20137, 65 FR 61103 and 72 FR 18394) . In addition to the approved program and to meet the requirements of 110(a)(2)(C) and 110(a)(2)(D)(i) for the 1997 ozone standard, EPA believes the State must have updated its PSD rules to treat NO_X as a precursor for ozone. Thus, we are proposing to approve portions of a SIP revision (submitted February 17, 2010) to implement NO_X as a precursor to ozone. These revisions are proposed for APCEC Regulation 19, Chapter 9, as described above.

For Arkansas to meet the requirements of the PSD portion of section 110(a)(2)(J), it must comply with section 110(a)(2)(C).[43] To implement section 110(a)(2)(C) for the 1997 and 2006 $PM_{2.5}$ standards, states were required to submit PSD NSR SIP revisions for the $PM_{2.5}$ standards by May 16, 2011 (73 FR 28321, May 16, 2008). At present, Arkansas has not submitted revisions to satisfy this requirement. Therefore, Arkansas fails to meet the requirements of section 110(a)(2)(C) for the 1997 and 2006 $PM_{2.5}$ NAAQS. We are proposing to find that the current Arkansas PSD SIP does not meet the requirements of section 110(a)(2)(J) with respect to the 1997 and 2006 $PM_{2.5}$ NAAQS.

Moreover, as stated in our discussion of the PSD program under section 110(a)(2)(C), the current EPA-approved SIP PSD program does not apply to GHG-emitting sources that emit at or above the levels of emissions set in the Tailoring Rule, or at other appropriate levels. Thus, the Arkansas SIP does not satisfy the portion of section 110(a)(2)(J) that relates to permitting GHGs with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. EPA's disapproval here does not engender any additional statutory obligation, because EPA has already promulgated a FIP for the Arkansas PSD program related to permitting GHGs at or above the Tailoring Rule thresholds (75 FR 82246).

EPA approved Arkansas' Visibility Protection Plan (Protection of Visibility in Mandatory Class I Federal Areas) into the Arkansas SIP on February 10, 1986 (51 FR 4910). EPA approved revisions to the Arkansas Visibility Protection Plan and approved a Long-Term Strategy for Visibility Protection into the Arkansas SIP on July 21, 1988 (53 FR 27514). The State's most recent SIP revision of their Regional Haze program was submitted to EPA on July 29, 2008, and we will take action on it in a separate rulemaking. 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 Act (which includes sections 169A and 169B). 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. This would be the case even in the event a secondary $PM_{2.5}$ NAAQS for visibility is established, because this NAAQS would not affect visibility requirements under part C. EPA is therefore proposing to find that the Arkansas SIP meets this portion of section 110(a)(2)(J) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

EPA is proposing to find that the Arkansas SIP meets the requirements of this portion of section 110(a)(2)(J) with respect to the 1997 8-hour ozone NAAQS with the exception of section 110(a)(2)(J) as it relates to the GHG component of the PSD program. EPA is proposing to find that the Arkansas SIP does not meet the requirements of section 110(a)(2)(J) as it relates to the GHG component of the PSD program with respect to the 1997 8-hour ozone NAAQS. EPA is also proposing to find that the Arkansas SIP does not meet the requirements of this portion of section 110(a)(2)(J) with respect to the 1997 and 2006 $PM_{2.5}$ NAAQS because the state has not submitted the required PSD SIP revision to fully implement the PSD NSR program for the 1997 and 2006 $PM_{2.5}$ NAAQS.

Air quality modeling and submission of data, pursuant to section 110(a)(2)(K): The AWAPCA prescribes at A.C.A. section 8–4–311(a)(1) that the ADEQ shall ''[d]evelop and effectuate a comprehensive program for the prevention and control of all sources of pollution of the air of this state.'' Arkansas has extensive modeling in numerous submitted SIP revisions. For example, Arkansas submitted modeling in SIP revisions for implementing an Economic Development Zone in Crittenden County, and demonstrating maintenance of the 1997 8-hour ozone standard in Crittenden County. EPA approved the modeling as part of the Arkansas SIP.[44]

This section of the Act also requires that a SIP provides for the submission of data related to such air quality modeling to the EPA upon request. A.C.A. section 8–4–311 authorizes ADEQ to cooperate with the Federal government, allowing it to make this submission to the EPA.

EPA is proposing to find that the Arkansas SIP meets the requirements of section 110(a)(2)(K) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Permitting fees, pursuant to section 110(a)(2)(L): The AWAPCA, as codified in Regulation 9, Chapter 5 provides authority for the ADEQ to charge and collect fees for Title V and non-Title V permit applications, revisions, renewals, and inspections. The non-Title V rules that address permit fees found in APCEC Regulation 9, Chapter 5 are in the federally-approved SIP. A detailed list of the applicable chapters listed herein is provided in the TSD. EPA is proposing to find that the Arkansas SIP meets the requirements of section 110(a)(2)(L) with respect to the 1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

Consultation/participation by affected local entities, pursuant to section 110(a)(2)(M): As indicated above, the Arkansas statute under A.C.A. section 8–1–203 provides that the APCEC ''shall meet regularly in publicly noticed open meetings to discuss and rule upon matters of environmental concern'' prior to the adoption of any rule or regulation implementing the substantive statutes charged to the ADEQ for administration. In addition, AWAPCA Section 82–1935 empowers the APCEC to develop and put into effect a comprehensive program for the prevention and control of all sources of pollution in the air in the state. The State has the power to advise, consult and cooperate with other agencies of the State, political subdivisions, other states, the Federal government, and with affected groups. EPA is proposing to find that the Arkansas SIP meets the requirements of section 110(a)(2)(M) with respect to the

[43] CAA Section 110(a)(2)(J) requires, among other things, that each implementation plan ''meet[s] the applicable requirements of [110(a)(2)(C)]''.

[44] See the Economic Development Zone implementation for the Crittenden County 1997 8-hour O3 nonattainment area, approved by EPA and adopted into the SIP on April 12, 2007 (72 FR 18394), and the Crittenden County 1997 8-hour O3 maintenance plan, approved by EPA and adopted into the SIP on March 24, 2010 (75 FR 14077).

1997 8-hour ozone and 1997 and 2006 $PM_{2.5}$ NAAQS.

IV. Proposed Action

We are proposing to partially approve and partially disapprove the submittals provided by the State of Arkansas to demonstrate that the Arkansas SIP meets the requirements of Section 110(a)(1) and (2) of the Act for the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. For the 1997 ozone standard, we are proposing to find that the current Arkansas SIP meets the infrastructure elements listed below:

Emission limits and other control measures (110(a)(2)(A) of the Act);

Ambient air quality monitoring/data system (110(a)(2)(B) of the Act);

Program for enforcement of control measures (110(a)(2)(C) of the Act), except for the portion that addresses GHGs;

Interstate Transport, pursuant to section (110(a)(2)(D)(ii) of the Act), except for the portion that addresses GHGs;

Adequate resources (110(a)(2)(E) of the Act);

Stationary source monitoring system (110(a)(2)(F) of the Act);

Emergency power (110(a)(2)(G) of the Act);

Future SIP revisions (110(a)(2)(H) of the Act);

Consultation with government officials (110(a)(2)(J) of the Act);

Public notification (110(a)(2)(J) of the Act);

Prevention of significant deterioration and visibility protection (110(a)(2)(J) of the Act), except for the portion that addresses GHGs;

Air quality modeling data (110(a)(2)(K) of the Act);

Permitting fees (110(a)(2)(L) of the Act); and

Consultation/participation by affected local entities (110(a)(2)(M) of the Act).

For the 1997 ozone standard, we are proposing to find that the current Arkansas SIP does not meet the infrastructure elements listed below:

Program for enforcement of control measures (110(a)(2)(C) of the Act), only as it relates to GHGs;

Interstate transport, pursuant to section 110(a)(2)(D)(ii) of the Act, only as it relates to GHGs; and

Prevention of significant deterioration (110(a)(2)(J) of the Act), only as it relates to GHGs.

We are also proposing to approve the Arkansas Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(II) that emissions from sources in Arkansas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, except as they relate to GHGs for the 1997 ozone NAAQS.

We are proposing to disapprove the portion of the Arkansas Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(II), as it relates to GHGs, that emissions from sources in Arkansas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality, for the 1997 ozone NAAQS.

For the 1997 and 2006 $PM_{2.5}$ standards, we are proposing to find that the current Arkansas SIP meets the infrastructure elements listed below:

Emission limits and other control measures (110(a)(2)(A) of the Act);

Ambient air quality monitoring/data system (110(a)(2)(B) of the Act);

Adequate resources (110(a)(2)(E) of the Act);

Stationary source monitoring system (110(a)(2)(F) of the Act);

Emergency power (110(a)(2)(G) of the Act);

Future SIP revisions (110(a)(2)(H) of the Act);

Consultation with government officials (110(a)(2)(J) of the Act);

Public notification (110(a)(2)(J) of the Act);

Air quality modeling data (110(a)(2)(K) of the Act);

Permitting fees (110(a)(2)(L) of the Act); and

Consultation/participation by affected local entities (110(a)(2)(M) of the Act).

For the 1997 and 2006 $PM_{2.5}$ standards, we are proposing to find that the current Arkansas SIP does not address the 110(a)(2) infrastructure elements listed below:

Program for enforcement of control measures (110(a)(2)(C) of the Act);

Interstate Transport, pursuant to section 110(a)(2)(D)(ii) of the Act; and

Prevention of significant deterioration and visibility protection (110(a)(2)(J) of the Act).

We are also proposing to disapprove the portion of the Arkansas Interstate Transport SIP that addresses the requirement of section 110(a)(2)(D)(i)(II)—that emissions from sources in Arkansas do not interfere with measures required in the SIP of any other state under part C of the CAA to prevent significant deterioration of air quality—for the 2006 $PM_{2.5}$ NAAQS.

EPA is also proposing to approve the following revisions to APCEC Regulation 19, Chapter 9, submitted by the State of Arkansas on February 17, 2010:

1. The substantive change adding NO_X to the definition of *Major Modification* through incorporation by reference of 40 CFR 52.21(b) and 40 CFR 51.301 as of November 29, 2005.

2. The substantive change adding NO_X to the definition of *Major Stationary Source* through incorporation by reference of 40 CFR 52.21(b) and 40 CFR 51.301 as of November 29, 2005.

3. The substantive change adding NO_X as a precursor to the table's criteria and other pollutants listing for ozone through incorporation by reference of 40 CFR 52.21(b)(23)(i).

4. The substantive change allowing for an exemption with respect to ozone monitoring for a source with a net emissions increase less than 100 tpy of NO_X through incorporation by reference of 40 CFR 52.21(i)(5)(i).

EPA is proposing these actions in accordance with section 110 and part C of the Act and EPA's regulations and consistent with EPA guidance. We are also proposing to make ministerial corrections to the attainment status table in 40 CFR 81.304 to accurately reflect the redesignation date of Crittenden County, Arkansas to attainment for the 1997 8-hour ozone standard. On March 24, 2010, we redesignated the county with an effective date of April 23, 2010 (75 FR 14077).

V. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

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

B. Paperwork Reduction Act

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

SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

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

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

We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

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

E. Executive Order 13132, Federalism

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

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

F. Executive Order 13175, Coordination With Indian Tribal Governments

This proposed action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because the action EPA is proposing neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law. Therefore, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this rule. Consistent with EPA policy, EPA nonetheless is offering consultation to Tribes regarding this rulemaking action. EPA will respond to relevant comments in the final rulemaking action.

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

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

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

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

I. National Technology Transfer and Advancement Act

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

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

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent

practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

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

K. Statutory Authority

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

List of Subjects in 40 CFR Part 52

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

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

Dated: January 30, 2012.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2012–2902 Filed 2–8–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2009–0730; FRL–9629–2]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Wisconsin; Redesignation of the Milwaukee-Racine and Sheboygan Areas to Attainment for 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve requests from the Wisconsin Department of Natural Resources (WDNR) to redesignate the Milwaukee-Racine and Sheboygan areas to attainment for the 1997 8-hour ozone standard, because the requests meet the statutory requirements for redesignation under the Clean Air Act (CAA or Act). The Milwaukee-Racine area includes Milwaukee, Ozaukee, Racine, Washington, Waukesha, and Kenosha Counties. The Sheboygan area includes Sheboygan County. WDNR submitted these requests on September 11, 2009, and supplemented the submittal on November 16, 2011. This proposed approval also involves several related actions. EPA is proposing to approve, as revisions to the Wisconsin State Implementation Plan (SIP), the state's plans for maintaining the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS or standard) through 2022 in the above-mentioned areas. EPA is also proposing to approve the 2005 comprehensive emissions inventories for the Milwaukee-Racine and Sheboygan areas as meeting the requirements of the CAA. Finally, EPA finds adequate and is proposing to approve the state's 2015 and 2022 Motor Vehicle Emission Budgets (MVEBs) for the Milwaukee-Racine and Sheboygan areas.

DATES: Comments must be received on or before March 12, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2009–0730, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: Aburano.Douglas@epa.gov.*
3. *Fax:* (312) 408–2279.
4. *Mail:* Doug Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand delivery:* Doug Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2009–0730. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of this document, ''What Should I Consider as I Prepare My Comments for EPA?''

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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886–1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental

Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

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I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What actions is EPA proposing to take?

EPA is proposing to determine that the Milwaukee-Racine and Sheboygan ozone nonattainment areas have met the requirements for redesignation under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve Wisconsin's requests to change the legal designations of the Milwaukee-Racine and Sheboygan areas from nonattainment to attainment for the 1997 8-hour ozone NAAQS. EPA is also proposing to approve Wisconsin's maintenance plan SIP revisions for the Milwaukee-Racine and Sheboygan areas (such approval being one of the CAA criteria for redesignation to attainment status). The maintenance plans are designed to keep the Milwaukee-Racine and Sheboygan areas in attainment of the ozone NAAQS through 2022. EPA is proposing to approve the 2005 comprehensive emissions inventories for the Milwaukee-Racine and Sheboygan areas as meeting the requirements of section 182(a)(1) of the CAA. Finally, EPA is proposing to approve the newly-established 2015 and 2022 MVEBs for the Milwaukee-Racine and Sheboygan areas. The adequacy comment period for the MVEBs began on December 6, 2011, with EPA's posting of the availability of the submittal on EPA's Adequacy Web site (at *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm*). The adequacy comment period for these MVEBs ended on January 5, 2012. EPA did not receive any requests for this submittal, or adverse comments on this submittal during the adequacy comment period. See section V. B. of this rulemaking, ''Adequacy of Wisconsin's MVEBs,'' for further explanation on this process. Therefore, EPA finds adequate, and is proposing to approve, the state's 2015 and 2022 MVEBs for use in future transportation conformity analyses for the areas.

III. What is the background for these actions?

A. What is the general background information?

Ground-level ozone is not emitted directly by sources. Rather, emissions of nitrogen oxides (NO_X) and volatile organic compounds (VOCs) react in the presence of sunlight to form ground-level ozone. NO_X and VOCs are referred to as precursors of ozone.

The CAA establishes a process for air quality management through the NAAQS. Before promulgation of the 8-hour standard, the ozone NAAQS was based on a 1-hour standard. On November 6, 1991 (56 FR 56693 and 56852), the Milwaukee-Racine and Sheboygan areas were designated as severe and moderate nonattainment areas, respectively, under the 1-hour ozone NAAQS. The Sheboygan area was subsequently redesignated to attainment of the 1-hour standard on August 26, 1996 (61 FR 43675). Although the Milwaukee-Racine area was monitoring attainment of the 1-hour ozone standard by the end of the 2005 ozone season, at the time EPA revoked the 1-hour ozone NAAQS, on June 15, 2005, the Milwaukee-Racine area was never redesignated as attainment under the 1-hour ozone NAAQS.

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million parts (ppm). On April 30, 2004 (69 FR 23857), EPA published a final rule designating and classifying areas under the 8-hour ozone NAAQS. These designations and classifications became effective June 15, 2004. EPA designated as nonattainment any area that was violating the 8-hour ozone NAAQS based on the three most recent years of air quality data, 2001–2003.

The CAA contains two sets of provisions, subpart 1 and subpart 2, that address planning and control requirements for nonattainment areas. (Both are found in title I, part D, 42 U.S.C. 7501–7509a and 7511–7511f, respectively.) Subpart 1 contains general requirements for nonattainment areas for any pollutant, including ozone, governed by a NAAQS. Subpart 2 provides more specific requirements for ozone nonattainment areas.

Under EPA's implementation rule for the 1997 8-hour ozone standard, (69 FR 23951, April 30, 2004), an area was classified under subpart 2 based on its 8-hour ozone design value,[1] if it had a 1-hour design value at the time of designation at or above 0.121 ppm (the lowest 1-hour design value in Table 1 of subpart 2) (69 FR 23954). All other areas were covered under subpart 1, based upon their 8-hour design values (69 FR 23958). The Milwaukee-Racine and Sheboygan areas were designated as subpart 2, 8-hour ozone moderate nonattainment areas by EPA on April 30, 2004 (69 FR 23857 and 23947) based on air quality monitoring data from 2001–2003 (69 FR 23860).

40 CFR 50.10 and appendix I of 40 CFR part 50 provide that the 8-hour ozone standard is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, when rounded. The data completeness requirement is met when the average percent of days with

[1] To determine the 8-hour design value for an area, the three-year average of the fourth-highest daily maximum 8-hour average ozone concentration is calculated for each monitor within an area. The highest three-year average is the design value for the area.

valid ambient monitoring data is greater than 90 percent, and no single year has less than 75 percent data completeness. *See* 40 CFR part 50, appendix I, 2.3(d).

WDNR submitted requests to redesignate the Milwaukee-Racine and Sheboygan areas to attainment for the 1997 8-hour ozone standard on September 11, 2009, and supplemented the request on November 16, 2011. Complete, quality-assured and certified data for the 2006–2008, 2007–2009, and 2008–2010 time periods indicate the 8-hour NAAQS for ozone, as promulgated in 1997, has been attained for the Milwaukee-Racine and Sheboygan areas. In addition, available monitoring data for 2011 continue to show the areas in attainment of the standard. Under the CAA, nonattainment areas may be redesignated to attainment if sufficient complete, quality-assured data are available for the Administrator to determine that the area has attained the standard, and the area meets the other CAA redesignation requirements in section 107(d)(3)(E).

On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm. EPA has not yet designated areas under the 2008 standard. The actions addressed in this proposed rulemaking relate only to the 1997 8-hour ozone standard.

B. What are the impacts of the December 22, 2006, and June 8, 2007, United States Court of Appeals decisions regarding EPA's Phase 1 Implementation Rule?

1. Summary of Court Decision

On December 22, 2006, in *South Coast Air Quality Management Dist.* v. *EPA,* the U.S. Court of Appeals for the District of Columbia (DC Circuit) vacated EPA's Phase 1 Implementation Rule for the 1997 8-hour Ozone Standard (69 FR 23951, April 30, 2004). 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the DC Circuit clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. *Id.,* Docket No. 04 1201. Therefore, several provisions of the Phase 1 Rule remain effective: Provisions related to classifications for areas currently classified under subpart 2 of title I, part D, of the CAA as 8-hour nonattainment areas; the 8-hour attainment dates; and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS. The June 8, 2007, decision also left intact the court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the D.C. Circuit let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged.

The June 8, 2007, decision reaffirmed the December 22, 2006, decision that EPA had improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) Section 185 penalty fees for 1-hour severe or extreme nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the Act, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS; and (4) certain transportation conformity requirements for certain types of Federal actions. The June 8, 2007, decision clarified that the court's reference to conformity requirements was limited to requiring the continued use of 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations.

This section sets forth EPA's views on the potential effect of the Court's rulings on this proposed redesignation action. For the reasons set forth below, EPA does not believe that the court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation or prevent EPA from proposing or ultimately finalizing this redesignation. EPA believes that the D.C. Circuit's December 22, 2006, and June 8, 2007, decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in light of the court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

2. Requirements Under the 8-Hour Ozone Standard

With respect to the 1997 8-hour standard, the Milwaukee-Racine and Sheboygan areas are classified under subpart 2. The June 8, 2007, opinion clarifies that the court did not vacate the Phase 1 Rule's provisions with respect to classifications for areas under subpart 2. The court's decision therefore upholds EPA's classifications for those areas classified under subpart 2 for the 8-hour ozone standard.

3. Requirements Under the 1-Hour Ozone Standard

a. Milwaukee-Racine Area

In its June 8, 2007 decision the D.C. Circuit limited its vacatur so as to uphold those provisions of the anti-backsliding requirements that were not successfully challenged. Therefore, an area must meet the anti-backsliding requirements which apply by virtue of the area's classification for the 1-hour ozone standard. See 40 CFR 51.900, *et seq.;* 70 FR 30592, 30604 (May 26, 2005). As set forth in more detail below, the area must also address four additional anti-backsliding provisions identified by the court in its decisions.

The anti-backsliding provisions at 40 CFR 51.905(a)(1) prescribe 1-hour ozone standard requirements that continue to apply after revocation of the 1-hour ozone NAAQS to former 1-hour ozone nonattainment areas. 40 CFR 51.905(a)(1)(i) provides that:

> The area remains subject to the obligation to adopt and implement the applicable requirements as defined in section 51.900(f), except as provided in paragraph (a)(1)(iii) of this section, and except as provided in paragraph (b) of this section.

40 CFR 51.900(f), as amended by 70 FR 30592, 30604 (May 26, 2005), states that:

> Applicable requirements means for an area the following requirements to the extent such requirements apply or applied to the area for the area's classification under section 181(a)(1) of the CAA for the 1-hour NAAQS at designation for the 8-hour NAAQS:
> (1) Reasonably available control technology (RACT).
> (2) Inspection and maintenance programs (I/M).
> (3) Major source applicability cut-offs for purposes of RACT.
> (4) Rate of Progress (ROP) reductions.
> (5) Stage II vapor recovery.
> (6) Clean fuels fleet program under section 182(c)(4) of the CAA.
> (7) Clean fuels for boilers under section 182(e)(3) of the CAA.[2]
> (8) Transportation Control Measures (TCMs) during heavy traffic hours as provided section 182(e)(4) of the CAA.[2]
> (9) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA.
> (10) Transportation controls under section 182(c)(5) of the CAA.
> (11) Vehicle miles traveled provisions of section 182(d)(1) of the CAA.
> (12) NO_X requirements under section 182(f) of the CAA.
> (13) Attainment demonstration or an alternative as provided under § 51.905(a)(1)(ii).

Pursuant to 40 CFR 51.905(c), the Milwaukee-Racine area is subject to the

[2] Applies only to areas classified as extreme; therefore, not a requirement for the Milwaukee-Racine area.

obligations set forth in 40 CFR 51.905(a) and 40 CFR 51.900(f).

In addition, the D.C. Circuit held that EPA should have retained four additional measures in its anti-backsliding provisions: (1) Nonattainment area NSR; (2) section 185 penalty fees; (3) contingency measures under section 172(c)(9) or 182(c)(9) of the Act; and (4) 1-hour MVEBs that were not yet replaced by 8-hour emissions budgets. EPA has addressed these four requirements as follows:

With respect to NSR, EPA has determined that an area being redesignated need not have an approved nonattainment NSR program, provided that the state demonstrates maintenance of the standard in the area without part D NSR in effect. The rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' This policy assumes that the state's PSD program will become effective in the area immediately upon redesignation to attainment. Consequently EPA concludes that an approved NSR program is not an applicable requirement for purposes of redesignation. See the more detailed explanations in the following rulemakings: Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorrain, Ohio (61 FR 20458, 20469–70, May 7, 1996); Louisville, Kentucky (66 FR 53665, 53669, October 23, 2001); Grand Rapids, Michigan (61 FR 31831, 31836–31837, June 21, 1996). Furthermore, EPA approved Wisconsin's NSR program on January 18, 1995 (60 FR 3538), February 6, 2006 (71 FR 5979), March 8, 2006 (71 FR 55062) and May 16, 2006 (71 FR 28274).

With regard to the requirement for section 185 source penalty fees, the Milwaukee-Racine area was classified as severe nonattainment under the 1-hour standard and is, therefore, subject to this requirement. EPA approved an excess VOC emissions fee rule for the Milwaukee-Racine area on June 25, 2002 (67 FR 42729). On April 24, 2009 (74 FR 18641), EPA published a final rule making a determination that the Milwaukee-Racine area had attained the 1-hour ozone standard and confirming that this finding of attainment relieved Wisconsin of the obligation to adopt section 185 source penalty fee regulations for this area.

With respect to the 1-hour MVEBs that were not yet replaced by 8-hour emissions budgets, the conformity portion of the court's June 8, 2007 ruling clarified that, for those areas with MVEBs for the 1-hour ozone standard, anti-backsliding requires that these MVEBs be used for 8-hour conformity determinations until replaced by MVEBs for the 8-hour ozone standard. To meet this requirement, conformity determinations in such areas must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93. Note below that EPA is proposing to find adequate and approve 8-hour MVEBs established by Wisconsin's 8-hour ozone maintenance plans for the Milwaukee and Sheboygan areas.

With respect to the contingency measure requirements under sections 172(c)(9) and 182(c)(9) of the CAA, these requirements must be addressed in state ozone Reasonable Further Progress (RFP) and attainment demonstration plans. Wisconsin addressed these requirements in the 1-hour ozone RFP and attainment demonstration plans for the Milwaukee-Racine area by adopting and implementing extra VOC and NO_X emission controls that go beyond the emission reductions needed for RFP and attainment of the 1-hour ozone standard. EPA approved these ozone control plans, including their contingency elements as follows: VOC 15 percent RFP plan, March 22, 1996 (61 FR 11735); post-1996 RFP plan, November 10, 2001 (66 FR 51572); and 1-hour ozone attainment demonstration and post-1999 RFP plan, November 13, 2001 (66 FR 56931). Therefore, Wisconsin has met the contingency measure requirements of sections 172(c)(9) and 182(c)(9) of the CAA for the 1-hour ozone standard.

b. Sheboygan Area

With respect to the 1-hour standard requirements, the Sheboygan area was an attainment area subject to a CAA section 175A maintenance plan under the 1-hour standard. The D.C. Circuit's decisions do not impact redesignation requests for these types of areas, except to the extent that the court, in its June 8, 2007, decision, clarified that for those areas with 1-hour MVEBs in their maintenance plans, anti-backsliding provisions require that those 1-hour budgets must be used for 8-hour conformity determinations until replaced by 8-hour budgets. All conformity determinations must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93.

With respect to the three other anti-backsliding provisions for the 1-hour standard that the court found were not properly retained, the Sheboygan area is an attainment area subject to a maintenance plan for the 1-hour standard, and the nonattainment NSR, contingency measures (pursuant to section 172(c)(9) or 182(c)(9)), and fee provision requirements no longer apply to an area that has been redesignated to attainment of the 1-hour standard.

Thus the decision in *South Coast* should not alter requirements that would preclude EPA from proposing or finalizing the redesignations of these areas.

IV. What are the criteria for redesignation to attainment?

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) allows for redesignation provided that: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and, (5) the state containing such area has met all requirements applicable to the area under section 110 and part D.

EPA provided guidance on redesignation in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990 on April 16, 1992 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

''Ozone and Carbon Monoxide Design Value Calculations,'' Memorandum from William G. Laxton, Director Technical Support Division, June 18, 1990;

''Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992;

''Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;

''Procedures for Processing Requests to Redesignate Areas to Attainment,''

Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992;

''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (ACT) Deadlines,'' Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;

''Technical Support Documents (TSD's) for Redesignation Ozone and Carbon Monoxide (CO) Nonattainment Areas,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;

''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992,'' Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993;

''Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas,'' Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, to Air Division Directors, Regions 1–10, November 30, 1993.

''Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994; and

''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard,'' Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995.

V. What is EPA's analysis of the State's request?

A. Redesignation

EPA is proposing to determine that the Milwaukee-Racine and Sheboygan areas have met all applicable redesignation criteria under CAA section 107(d)(3)(E). The bases for EPA's proposed approval of the redesignation requests are as follows:

1. The Areas Have Attained the 1997 8-Hour Ozone NAAQS. (Section 107(d)(3)(E)(i))

On March 1, 2011 (76 FR 11080), EPA determined that the Milwaukee-Racine and Sheboygan areas have attained the 1997 8-hour ozone NAAQS based on monitoring data for 2006–2008 and 2007–2009, and 2008–2010 time periods. An area may be considered to be attaining the 1997 8-hour ozone NAAQS if there are no violations, as determined in accordance with 40 CFR 50.10 and 40 CFR part 50, appendix I, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. To attain this standard, the three-year average of the fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area over each year must not exceed 0.08 ppm. Based on the rounding convention described in 40 CFR part 50, appendix I, the standard is attained if the design value is 0.084 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58, and recorded in EPA's Air Quality System (AQS). The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

All 2006–2010 monitoring data have been quality-assured in accordance with 40 CFR 58.10, recorded in the AQS database, and certified. The data meet the completeness criteria in 40 CFR 50, appendix I, which requires a minimum completeness of 75 percent annually and 90 percent over each three-year period. Monitoring data is presented in Table 1 below. In addition, available preliminary monitoring data for 2011 continue to show the areas in attainment of the standard.

TABLE 1—ANNUAL 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS AND THREE-YEAR AVERAGES OF 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS

Area	County	Monitor	2006 4th high (ppm)	2007 4th high (ppm)	2008 4th high (ppm)	2009 4th high (ppm)	2010 4th high (ppm)	2006–2008 average (ppm)	2007–2009 average (ppm)	2008–2010 average (ppm)
Milwaukee-Racine.	Kenosha	Pleasant Prairie 55–059–0019.	0.079	0.085	0.072	0.071	0.081	0.078	0.076	0.074
	Milwaukee ...	16th St. HC 55–079–0010	0.064	0.067	0.059	0.066	0.065	0.063	0.064	0.063
		WDNR SERHQ 55–079–0026.	0.068	0.075	0.063	0.067	0.076	0.068	0.068	0.068
		UWM-North 55–079–0041	0.073	0.078	0.065	0.068	n/a	0.072	0.070	n/a
		Bayside 55–079–0085	0.073	0.083	0.069	0.072	0.082	0.075	0.074	0.074
	Ozaukee	Grafton 55–089–0008	0.071	0.082	0.064	0.067	0.075	0.072	0.071	0.068
		Harr. Beach 55–089–0009	0.072	0.084	0.067	0.070	0.078	0.074	0.073	0.071
	Racine	Racine 55–101–0017	0.071	0.077	0.065	0.071	0.078	0.071	0.071	0.071
	Washington	Slinger 55–131–0009	0.066	0.071	0.060	0.065	0.064	0.065	0.065	0.063
	Waukesha ...	Waukesha 55–133–0027	0.067	0.072	0.060	0.059	0.062	0.066	0.063	0.060
Sheboygan ..	Sheboygan ..	Kohler Andre Park 55–117–0006.	0.083	0.088	0.075	0.074	0.085	0.082	0.079	0.078

In addition, as discussed below with respect to the maintenance plan, WDNR has committed to continue to operate an EPA-approved monitoring network in the areas. WDNR will continue to quality assure monitoring data in accordance with 40 CFR part 58 and enter all data into the AQS in accordance with Federal guidelines. In summary, EPA believes that the data provide an adequate demonstration that the Milwaukee-Racine and Sheboygan areas have attained and continue to attain the 8-hour ozone NAAQS.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D; and the Area Has a Fully Approved SIP Under Section 110(k). (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii))

We are proposing to determine that Wisconsin has met all currently applicable SIP requirements for

purposes of redesignation of the Milwaukee-Racine and Sheboygan areas to attainment of the 1997 8-hour ozone standard under section 110 and part D of the CAA, in accordance with section 107(d)(3)(E)(v). We are also proposing to determine that the Wisconsin SIP, with the exception of the comprehensive emission inventory and certain VOC RACT rules, is fully approved with respect to all applicable requirements for purposes of redesignation to attainment of the 1997 8-hour ozone standard, in accordance with section 107(d)(3)(E)(ii) of the CAA. As discussed below, in this action EPA is proposing to approve Wisconsin's 2005 comprehensive emissions inventory as meeting the comprehensive emissions inventory requirement of section 182(a)(1) for the areas. EPA is taking action on the Wisconsin VOC RACT regulations in a separate rule.

Recognizing that the comprehensive emissions inventory and VOC RACT rules must be approved on or before we complete final rulemaking approving the redesignation requests, we determine here that, assuming that this occurs, Wisconsin will have met all applicable section 110 and part D SIP requirements of the CAA for purposes of approval of Wisconsin's ozone redesignation requests for the Milwaukee-Racine and Sheboygan areas. In making these determinations, we have ascertained what SIP requirements are applicable to the area for purposes of redesignation, and have determined that the portions of the SIP meeting these requirements are fully approved or will be fully approved under section 110(k) of the CAA by the time we complete final rulemaking on Wisconsin's ozone redesignation requests for the Milwaukee-Racine and Sheboygan areas. As discussed more fully below, SIPs must be fully approved only with respect to currently applicable requirements of the CAA.

The September 4, 1992, Calcagni memorandum (see ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992) describes EPA's interpretation of section 107(d)(3)(E) of the CAA. Under this interpretation, a state and the area it wishes to redesignate must meet the relevant CAA requirements that are due prior to the state's submittal of a complete redesignation request for the area. *See also* the September 17, 1993, Michael Shapiro memorandum and 60 FR 12459, 12465–66 (March 7, 1995) (redesignation of Detroit-Ann Arbor, Michigan to attainment of the 1-hour ozone NAAQS). Applicable requirements of the CAA that come due subsequent to the state's submittal of a complete request remain applicable until a redesignation to attainment is approved, but are not required as a prerequisite to redesignation. *See* section 175A(c) of the CAA. *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). *See also* 68 FR 25424, 25427 (May 12, 2003) (redesignation of the St. Louis/East St. Louis area to attainment of the 1-hour ozone NAAQS).

Since EPA determined that the areas have attained the 1997 8-hour ozone standard, under 40 CFR 51.918, the requirements to submit certain planning SIPs related to attainment, including attainment demonstration requirements (the reasonably available control measure (RACM) requirement of section 172(c)(1) of the CAA, the RFP and attainment demonstration requirements of sections 172(c)(2) and (6) and 182(b)(1) of the CAA, and the requirement for contingency measures of section 172(c)(9) of the CAA) are not applicable to the areas as long as they continue to attain the NAAQS and will cease to apply upon redesignation. In addition, in the context of redesignations, EPA has interpreted requirements related to attainment as not applicable for purposes of redesignation. For example, in the General Preamble EPA stated that:

> [t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans * * * provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas. ''General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990,'' (General Preamble) 57 FR 13498, 13564 (April 16, 1992).

See also Calcagni memorandum at 6 (''The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.'').

a. The Milwaukee-Racine and Sheboygan Areas Have Met All Applicable Requirements Under Section 110 and Part D of the CAA for Purposes of Redesignation

i. Section 110 General SIP Requirements

Section 110(a) of title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a state must have been adopted by the state after reasonable public notice and hearing, and that, among other things, it includes enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provides for establishment and operation of appropriate devices, methods, systems and procedures necessary to monitor ambient air quality; provides for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; includes provisions for the implementation of part C, PSD, and part D, NSR permit programs; includes criteria for stationary source emission control measures, monitoring, and reporting; includes provisions for air quality modeling; and provides for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address transport of air pollutants, *e.g.,* the NO_X SIP Call.[3] However, the section 110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification. EPA believes that the requirements linked with a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, we believe that these requirements should not be construed to be applicable requirements for purposes of redesignation.

Further, we conclude that the other section 110 elements described above that are not connected with nonattainment plan submissions and not linked with an area's attainment status are also not applicable requirements for purposes of redesignation. A state remains subject to these requirements after an area is redesignated to attainment. We conclude that only the section 110 and part D requirements which are linked with a particular area's designation and

[3] On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP call requiring the District of Columbia and 22 states to reduce emissions of NO_X in order to reduce the transport of ozone and ozone precursors. Wisconsin was not included in EPA's NO_X SIP call.

classification are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. *See* Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). *See also* the discussion on this issue in the Cincinnati, Ohio 1-hour ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania 1-hour ozone redesignation (66 FR 50399, October 19, 2001).

We have reviewed Wisconsin's SIP and have concluded that it meets the general SIP requirements under section 110 of the CAA, to the extent those requirements are applicable for purposes of redesignation. EPA has previously approved provisions of the Wisconsin SIP addressing section 110 elements under the 1-hour ozone standard (40 CFR 52.2570). Further, in submittals dated December 12, 2007, January 24, 2011, and March 28, 2011, Wisconsin confirmed that the state continues to meet the section 110 requirements for the 8-hour ozone standard. EPA approved some elements of this Wisconsin submittal on July 13, 2011, at 76 FR 41075. The requirements of section 110(a)(2), however, are statewide requirements that are not linked to the 8-hour ozone nonattainment status of the Milwaukee-Racine and Sheboygan areas. Therefore, EPA concludes that these infrastructure SIP elements are not applicable requirements for purposes of review of the state's 8-hour ozone redesignation request.

ii. Part D Requirements

EPA has determined that, if EPA finalizes the approval of the 2005 comprehensive emissions inventory, discussed in section V.C. of this rulemaking, and the VOC RACT submittal, discussed below under the heading ''Subpart 2 Section 182(a) and (b) Requirements,'' the Wisconsin SIP will meet the SIP requirements applicable for purposes of redesignation under part D of the CAA for the Milwaukee-Racine and Sheboygan areas. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Subpart 2 of part D, which includes section 182 of the CAA, establishes additional specific requirements depending on the area's nonattainment classification.

The Milwaukee-Racine and Sheboygan areas were classified as moderate areas under subpart 2. Therefore, the state must meet the applicable requirements of both subpart 1 and subpart 2 of part D. The applicable subpart 1 requirements are contained in sections 172(c)(1)–(9) and in section 176. The applicable subpart 2 requirements are contained in sections 182(a) and (b) (marginal and moderate nonattainment area requirements).

Subpart 1 Section 172 Requirements. For purposes of evaluating this redesignation request, the applicable section 172 SIP requirements for the Milwaukee-Racine and Sheboygan areas are contained in sections 172(c)(1)-(9). A thorough discussion of the requirements contained in section 172 can be found in the General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992).

Section 172(c)(1) requires the plans for all nonattainment areas to provide for the implementation of all RACM as expeditiously as practicable and to provide for attainment for the national primary ambient air quality standards. EPA interprets this requirement to impose a duty on all states containing nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in each area as components of the area's attainment demonstration. Because attainment has been reached in the Milwaukee-Racine and Sheboygan areas, no additional measures are needed to provide for attainment and section 172(c)(1) requirements are no longer considered to be applicable as long as the area continues to attain the standard until redesignation. See 40 CFR 51.918.

The RFP requirement under section 172(c)(2) is defined as progress that must be made toward attainment. This requirement is not relevant for purposes of redesignation because the Milwaukee-Racine and Sheboygan areas have demonstrated monitored attainment of the 1997 8-hour ozone NAAQS. (General Preamble, 57 FR 13564). See also 40 CFR 51.918. In addition, because the Milwaukee-Racine and Sheboygan areas have attained the ozone NAAQS and are no longer subject to an RFP requirement, the section 172(c)(9) contingency measures are not applicable for purposes of redesignation. *Id.*

Section 172(c)(3) requires submission and approval of a comprehensive, accurate and current inventory of actual emissions. This requirement was superseded by the inventory requirement in section 182(a)(1) discussed below.

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA approved Wisconsin's current NSR program on December 17, 2008 (73 FR 76558 and 76560). Nonetheless, EPA has determined that, since PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' Wisconsin has demonstrated that the Milwaukee-Racine and Sheboygan areas will be able to maintain the standard without part D NSR in effect; therefore, EPA concludes that the state need not have a fully approved part D NSR program prior to approval of the redesignation request. The state's PSD program will become effective in the Milwaukee-Racine and Sheboygan areas upon redesignation to attainment. *See* rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the standard. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, we believe the Wisconsin SIP meets the requirements of section 110(a)(2) for purposes of redesignation.

Subpart 1, Section 176 Conformity Requirements.

Section 176(c) of the CAA requires states to establish criteria and

procedures to ensure that Federally-supported or funded activities, including highway projects, conform to the air quality planning goals in the applicable SIPs. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity). State conformity revisions must be consistent with Federal conformity regulations relating to consultation, enforcement, and enforceability, which EPA promulgated pursuant to CAA requirements.

EPA interprets the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) for two reasons. First, the requirement to submit SIP revisions to comply with the conformity provisions of the CAA continues to apply to areas after redesignation to attainment, since such areas would be subject to a section 175A maintenance plan. Second, EPA's Federal conformity rules require the performance of conformity analyses in the absence of Federally-approved state rules. Therefore, because areas are subject to the conformity requirements regardless of whether they are redesignated to attainment and, because they must implement conformity under Federal rules if state rules are not yet approved, it is reasonable to view these requirements as not applying for purposes of evaluating a redesignation request. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. *See also* 60 FR 62748, 62749–62750 (Dec. 7, 1995) (Tampa, Florida).

EPA approved Wisconsin's general and transportation conformity SIPs on July 29, 1996 (61 FR 39329) and August 27, 1996 (61 FR 43970), respectively. Wisconsin has submitted onroad motor vehicle budgets for the Milwaukee-Racine area of 21.08 tons per day (tpd) and 15.98 tpd VOC and 51.22 tpd and 31.91 tpd NO_X for the years 2015 and 2022, respectively. Wisconsin has submitted onroad motor vehicle budgets for the Sheboygan area of 2.024 tpd and 1.615 tpd VOC and 4.321 tpd and 2.778 tpd NO_X for the years 2015 and 2022, respectively. The areas must use the MVEBs from the maintenance plan in any conformity determination that is effective on or after the effective date of the maintenance plan approval.

Subpart 2 Section 182(a) and (b) Requirements.

Comprehensive Emissions Inventory. Section 182(a)(1) requires the submission of a comprehensive emissions inventory. As part of Wisconsin's redesignation request for the Milwaukee-Racine and Sheboygan areas, the state submitted a 2005 comprehensive emissions inventory. As discussed below in section V.C., EPA is proposing to approve the 2005 inventory as meeting the section 182(a)(1) comprehensive emissions inventory requirement.

Emissions Statements. EPA approved Wisconsin's emission statement SIP, as required by section 182(a)(3)(B), on December 6, 1993 (58 FR 64155).

Reasonable Further Progress and Attainment Demonstration. On September 11, 2009, Wisconsin submitted an attainment demonstration and RFP plans for the Milwaukee-Racine and Sheboygan areas as required by section 182(b)(1) of the CAA. Because attainment has been reached, section 182(b)(1) requirements are no longer considered to be applicable as long as the area continues to attain the standard. If EPA finalizes approval of the redesignation of the Milwaukee-Racine and Sheboygan areas, EPA will take no further action on the attainment demonstration and RFP plans submitted by Wisconsin for the areas.

VOC RACT Requirements. Section 182(b)(2) requires states with moderate nonattainment areas to implement RACT under section 172(c)(1) with respect to each of the following: (1) All sources covered by a Control Technology Guideline (CTG) document issued between November 15, 1990, and the date of attainment; (2) all sources covered by a CTG issued prior to November 15, 1990; and, (3) all other major non-CTG stationary sources. As required under the 1-hour ozone standard, Wisconsin submitted VOC RACT rules covering the second and third categories. EPA approved these VOC RACT rules on the following dates: August 15, 1994 (59 FR 41709), April 27, 1995 (60 FR 20643), June 30, 1995 (60 FR 34170), July 28, 1995 (60 FR 38722), February 12, 1996 (61 FR 5307), February 13, 1996 (61 FR 5514), April 4, 1996 (61 FR 14972), April 9, 1996 (61 FR 15706), April 25, 1996 (61 FR 18257), July 17, 1996 (61 FR 37216), August 29, 1996 (61 FR 45327), June 8, 2000 (65 FR 36351), November 13, 2001 (66 FR 56931), and September 22, 2006 (71 FR 55287). With respect to the first category, EPA issued CTGs for five source categories in September 2006 and three additional source categories in September 2007. Areas classified as moderate and above were required to submit VOC RACT for the source categories covered by these CTGs, by September 2007 and September 2008, respectively. Wisconsin submitted SIP revisions to address these CTGs on September 1, 2009, and November 16, 2011. EPA is taking action on these revisions in a separate rulemaking action. Full approval of Wisconsin's RACT submittals is a prerequisite for approval of the redesignation of the Milwaukee-Racine and Sheboygan areas to attainment.

NO_X RACT. Section 182(f) establishes NO_X requirements for ozone nonattainment areas. EPA approved Wisconsin's NO_X RACT SIP on October 19, 2010 (75 FR 64155).

Stage II Vapor Recovery. Section 182(b)(3) requires states to submit Stage II rules no later than November 15, 1992. EPA approved Wisconsin's Stage II rule on August 13, 1993 (58 FR 43080), August 15, 1994 (59 FR 41709), and April 27, 1995 (60 FR 206423).

Vehicle Inspection and Maintenance (I/M). EPA's final I/M regulations in 40 CFR part 85 required the states to submit a fully adopted I/M program by November 15, 1993. EPA approved Wisconsin's enhanced I/M program on January 12, 1995 (60 FR 2881) and August 16, 2001 (66 FR 42949).

Thus, as discussed above, with approval of the comprehensive emissions inventory and Wisconsin's VOC RACT submittals, the Milwaukee-Racine and Sheboygan areas will satisfy the requirements applicable for purposes of redesignation under section 110 and part D of the CAA.

b. The Milwaukee-Racine and Sheboygan Areas Have a Fully Approved Applicable SIP for Purposes of Redesignation Under Section 110(k) of the CAA

If EPA issues a final approval of the comprehensive emissions inventory and Wisconsin's VOC RACT submittals, EPA will have fully approved the Wisconsin SIP for the Milwaukee-Racine and Sheboygan areas under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. EPA may rely on prior SIP approvals in approving a redesignation request (*See* page three of the September 4, 1992, John Calcagni memorandum; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998); *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)), plus any additional measures it may approve in conjunction with a redesignation action. *See* 68 FR 25413, 25426 (May 12, 2003). Since the passage of the CAA of 1970, Wisconsin has adopted and submitted, and EPA has fully approved, provisions addressing the various required SIP elements applicable to the Milwaukee-Racine and Sheboygan areas under the

1-hour ozone standard. In this action, EPA is proposing to approve Wisconsin's 2005 comprehensive emissions inventory for the Milwaukee-Racine and Sheboygan areas as meeting the requirement of section 182(a)(1) of the CAA. In a separate rule, EPA will take action on the Wisconsin VOC RACT submittals.

c. The Milwaukee-Racine Area Has a Fully Approved SIP and Meets Anti-Backsliding Requirements Under the 1-Hour Ozone Standard

The anti-backsliding provisions at 40 CFR 51.905(a)(1) prescribe 1-hour ozone NAAQS requirements that continue to apply after the revocation of the 1-hour ozone NAAQS for former 1-hour ozone nonattainment areas. 40 CFR 51.905(a)(1)(i) provides that:

> The area remains subject to the obligation to adopt and implement the applicable requirements defined in 40 CFR 51.900(f), except as provided in paragraph (a)(1)(iii) of this section, and except as provided in paragraph (b) of this section.

40 CFR 51.900(f), as amended by 70 FR 30592, 30604 (May 26, 2005), provides that:

> Applicable requirements means for an area the following requirements to the extent such requirements apply or applied to the area for the area's classification under section 181(a)(1) of the CAA for the 1-hour NAAQS at designation for the 8-hour NAAQS:
> (1) Reasonably available control technology (RACT).
> (2) Inspection and maintenance programs (I/M).
> (3) Major source applicability cut-offs for purposes of RACT.
> (4) Rate of Progress (ROP) reductions.
> (5) Stage II vapor recovery.
> (6) Clean fuels fleet program under section 182(c)(4) of the CAA.
> (7) Clean fuels for boilers under section 182(e)(3) of the CAA. [Not a requirement for the Milwaukee-Racine area.]
> (8) Transportation Control Measures (TCMs) during heavy traffic hours as provided under section 182(e)(4) of the CAA.
> (9) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA.
> (10) Transportation controls under section 182(c)(5) of the CAA.
> (11) Vehicle miles travelled provisions of section 182(d)(1) of the CAA.
> (12) NO_X requirements under section 182(f) of the CAA.
> (13) Attainment demonstration or an alternative as provided under 40 CFR 51.905(a)(1)(ii).

In addition to applicable requirements listed under 40 CFR 51.900(f) and as discussed above, the state must also comply with the 1-hour anti-backsliding requirements discussed in the DC Circuit's decisions in *South Coast Air Quality Management Dist.* v. *EPA*. *See* III.B.i, above.

Pursuant to 40 CFR 51.905(c), the Milwaukee-Racine area is subject to the obligations set forth in 40 CFR 51.905(a) and 40 CFR 51.900(f). The following paragraphs address the 1-hour ozone SIP requirements applicable to the Milwaukee-Racine area pursuant to all the anti-backsliding requirements described above.

Prior to the revocation of the 1-hour ozone standard on June 15, 2005, the Milwaukee-Racine area was classified as a severe nonattainment area for the 1-hour ozone standard with an attainment deadline of November 15, 2007, and was therefore subject to the ozone SIP requirements for severe 1-hour ozone nonattainment areas contained in sections 182(a) through 182(d) of the CAA. In reviewing Wisconsin's ozone redesignation request for the Milwaukee-Racine area, we assessed whether the area satisfied the CAA requirements under the 1-hour ozone standard. We conclude that this area and the state of Wisconsin have satisfied all anti-backsliding CAA requirements applicable to a severe ozone nonattainment area by complying with all applicable 1-hour ozone SIP requirements. The following discusses how the applicable CAA requirements have been met in the Milwaukee-Racine area.

40 CFR 51.900(f)(1) and (3) RACT

Section 182(a)(2)(A) of the CAA requires RACT corrections. Section 182(b)(2) requires RACT for each category of VOC sources covered by a CTG and for all other major sources of VOC within an ozone nonattainment area. Section 182(d) specifies requirements for severe ozone nonattainment areas, including a major source emissions cut-off of 25 tons per year.

Under the 1-hour ozone standard, EPA fully approved Wisconsin's VOC RACT regulations as SIP revisions for CTG sources and for major non-CTG sources through rulemakings on the following dates: August 15, 1994 (59 FR 41709), April 27, 1995 (60 FR 20643), June 30, 1995 (60 FR 34170), July 28, 1995 (60 FR 38722), February 12, 1996 (61 FR 5307), February 13, 1996 (61 FR 5514), April 4, 1996 (61 FR 14972), April 9, 1996 (61 FR 15706), April 25, 1996 (61 FR 18257), July 17, 1996 (61 FR 37216), August 29, 1996 (61 FR 45327), June 8, 2000 (65 FR 36351), November 13, 2001 (66 FR 56931), and September 22, 2006 (71 FR 55287). These RACT SIP revisions include rules covering all non-CTG sources in the Milwaukee-Racine area with the potential to emit VOCs at or in excess of 25 tons per year.

EPA issued CTGs for five source categories in September 2006 and three additional source categories in September 2007. Areas classified as moderate and above for the 1997 8-hour standard were required to submit VOC RACT for the source categories covered by these CTGs by September 2007 and September 2008, respectively. Wisconsin submitted SIP revisions to address these CTGs on September 1, 2009, and November 16, 2011. EPA is taking action on these revisions in a separate rulemaking action. Full approval of Wisconsin's RACT submittals is a prerequisite for approval of the redesignation of the Milwaukee-Racine and Sheboygan areas to attainment.

40 CFR 51.900(f)(2) Vehicle I/M

EPA approved Wisconsin's enhanced I/M program on January 12, 1995 (60 FR 2881), and August 16, 2001 (66 FR 42949).

40 CFR 51.900(f)(4) ROP

Sections 182(b)(1)(A) and 182(c)(2)(B) of the CAA establish the ROP requirements for ozone nonattainment areas. EPA has fully approved Wisconsin's SIP revisions that demonstrate that Wisconsin achieved ROP in the Milwaukee-Racine area. On March 22, 1996 (61 FR 11735), EPA approved Wisconsin's plan to achieve a 15 percent reduction in VOC emissions in the Milwaukee-Racine area, as required in section 182(b) of the CAA. On October 10, 2001 (66 FR 51572), EPA approved Wisconsin's plan to achieve ROP between 1996 and 1999 in this area, meeting the ROP requirements of section 182(c) of the CAA. Finally, on November 13, 2001 (66 FR 56931), EPA approved Wisconsin's plan to achieve ROP emission reductions for the period of 1999 through 2007.

40 CFR 51.900(f)(5) Stage II Gasoline Vapor Recovery

EPA approved Wisconsin's Stage II rule on August 13, 1993 (58 FR 43080), August 15, 1994 (59 FR 41709), and April 27, 1995 (60 FR 206423).

40 CFR 51.900(f)(6) Clean Fuel Fleet Program

EPA approved Wisconsin's clean fuel fleet program rules as required by section 182(c)(4) of the CAA on March 11, 1996 (61 FR 9639).

40 CFR 51.900(f)(7) Clean Fuels for Boilers

Section 182(e)(3) of the CAA, which requires clean fuels for boilers, does not apply to the Milwaukee-Racine area.

This CAA requirement only applies to extreme ozone nonattainment areas.

40 CFR 51.900(f)(8) Traffic Control Measures During Heavy Traffic Hours

This requirement applies to areas subject to section 182(e)(4) of the CAA, which covers extreme ozone nonattainment areas, and, therefore, does not apply to the Milwaukee-Racine area.

40 CFR 51.900(f)(9) Enhanced Ambient Monitoring

On March 18, 1994 (59 FR 1251), EPA approved Wisconsin's SIP revision establishing an enhanced monitoring program for ozone in the Milwaukee-Racine area, as required by section 182(c)(1) of the CAA.

40 CFR 51.900(f)(10) Transportation Control Measures

Within six months of November 15, 1990, and every three years thereafter, section 182(c)(5) of the CAA requires states to submit a demonstration that current aggregate vehicle mileage, aggregate vehicle emissions, congestion levels, and other relevant traffic-related and vehicle emissions-related factors are consistent with those used for the area's ozone attainment demonstration for serious and above 1-hour ozone nonattainment areas. If the levels of relevant parameters that are projected in the attainment demonstration are exceeded, a state has 18 months to develop and submit a revision to the SIP to include TCMs to reduce mobile source emissions to levels consistent with the emission levels in the attainment demonstration.

The section 182(c)(5) requirements are included in those measures subject to EPA's interpretation under EPA's May 10, 1995, Clean Data Policy memorandum. As provided by the clean data policy, since the Milwaukee-Racine area is attaining the 1-hour ozone standard, any requirement for submitting the section 182(c)(5) measures for the Milwaukee-Racine area is suspended. *See also* 40 CFR 51.918.

40 CFR 51.900(f)(11) Vehicle Miles Travelled

Section 182(d)(1)(A) of the CAA requires severe ozone nonattainment areas to offset the growth in emissions attributed to growth in VMT; to select and implement TCMs necessary to comply with the periodic emission reduction requirements of sections 182(b) and (c); and, to consider TCMs specified in section 108(f) of the CAA, and implement TCMs as necessary to demonstrate attainment with the ozone standard. EPA approved Wisconsin's section 182(d)(1)(A) VMT SIP on May 5, 1995 (60 FR 22284), and September 11, 1995 (60 FR 47088).

40 CFR 51.900(f)(12) NO_X Requirements Under Section 182(f)

Section 182(f) requires major sources of NO_X in an ozone nonattainment area to be covered by emission control requirements equivalent to those required for major sources of VOC, unless EPA waives the NO_X emission control requirements as provided in section 182(f). The section 182(f) NO_X emission control requirements include NO_X RACT in ozone nonattainment areas required to implement VOC RACT for 1-hour ozone nonattainment areas classified as moderate or above. On February 3, 1998 (63 FR 5460), EPA approved a NO_X emissions control waiver for the Milwaukee-Racine area for the 1-hour ozone standard.

40 CFR 51.900(f)(13) Ozone Attainment Demonstration

On November 13, 2001 (66 FR 56931), EPA approved Wisconsin's 1-hour ozone attainment demonstration SIP revision for the Milwaukee-Racine area.

New Source Review

EPA has determined that an area being redesignated need not have an approved nonattainment NSR program, provided that the state demonstrates maintenance of the standard in the area without part D NSR in effect. The rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas *See* III.3.a., above

Transportation Conformity

The conformity portion of the court's ruling does not impact the redesignation request for the Milwaukee-Racine area except to the extent that the court, in its June 8, 2007, decision clarified that, for those areas with MVEBs for the 1-hour ozone standard, anti-backsliding requires that these MVEBs be used for 8-hour conformity determinations until replaced by MVEBs for the 8-hour ozone standard. To meet this requirement, conformity determinations in such areas must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93. Note below that EPA is proposing to find adequate and approve 8-hour MVEBs established by Wisconsin's 8-hour ozone maintenance plans for the Milwaukee and Sheboygan areas.

Contingency Measures

The contingency measure requirements under sections 172(c)(9) and 182(c)(9) of the CAA must be addressed in state ozone RFP and attainment demonstration plans. Wisconsin addressed these requirements in the 1-hour ozone RFP and attainment demonstration plans for the Milwaukee-Racine area by adopting and implementing extra VOC and NO_X emission controls that go beyond the emission reductions needed for RFP and attainment of the 1-hour ozone standard. EPA approved these ozone control plans, including their contingency elements as follows: VOC 15 percent RFP plan, March 22, 1996 (61 FR 11735); post-1996 RFP plan, November 10, 2001 (66 FR 51572); and 1-hour ozone attainment demonstration and post-1999 RFP plan, November 13, 2001 (66 FR 56931). Therefore, Wisconsin has met the contingency requirements of sections 172(c)(9) and 182(c)(9) of the CAA for the 1-hour ozone standard.

Section 185 Source Emission Penalty Fees

EPA approved an excess VOC emissions fee rule for the Milwaukee-Racine area on June 25, 2002 (67 FR 42729). On April 24, 2009 (74 FR 18641), EPA published a final rule making a determination that the Milwaukee-Racine area had attained the 1-hour ozone standard and confirming that this finding of attainment relieved Wisconsin of the obligation to adopt section 185 source penalty fee regulations for this area.

Conclusion

For the reasons discussed above, EPA concludes that Wisconsin has met all part D SIP requirements for the 1-hour ozone standard applicable to the Milwaukee-Racine area for purposes of redesignation, as addressed in the DC Circuit's and EPA's anti-backsliding requirements.

3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions. (Section 107(d)(3)(E)(iii))

EPA finds that Wisconsin has demonstrated that the observed air quality improvement in the Milwaukee-Racine and Sheboygan areas is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal

measures, and other state-adopted measures.

In making this demonstration, the state has calculated the change in emissions between 2005 and 2008. For the nonattainment inventory, Wisconsin used the 2005 emissions inventory developed to meet the comprehensive emissions inventory requirement of section 182(a)(1) of the CAA. The state developed an attainment inventory for 2008, one of the years the Milwaukee-Racine and Sheboygan areas monitored attainment of the 1997 8-hour ozone standard. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that the Milwaukee-Racine and Sheboygan areas and upwind areas have implemented in recent years.

a. Permanent and Enforceable Controls Implemented

The following is a discussion of permanent and enforceable measures that have been implemented in the areas:

i. *Automobile Inspection and Maintenance (I/M) program.* Wisconsin operates an enhanced automobile inspection and maintenance program in the Milwaukee-Racine and Sheboygan areas.

ii. *Stationary Source NO_X Rules.* As part of the state's ROP plan under the 1-hour ozone standard, Wisconsin adopted regulations that control NO_X emissions at electric utilities and large industrial combustion sources and establish NO_X emissions standards for new sources. The regulation of existing sources was estimated to achieve a 55 ton per day reduction by 2007.

iii. *Federal Mobile Source Emission Control Measures.* Reductions in VOC and NO_X emissions have occurred statewide and in upwind areas as a result of Federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include the following.

Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards. These emission control requirements result in lower VOC and NO_X emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. The EPA has estimated that, by the end of the phase-in period, the following vehicle NO_X emission reductions will occur nationwide: passenger cars (light duty vehicles) (77 percent); light duty trucks, minivans, and sports utility vehicles (86 percent); and, larger sports utility vehicles, vans, and heavier trucks (69 to 95 percent). VOC emission reductions are expected to range from 12 to 18 percent, depending on vehicle class, over the same period. Some of these emission reductions occurred by the attainment years and additional emission reductions will occur throughout the maintenance period.

Heavy-Duty Diesel Engine Rule. In July 2000, EPA issued a rule, effective in 2004, that includes standards limiting the sulfur content of diesel fuel. A second phase took effect in 2007 which further reduced the highway diesel fuel sulfur content to 15 parts per million, leading to additional reductions in combustion NO_X and VOC emissions. This rule is expected to achieve a 95 percent reduction in NO_X emissions from diesel trucks and busses.

Nonroad Diesel Rule. EPA issued this rule in 2004. This rule applies to diesel engines used in industries, such as construction, agriculture, and mining. It is estimated that compliance with this rule will cut NO_X emissions from nonroad diesel engines by up to 90 percent. Some of these emission reductions occurred by the attainment years and additional emission reductions will occur throughout the maintenance period.

iv. *New Source Performance Standards (NSPS), National Emissions Standards for Hazardous Air Pollutants (NESHAPS) and Maximum Achievable Control Technology Standards (MACT).* A broad range of emission sectors are subject to Federal NSPS, NESHAP, and MACT standards with compliance requirements which take effect over the attainment period.

v. *Control Measures in Upwind Areas.* On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X. Affected states were required to comply with Phase I of the SIP Call beginning in 2004, and Phase II beginning in 2007. The reduction in NO_X emissions has resulted in lower concentrations of transported ozone entering the Milwaukee-Racine and Sheboygan areas. Emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable.

b. Emission Reductions

Wisconsin is using the 2005 emissions inventory developed pursuant to section 182(a)(1) of the CAA as the nonattainment inventory. This inventory is discussed in more detail in section V.C., below. In summary, WDNR developed the point source inventory using actual reported emissions, EPA's Clean Air Markets Database and EPA techniques for emissions calculation. The area source inventory was created by backcasting Wisconsin's 2008 emissions inventory that was submitted to EPA for the National Emissions Inventory. The nonroad mobile inventory was created using EPA's National Mobile Inventory Model (NMIM) (2009/05/04 version). In addition, emissions estimates were developed for commercial marine vessels, aircraft, and railroads, three nonroad categories not included in the model. The onroad mobile source inventory was developed using EPA's MOVES2010a model. Wisconsin is using the 2008 emissions inventory for the attainment inventory. The point source sector of the emissions inventory was created using annually reported point source emissions, EPA's Clean Air Markets Database, and EPA techniques for emissions calculation. Emissions were estimated by collecting process-level information from each facility that qualifies for inclusion in the state's point source database. Area source emissions estimates were taken from the 2008 emissions inventory developed by WDNR to meet the periodic emissions inventory requirement of 40 CFR part 51, subpart A.

In general, area source emissions estimates were calculated using population, gasoline consumption, employment, crop acreages, and other activity surrogates along with emission factors. Emission factors were derived from local data, local or national surveys and EPA guidance for the development of emissions inventories. Nonroad emissions estimates were developed using EPA's NMIM (2009/05/04 version). In addition, emissions estimates were developed for commercial marine vessels, aircraft, and railroads, three nonroad categories not included in the model. The onroad mobile source inventory was developed using EPA's MOVES2010a model.

Using the inventories described above, Wisconsin's submittal documents changes in VOC and NO_X emissions from 2005 to 2008 for the Milwaukee-Racine and Sheboygan areas. Emissions data are shown in Tables 2 through 4.

TABLE 2—MILWAUKEE-RACINE AND SHEBOYGAN AREA VOC AND NO_X EMISSIONS FOR NONATTAINMENT YEAR 2005

[tpd]

County	Point		Area		Nonroad		Onroad		Total	
	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X
Milwaukee-Racine Area	13.04	64.24	55.38	14.48	60.30	50.30	46.89	117.20	175.61	246.22
Kenosha County	0.73	32.75	3.28	0.73	5.41	4.32	3.98	9.58	13.40	47.38
Milwaukee County	6.88	28.13	20.65	6.77	15.71	17.94	20.79	53.12	64.03	105.96
Ozaukee County	0.42	0.52	3.79	0.87	2.70	5.44	2.72	6.84	9.63	13.67
Racine County	1.17	0.77	5.88	1.25	7.42	5.70	4.38	10.65	18.85	18.37
Washington County	0.47	0.88	9.71	1.19	6.45	4.08	3.91	9.78	20.54	15.93
Waukesha County	3.37	1.19	12.07	3.67	22.61	12.82	11.11	27.23	49.16	44.91
Sheboygan Area (Sheboygan County)	2.307	17.338	6.879	1.114	6.245	4.389	3.340	8.489	18.771	31.330

TABLE 3—MILWAUKEE-RACINE AND SHEBOYGAN AREA VOC AND NO_X EMISSIONS FOR ATTAINMENT YEAR 2008

[tpd]

County	Point		Area		Nonroad		Onroad		Total	
	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X
Milwaukee-Racine Area	12.17	39.16	57.22	14.76	50.02	45.34	36.35	92.74	155.76	192.00
Kenosha County	1.33	8.56	3.39	0.76	4.57	3.94	3.05	7.52	12.34	20.78
Milwaukee County	5.52	26.91	21.19	6.85	12.90	15.83	16.05	41.68	55.66	91.27
Ozaukee County	0.42	0.73	3.99	0.89	2.17	4.66	2.13	5.47	8.71	11.75
Racine County	1.41	1.13	6.17	1.27	6.23	4.99	3.51	8.79	17.32	16.18
Washington County	0.49	0.26	9.97	1.23	5.39	4.10	2.97	7.62	18.82	13.21
Waukesha County	3.00	1.57	12.51	3.76	18.76	11.82	8.64	21.66	42.91	38.81
Sheboygan Area (Sheboygan County)	2.113	12.972	7.064	1.139	5.329	3.689	2.665	6.322	17.171	24.122

TABLE 4—COMPARISON OF MILWAUKEE-RACINE AND SHEBOYGAN AREA 2005 AND 2008 VOC AND NO_X EMISSIONS

[tpd]

County	VOC			NO_X		
	2005	2008	Net change (2005–2008)	2005	2008	Net change (2005–2008)
Milwaukee-Racine Area	175.61	155.76	−19.85	246.22	192.00	−54.22
Point	13.04	12.17	−0.87	64.24	39.16	−25.08
Area	55.38	57.22	1.84	14.48	14.76	0.28
Nonroad	60.30	50.02	−10.28	50.30	45.34	−4.96
Onroad	46.89	36.35	−10.54	117.20	92.74	−24.46
Sheboygan Area	18.771	17.171	−1.600	31.330	24.122	−7.208
Point	2.307	2.113	−0.194	17.338	12.972	−4.366
Area	6.879	7.064	0.185	1.114	1.139	0.025
Nonroad	6.245	5.329	−0.916	4.389	3.689	−0.700
Onroad	3.340	2.665	−0.675	8.489	6.322	−2.167

Table 4 shows that the Milwaukee-Racine area reduced VOC emissions by 19.85 tpd and NO_X emissions by 54.22 tpd between 2005 and 2008, and the Sheboygan area reduced VOC emissions by 1.600 tpd and NO_X emissions by 7.208 tpd between 2005 and 2008. Based on the information summarized above, Wisconsin has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions.

4. The Area Has a Fully Approved Maintenance Plan Pursuant to Section 175a of the CAA. (Section 107(d)(3)(E)(iv))

In conjunction with its requests to redesignate the Milwaukee-Racine and Sheboygan nonattainment areas to attainment status, WDNR submitted SIP revisions to provide for the maintenance of the 1997 8-hour ozone NAAQS in the areas through 2022.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the state must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial ten-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future violations of the 1997 8-hour ozone standard.

The September 4, 1992, John Calcagni memorandum provides additional guidance on the content of a maintenance plan. The memorandum clarifies that an ozone maintenance plan should address the following items: The attainment VOC and NO_X emissions inventories, a maintenance demonstration showing maintenance for ten years of the maintenance period, a commitment to maintain the existing

monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

b. Attainment Inventory

WDNR developed an emissions inventory for 2008, one of the years Wisconsin used to demonstrate monitored attainment of the 1997 8-hour NAAQS, as described above. The attainment level of emissions is summarized in Table 3, above.

c. Demonstration of Maintenance

Along with the redesignation requests, WDNR submitted revisions to the 8-hour ozone SIP to include maintenance plans for the Milwaukee-Racine and Sheboygan areas, in compliance with section 175A of the CAA. These demonstrations show maintenance of the 1997 8-hour ozone standard through 2022 by assuring that current and future emissions of VOC and NO_X for the Milwaukee-Racine and Sheboygan areas remain at or below attainment year emission levels. A maintenance demonstration need not be based on modeling. *See Wall v. EPA,* 265 F.3d 426 (6th Cir. 2001), *Sierra Club v. EPA,* 375 F. 3d 537 (7th Cir. 2004). *See also* 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003).

Wisconsin is using emissions inventories for the years 2015 and 2022 to demonstrate maintenance. The emissions inventories were developed as described below.

Electric Generating Unit (EGU) point source emissions for 2018 were estimated using IPM3.0. Non-EGU point source emissions for 2018 were derived by applying growth and control factors, developed by Pechan for the Lake Michigan Air Directors Consortium (LADCO), to the 2005 inventory. Growth factors were initially based on the Economic Growth and Analysis System (EGAS) model and were modified for select priority categories by examining emissions activity data. Projected emissions for 2015 and 2022 were estimated using linear interpolation and extrapolation from 2008 and 2018 emissions estimates.

Area source emissions inventories were created by projecting the 2008 emissions inventory. The emission projections were primarily based on growth factors from the EGAS model. If EGAS growth factors were not available, population based growth factors were used.

Nonroad emissions estimates were developed using EPA's NMIM model (2009/05/04 version). In addition, emissions estimates were developed for commercial marine vessels, aircraft, and railroads, three nonroad categories not included in the model. Onroad emissions estimates were generated using the MOVES2010a model.

Emissions data are shown in Tables 5 through 7 below.

TABLE 5—MILWAUKEE-RACINE AND SHEBOYGAN AREA VOC AND NO_X EMISSIONS FOR MAINTENANCE YEAR 2015

[tpd]

County	Point		Area		Nonroad		Onroad		Total	
	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X
Milwaukee-Racine Area	15.89	45.35	53.53	13.63	30.58	29.60	21.08	51.22	121.08	139.80
Kenosha County	0.99	13.12	3.17	0.71	2.71	2.73	1.82	4.18	8.69	20.74
Milwaukee County	8.37	29.42	19.64	6.20	8.37	10.40	9.10	23.08	45.48	69.10
Ozaukee County	0.52	0.74	3.81	0.84	1.37	2.89	1.24	2.98	6.94	7.45
Racine County	1.47	0.76	5.85	1.18	3.63	3.46	2.05	4.76	13.00	10.16
Washington County	0.51	0.15	9.34	1.17	3.32	2.51	1.77	4.24	14.94	8.07
Waukesha County	4.03	1.16	11.72	3.53	11.18	7.61	5.10	11.98	32.03	24.28
Sheboygan Area (Sheboygan County)	2.895	11.486	6.568	1.067	3.263	2.432	2.024	4.321	14.750	19.306

TABLE 6—MILWAUKEE-RACINE AND SHEBOYGAN AREA VOC AND NO_X EMISSIONS FOR MAINTENANCE YEAR 2022

[tpd]

County	Point		Area		Nonroad		Onroad		Total	
	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X
Milwaukee-Racine Area	19.61	51.57	59.83	13.51	23.55	21.13	15.98	31.91	118.97	118.12
Kenosha County	0.65	17.68	3.50	0.72	1.84	1.94	1.41	2.64	7.40	22.98
Milwaukee County	11.22	31.93	21.88	6.03	7.48	7.76	6.78	14.18	47.36	59.90
Ozaukee County	0.63	0.76	4.33	0.85	1.19	1.83	0.95	1.88	7.10	5.32
Racine County	1.52	0.39	6.63	1.17	2.44	2.57	1.58	3.00	12.17	7.13
Washington County	0.53	0.05	10.43	1.20	2.52	1.59	1.36	2.69	14.84	5.53
Waukesha County	5.06	0.76	13.06	3.54	8.08	5.44	3.90	7.52	30.10	17.26
Sheboygan Area (Sheboygan County)	3.677	10.000	7.256	1.074	2.189	1.876	1.615	2.778	14.737	15.728

TABLE 7—COMPARISON OF MILWAUKEE-RACINE AND SHEBOYGAN AREA 2008, 2015 AND 2022 VOC AND NO_X EMISSIONS

[tpd]

County	VOC				NO_X			
	2008	2015	2022	Net change (2008–2022)	2008	2015	2022	Net change (2008–2022)
Milwaukee-Racine Area	155.76	121.08	118.97	−36.79	192.00	139.80	118.12	−73.88
Point	12.17	15.89	19.61	7.44	39.16	45.35	51.57	12.41
Area	57.22	53.53	59.83	2.61	14.76	13.63	13.51	−1.25
Nonroad	50.02	30.58	23.55	−26.47	45.34	29.60	21.13	−24.21
Onroad	36.35	21.08	15.98	−20.37	92.74	51.22	31.91	−60.83

TABLE 7—COMPARISON OF MILWAUKEE-RACINE AND SHEBOYGAN AREA 2008, 2015 AND 2022 VOC AND NO_X EMISSIONS—Continued

[tpd]

County	VOC				NO_X			
	2008	2015	2022	Net change (2008–2022)	2008	2015	2022	Net change (2008–2022)
Sheboygan Area	17.171	14.750	14.737	−2.434	24.122	19.306	15.728	−8.394
Point	2.113	2.895	3.677	1.564	12.972	11.486	10.000	−2.972
Area	7.064	6.568	7.256	0.192	1.139	1.067	1.074	−0.065
Nonroad	5.329	3.263	2.189	−3.140	3.689	2.432	1.876	−1.813
Onroad	2.665	2.024	1.615	−1.050	6.322	4.321	2.778	−3.544

The emission projections show that WDNR does not expect emissions in the Milwaukee-Racine and Sheboygan areas to exceed the level of the 2008 attainment year inventory during the maintenance period. In the Milwaukee-Racine area, WDNR projects VOC emissions to decrease by 36.79 tpd and NO_X emissions to decrease by 73.88 tpd between 2008 and 2022. In the Sheboygan area, WDNR projects VOC emissions to decrease by 2.434 tpd and NO_X emissions to decrease by 8.394 tpd between 2008 and 2022.

Further, ozone modeling performed by the Lake Michigan Air Directors Consortium supports the conclusion that the Milwaukee-Racine and Sheboygan areas will maintain the 1997 8-hour ozone standard throughout the maintenance period. Peak modeled ozone levels in the Milwaukee-Racine area for 2012 and 2018 are 0.080 ppm, and 0.077 ppm, respectively. Peak modeled ozone levels in the Sheboygan area for 2012 and 2018 are 0.081 ppm, and 0.076 ppm, respectively. These projected ozone levels were modeled applying only legally enforceable controls; *e.g.,* consent decrees, rules, the NO_X SIP Call, Federal motor vehicle control programs, *etc.*

As part of its maintenance plans, the state elected to include ''safety margins'' for the areas. A ''safety margin'' is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan, which continues to demonstrate attainment of the standard. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. The Milwaukee-Racine and Sheboygan areas attained the 8-hour ozone NAAQS during the 2006–2008, 2007–2009, and 2008–2010 time periods. Wisconsin used 2008 as the attainment level of emissions for the areas. In the maintenance plans, WDNR projected emission levels for 2022. For the Milwaukee-Racine area, the emissions from point, area, nonroad, and onroad mobile sources in 2008 equaled 155.76 tpd of VOC. WDNR projected VOC emissions for the year 2022 to be 118.97 tpd of VOC. The SIP submission demonstrates that the Milwaukee-Racine area will continue to maintain the standard with emissions at this level. The safety margin for VOC is calculated to be the difference between these amounts or, in this case, 36.79 tpd of VOC for 2022. By this same method, for the Milwaukee-Racine area, 73.88 tpd (*i.e.,* 192.00 tpd less 118.12 tpd) is the safety margin for NO_X for 2022. For the Sheboygan area, the safety margin for 2022 is 2.434 tpd of VOC and 8.394 tpd of NO_X. The safety margin, or a portion thereof, can be allocated to any of the source categories, as long as the total attainment level of emissions is maintained.

d. Monitoring Network

Wisconsin currently operates ten ozone monitors in the Milwaukee-Racine area and one monitor in the Sheboygan area. WDNR has committed to continue to monitor ozone levels in the areas. WDNR will work with EPA should changes in siting become necessary. Wisconsin remains obligated to meet monitoring requirements and continue to quality assure monitoring data in accordance with 40 CFR part 58, and to enter all data into the AQS in accordance with Federal guidelines.

e. Verification of Continued Attainment

Continued attainment of the ozone NAAQS in the Milwaukee-Racine and Sheboygan areas depends, in part, on the state's efforts toward tracking indicators of continued attainment during the maintenance period. Wisconsin's plan for verifying continued attainment of the 8-hour standard in the Milwaukee-Racine and Sheboygan consists of plans to continue ambient ozone monitoring in accordance with the requirements of 40 CFR part 58. WDNR will also continue to develop and submit periodic emission inventories as required by the Federal Consolidated Emissions Reporting Rule (67 FR 39602, June 10, 2002) to track future levels of emissions.

f. Contingency Plan

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the state. The state should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the state will implement all measures with respect to control of the pollutant(s) that were contained in the SIP before redesignation of the area to attainment. See section 175A(d) of the CAA.

As required by section 175A of the CAA, Wisconsin has adopted contingency plans for the Milwaukee-Racine and Sheboygan areas to address possible future ozone air quality problems. A contingency plan response will be triggered whenever a three-year average fourth-high monitored value of 0.085 ppm or greater is monitored within the maintenance area. When a response is triggered, WDNR will evaluate existing but not fully implemented, forthcoming, and, if necessary, new control measures to correct the violation of the standard within 18 months. Wisconsin has confirmed EPA's interpretation that this commitment means that the measure will be adopted and implemented within 18 months of the triggering event. In addition, it is EPA's

understanding that to acceptably address a violation of the standard, existing and forthcoming control measures must be in excess of emissions reductions included in the projected maintenance inventories.

WDNR included the following list of potential contingency measures in its maintenance plans:

i. Broaden the application of the NO_X RACT program by including a larger geographic area, and/or including sources with potential emissions of 50 tons per year, and/or increasing the cost-effectiveness thresholds utilized as a basis for Wisconsin's NOx RACT Program;

ii. Develop an anti-idling control program for mobile sources targeting diesel vehicles;

iii. Adopt a rule reducing VOC content in architectural, industrial and maintenance coatings; and

iv. Adopt a rule reducing VOC content in commercial and consumer products.

g. Provisions for Future Updates of the Ozone Maintenance Plan

As required by section 175A(b) of the CAA, WDNR commits to submit to the EPA updated ozone maintenance plans eight years after redesignation of the Milwaukee-Racine and Sheboygan areas to cover an additional ten-year period beyond the initial ten-year maintenance period. As required by section 175A of the CAA, Wisconsin has committed to retain the VOC and NO_X control measures contained in the SIP prior to redesignation.

EPA has concluded that the maintenance plans adequately address the five basic components of a maintenance plan: Attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and a contingency plan. Thus EPA proposes to find that the maintenance plan SIP revisions submitted by Wisconsin for the Milwaukee-Racine and Sheboygan areas meet the requirements of section 175A of the CAA.

B. Adequacy of Wisconsin's MVEBs

1. How are MVEBs developed and what are the MVEBs for the Milwaukee-Racine and Sheboygan areas?

Under the CAA, states are required to submit, at various times, control strategy SIP revisions and ozone maintenance plans for ozone nonattainment areas and for areas seeking redesignations to attainment of the ozone standard. These emission control strategy SIP revisions (*e.g.,* RFP and attainment demonstration SIP revisions) and ozone maintenance plans create MVEBs based on onroad mobile source emissions for criteria pollutants and/or their precursors to address pollution from onroad transportation sources. The MVEBs are the portions of the total allowable emissions that are allocated to highway and transit vehicle use that, together with emissions from other sources in the area, will provide for attainment or maintenance.

Under 40 CFR part 93, a MVEB for an area seeking a redesignation to attainment is established for the last year of the maintenance plan. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188).

Under section 176(c) of the CAA, new transportation projects that receive Federal funding or support, such as the construction of new highways, must ''conform'' to (*i.e.,* be consistent with) the SIP. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, or delay timely attainment of the NAAQS. If a transportation plan does not conform, most new transportation projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

When reviewing SIP revisions containing MVEBs, including attainment strategies, rate-of-progress plans, and maintenance plans, EPA must affirmatively approve or find that the MVEBs are ''adequate'' for use in determining transportation conformity before the MVEBs can be used. Once EPA affirmatively approves or finds the submitted MVEBs to be adequate for transportation conformity purposes, the MVEBs must be used by state and Federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of MVEBs are set out in 40 CFR 93.118(e)(4).

EPA's process for determining adequacy of a MVEB consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period; and, (3) EPA taking action on the MVEB. The process for determining the adequacy of submitted SIP MVEBs is codified at 40 CFR 93.118.

The maintenance plans submitted by Wisconsin for the Milwaukee-Racine and Sheboygan areas contain new VOC and NO_X MVEBs for the areas for the years 2015 and 2022. The availability of the SIP submission with these 2015 and 2022 MVEBs was announced for public comment on EPA's Adequacy Web site on December 6, 2011, at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.* The EPA public comment period on adequacy of the 2015 and 2022 MVEBs for the Milwaukee-Racine and Sheboygan areas closed on January 5, 2012. No adverse comments on the submittal were received during the adequacy comment period. The submitted maintenance plan, which included the MVEBs, was endorsed by the Governor (or his or her designee) and was subject to a state public hearing. The MVEBS were developed as part of an interagency consultation process which includes Federal, state, and local agencies. The MVEBS were clearly identified and precisely quantified. These MVEBs, when considered together with all other emissions sources, are consistent with maintenance of the 1997 8-hour ozone standard.

EPA, through this rulemaking, has found adequate and is proposing to approve the MVEBs for use to determine transportation conformity in the Milwaukee-Racine and Sheboygan areas, because EPA has determined that the areas can maintain attainment of the 8-hour ozone NAAQS for the relevant maintenance period with mobile source emissions at the levels of the MVEBs. WDNR has determined the 2015 MVEBs for the Milwaukee-Racine and Sheboygan areas to be 21.08 tpd for VOC and 51.22 tpd for NO_X, and 2.024 tpd for VOC and 4.321 tpd for NO_X, respectively. WDNR has determined the 2022 MVEBs for the Milwaukee-Racine and Sheboygan areas to be 15.98 tpd for VOC and 31.91 tpd for NO_X, and 1.615 tpd for VOC and 2.778 tpd for NO_X, respectively. These MVEBs are consistent with the onroad mobile source VOC and NO_X emissions projected by the Wisconsin Department of Transportation for 2015 and 2022, as summarized in Table 7 above. Wisconsin has demonstrated that the Milwaukee-Racine area can maintain the 8-hour ozone NAAQS with mobile source emissions of 21.08 tpd and 15.98 tpd of VOC and 51.22 tpd and 31.91 tpd of NO_X in 2015 and 2022, respectively, since emissions will remain under attainment year emission levels. Wisconsin has demonstrated that the Sheboygan area can maintain the 8-hour ozone NAAQS with mobile source

emissions of 2.024 tpd and 1.615 tpd of VOC and 4.321 tpd and 2.778 tpd of NO_X in 2015 and 2022, respectively, since emissions will remain under attainment year emission levels.

C. 2005 Comprehensive Emissions Inventory

As discussed above, section 182(a)(1) of the CAA requires states containing areas classified as marginal and above to submit a comprehensive emissions inventory. As part of Wisconsin's redesignation request for the Milwaukee-Racine and Sheboygan areas, the state submitted a 2005 comprehensive emissions inventory. Emissions contained in the submittal cover the general source categories of point sources, area sources, nonroad mobile sources and onroad mobile sources.

WDNR developed the point source inventory using annually reported point source emissions, EPA's Clean Air Markets Database and EPA techniques for emissions calculation. Where feasible, Federal, state and local controls were factored into the emission calculations. Emissions were estimated by collecting process-level information from each facility that qualifies for inclusion in the Wisconsin's point source database.

The area source inventory was created by backcasting Wisconsin's 2008 emissions inventory that WDNR submitted to EPA for the National Emissions Inventory. The backcasting factors were primarily based on growth factors from the EGAS model. If growth factors were not available for source classification code, population based growth factors were used.

The nonroad mobile inventory was created using NMIM (2009/05/04 version). In addition, emissions estimates were developed for commercial marine vesels, aircraft, and railroads, three nonroad categories not included in the model. Through LADCO, Pechan, an independent contractor, provided marine and rail emission estimates. Aircraft emissions were calculated using the Federal Aviation Administration's Emissions and Dispersion Modeling System.

The Onroad mobile source inventory was developed using EPA's MOVES2010a model. Emissions estimates were made in accordance with the User Guide for MOVES2010a [4] and Technical Guidance on the Use of MOVES2010 for Emission Inventory Preparation in State Implementation Plans and Transportation Conformity [5].

The 2005 emissions estimates are summarized in Table 2, above. EPA is proposing to approve the 2005 emissions inventory as meeting the section 182(a)(1) comprehensive emissions inventory requirement for the Milwaukee-Racine and Sheboygan areas.

VI. Summary of Actions

After evaluating the redesignation requests submitted by Wisconsin, EPA concludes that the requests meet the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. Therefore, EPA is proposing to approve the redesignation of the Milwaukee-Racine and Sheboygan areas from nonattainment to attainment for the 1997 8-hour ozone NAAQS. EPA is also proposing to approve Wisconsin's maintenance plan SIP revisions for the Milwaukee-Racine and Sheboygan areas. EPA's proposed approval of the maintenance plans is based on the state's demonstration that the plans meet the requirements of section 175A of the CAA, as described more fully above. EPA is also proposing to approve WDNR's 2005 comprehensive emissions inventories for the Milwaukee-Racine and Sheboygan areas as meeting the requirements of section 182(a)(1) of the CAA. Finally, EPA finds adequate under 40 CFR 93.118(e) and is proposing to approve Wisconsin's 2015 and 2022 MVEBs for the Milwaukee-Racine and Sheboygan areas.

VII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to 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 redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands. However, because there are tribal lands located in Milwaukee County, we provided the affected tribe with the opportunity to consult with EPA on the redesignation. The affected tribe raised no concerns with the proposed rule.

List of Subjects

40 CFR part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Volatile organic compounds.

40 CFR Part 81

Air pollution control, Environmental protection, National parks, Wilderness areas.

[4] U.S. EPA, Office of Transportation and Air Quality, Assessment and Standards Division, August 2010, EPA–420–B–10–036.

[5] U.S. EPA, Office of Transportation and Air Quality, Transportation and Regional Programs Division, April 2010, EPA–420–B–10–023.

Dated: January 31, 2012.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2012–2989 Filed 2–8–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2009–0666; FRL–9629–3]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Illinois; Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a request from Illinois to redesignate the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana (IL-IN) ozone nonattainment area (the Greater Chicago area) to attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS or standard) because the request meets the statutory requirements for redesignation under the Clean Air Act (CAA). The Illinois portion of the Greater Chicago area includes Cook, DuPage, Kane, Lake, McHenry, and Will Counties and portions of Grundy (Aux Sable and Goose Lake Townships) and Kendall (Oswego Township) Counties. The Illinois Environmental Protection Agency (IEPA) submitted this request on July 23, 2009, and supplemented its request in a submittal on September 16, 2011. EPA is proposing to approve, as a revision of the Illinois State Implementation Plan (SIP), the State's plan for maintaining the 1997 8-hour ozone standard through 2025 in the Illinois portion of the Greater Chicago area. EPA is proposing to approve 2002 Volatile Organic Compound (VOC) and Nitrogen Oxides (NO_X) emission inventories for the Illinois portion of the Greater Chicago area as a revision of the Illinois SIP because the emission inventories meet the requirements of section 182(a) of the CAA. Finally, EPA proposes to approve the State's 2008 and 2025 VOC and NO_X Motor Vehicle Emission Budgets (MVEBs) for the Illinois portion of the Greater Chicago area.

DATES: Comments must be received on or before March 12, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2009–0666, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: aburano.douglas@epa.gov.*
- *Fax:* (312) 408–2279.
- *Mail:* Douglas Aburano, Chief, Attainment Planning and Maintenance Section (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* Douglas Aburano, Chief, Attainment Planning and Maintenance Section (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 18th Floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office's normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2009–0666. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects and viruses. For additional instructions on submitting comments, go to section I of the **SUPPLEMENTARY INFORMATION** section of this document.

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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Edward Doty at (312) 886–6057 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Edward Doty, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6057, or *Doty.Edward@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

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A. Has the Greater Chicago area attained the 1997 8-hour ozone NAAQS?
B. Has the State of Illinois met all applicable requirements of Section 110 and Part D of the CAA for the Illinois portion of the Greater Chicago area, and does the Illinois portion of the Greater Chicago area have a fully approved SIP under Section 110(k) of the CAA?
1. The Illinois Portion of the Greater Chicago Area Has Met All Applicable Requirements of Section 110 and Part D of the CAA for Purposes of Redesignation
2. The Illinois Portion of the Greater Chicago Area Has a Fully Approved SIP for Purposes of Redesignation Under Section 110 of the CAA

3. The Illinois Portion of the Greater Chicago Area Has a Fully Approved SIP and Meets Anti-Backsliding Requirements Under the 1-Hour Ozone Standard
C. Are the air quality improvements in the Greater Chicago area due to permanent and enforceable emission reductions?
1. Permanent and Enforceable Controls Implemented
2. Emission Reductions
D. Does Illinois have a fully approvable ozone maintenance plan?
1. Maintenance Plan Requirements
2. Attainment Inventory
3. Has the State documented maintenance of the ozone standard in the Illinois portion of the Greater Chicago area?
4. What is the contingency plan for the Illinois portion of the Greater Chicago area?
5. Monitoring Network and Verification of Continued Attainment
VI. Has the State adopted approvable motor vehicle emission budgets?
VII. 2002 Emissions Inventories
VIII. Statutory and Executive Order Reviews

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified in the proposed rule.

II. What actions is EPA proposing?

EPA is proposing to take several related actions. First, EPA is proposing to approve the redesignation of the Illinois portion of the Greater Chicago area from nonattainment to attainment of the 1997 8-hour ozone NAAQS. EPA is also proposing to approve Illinois' ozone maintenance plan for the Illinois portion of the Greater Chicago area as a revision of the Illinois SIP (such approval being one of the CAA criteria for redesignation to attainment). The ozone maintenance plan demonstrates that the Greater Chicago area should remain in attainment of the 1997 8-hour ozone standard through 2025, and specifies the measures that will be taken in the Illinois portion of the Greater Chicago area to assure maintenance of the 1997 8-hour ozone standard in the Greater Chicago area.

EPA is proposing to approve 2002 VOC and NO_X emission inventories for the Illinois portion of the Greater Chicago area as a revision of the Illinois SIP. These emission inventories satisfy the requirements in section 182(a)(1) of the CAA for comprehensive, accurate, and current emission inventories.

Finally, EPA is proposing to approve VOC and NO_X 2008 and 2025 MVEBs for the Illinois portion of the Greater Chicago area.

III. What is the background for these actions?

A. General Background

EPA has determined that ground-level ozone (O_3) is detrimental to human health. On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone NAAQS of 0.08 parts per million parts of air (0.08 ppm) (the 1997 8-hour ozone standard). This standard is violated in an area when any monitor in the area records 8-hour ozone concentrations with a 3-year average of the annual fourth-highest daily maximum 8-hour ozone concentrations equaling or exceeding 0.085 ppm.

Ground-level ozone is generally not emitted directly by sources. Rather, emitted NO_X and VOC react in the presence of sunlight to form ground-level ozone, as a secondary pollutant, along with other secondary compounds. NO_X and VOC are ''ozone precursors.'' Reduction of peak ground-level ozone concentrations is achieved through controlling VOC and NO_X emissions.

Section 107 of the CAA required EPA to designate as nonattainment any area that violated the 1997 8-hour ozone standard. EPA promulgated 8-hour ozone designations and classifications on April 30, 2004 (69 FR 23857). The Greater Chicago area was designated and classified as a moderate nonattainment area for the 1997 8-hour ozone standard. The designation and classification became effective on June 15, 2004.

The CAA contains two sets of provisions, subparts 1 and 2, that address planning and emission control requirements for ozone nonattainment areas. Both of these subparts are found in title I, part D of the CAA; sections 171–179 and sections 181–185, respectively. Subpart 1 contains general, less prescriptive requirements for all nonattainment areas of any pollutant, including ozone, governed by a NAAQS. Subpart 2 contains additional, more specific requirements for certain ozone nonattainment areas, and applies to ozone nonattainment areas classified under section 181 of the CAA.

Under EPA's implementation rule for the 1997 8-hour ozone standard (69 FR 23951, April 30, 2004), an area was classified under subpart 2 based on its 8-hour ozone design value (i.e., the 3-year average annual fourth-highest daily maximum 8-hour average ozone concentration at the worst-case monitoring site in the area or in its immediate downwind environs), if it had a 1-hour ozone design value [1] at the time of designation at or above 0.121 ppm. All other areas were covered under subpart 1 based on their 8-hour ozone design values [2] (69 FR 23958). The Greater Chicago area was designated as a subpart 2 moderate ozone nonattainment area by EPA on April 30, 2004 (69 FR 23898), based on air quality monitoring data from 2001–2003 (69 FR 23898).

40 CFR 50.10 and 40 CFR part 50, appendix I provide that the 8-hour ozone standard is attained when the 3-year averages of the annual fourth-highest daily maximum 8-hour average ozone concentrations at all monitoring sites in the area are less than or equal to 0.08 ppm. The ozone data must be complete over the 3-year period, meeting the data completeness requirements of 40 CFR part 50, appendix I, section 2.3(d).

On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm (the 2008 8-hour ozone standard). EPA has not yet promulgated area designations for this standard. The actions addressed in this proposed rule relate only to the 1997 8-hour ozone standard.

On July 23, 2009, IEPA requested that EPA redesignate the Illinois portion of the Greater Chicago area to attainment for the 1997 8-hour ozone standard based on ozone data for the period of 2006–2008. On September 16, 2011, IEPA supplemented the original redesignation request, submitting ozone data for the period of 2008–2010, revising the mobile source emission estimates using EPA's new on-road

[1] Fourth-highest daily maximum 1-hour ozone concentration over a 3-year period at the worst-case monitoring site in the area.

[2] Three-year averages of the annual fourth-highest daily maximum 8-hour ozone concentrations at the worst-case monitoring sites in the areas.

mobile source emissions model, MOVES, and extending the demonstration of maintenance through 2025, with new MVEBs.

B. What are the impacts of the December 22, 2006, and June 8, 2007, United States Court of Appeals decisions regarding EPA's Phase 1 Ozone Implementation Rule?

1. Summary of Court Decisions

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated EPA's Phase 1 implementation rule for the 1997 8-hour ozone standard (69 FR 23591, April 30, 2004). *South Coast Air Quality Management Dist.* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the D.C. Circuit Court (Court) clarified that the Phase 1 rule was vacated only for those parts of the rule that had been successfully challenged. *Id.,* Docket No. 04 1201. Therefore, several provisions of the Phase 1 rule remain effective: Provisions related to classifications for areas currently classified under subpart 2 of title I, part D of the CAA as 8-hour ozone nonattainment areas; 8-hour ozone attainment dates for these areas; and, the timing of emission reductions needed for attainment of the 8-hour ozone NAAQS in these areas. The June 8, 2007, decision also left intact the Court's rejection of EPA's reasons for implementing the 8-hour ozone standard in certain nonattainment areas under subpart 1 in lieu of subpart 2 of the CAA. By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour ozone standard and those anti-backsliding provisions of the Phase 1 rule that had not been successfully challenged.

The June 8, 2007, decision reaffirmed the December 22, 2006, decision that EPA had failed to retain four measures required for 1-hour ozone nonattainment areas under the anti-backsliding provisions of the regulations: (1) Part D New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) section 185 penalty fees for 1-hour severe or extreme ozone nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour ozone NAAQS, or for failure to attain the NAAQS; and, (4) certain transportation conformity requirements for Federal actions. The June 8, 2007, decision clarified that the Court's reference to conformity requirements was limited to requiring the continued use of 1-hour MVEBs until 8-hour MVEBs are available for the 8-hour conformity determinations.

This section sets forth EPA's views on the potential effect of the Court's rulings on this proposed redesignation action. For the reasons set forth below in sections III.B.2 and B.3, EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation, and do not prevent EPA from proposing and ultimately finalizing this redesignation. EPA believes that the Court's decisions impose no impediment to moving forward with redesignation of this area to attainment, because, even in light of the Court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

2. Requirements Under the 8-Hour Ozone Standard

With respect to the 1997 8-hour ozone standard, the Greater Chicago area is classified as moderate nonattainment under subpart 2, part D of the CAA. The June 8, 2007, decision clarifies that the Court did not vacate the Phase 1 rule's provisions with respect to classifications for areas under subpart 2. The Court's decision, therefore, upholds EPA's classifications for those areas classified under subpart 2 for the 1997 8-hour ozone standard, and all 8-hour ozone requirements for these areas remain in place.

3. Requirements Under the 1-Hour Ozone Standard

In its June 8, 2007, decision, the Court limited its Phase 1 rule vacatur so as to uphold provisions of EPA's anti-backsliding requirements that were not successfully challenged. Therefore, an area must meet the anti-backsliding requirements which apply by virtue of the area's classification for the 1-hour ozone standard. See 40 CFR 51.900, *et seq.;* 70 FR 30592, 30604 (May 26, 2005). As set forth in more detail below, the area must address four anti-backsliding provisions identified by the Court in its decisions.

The anti-backsliding provisions at 40 CFR 51.905(a)(1) prescribe 1-hour ozone standard requirements that continue to apply after revocation of the 1-hour ozone standard for former 1-hour ozone nonattainment areas. Section 51.905(a)(1)(i) provides that:

> The area remains subject to the obligation to adopt and implement the applicable requirements as defined in section 51.900(f), except as provided in paragraph (a)(1)(iii) of this section, and except as provided in paragraph (b) of this section.

Section 51.900(f), as amended by 70 FR 30592, 30604 (May 26, 2005), provides that:

> Applicable requirements means for an area that the following requirements, to the extent such requirements applied to the area for the area's classification under section 181(a)(1) of the CAA for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS, remain in effect:
> (1) Reasonably available control technology (RACT).
> (2) Inspection and maintenance programs (I/M).
> (3) Major source applicability cut-offs for purposes of RACT.
> (4) Rate of Progress (ROP) reductions.
> (5) Stage II vapor recovery.
> (6) Clean fuels fleet program under section 183(c)(4) of the CAA.
> (7) Clean fuels for boilers under section 182(e)(3) of the CAA.
> (8) Transportation Control Measures (TCMs) during heavy traffic hours as provided under section 182(e)(4) of the CAA. [Not a requirement for the Illinois portion of the Greater Chicago area.]
> (9) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA.
> (10) TCMs under section 182(c)(5) of the CAA.
> (11) Vehicle miles traveled (VMT) provisions of section 182(d)(1) of the CAA.
> (12) NO_X requirements under section 182(f) of the CAA.
> (13) Attainment demonstration or alternative as provided under section 51.905(a)(1)(ii).

Pursuant to 40 CFR 51.905(c), the Illinois portion of the Greater Chicago area is subject to the obligations set forth in 51.905(a) and 51.900(f).

With regard to part D NSR requirements, EPA has determined that an area being redesignated to attainment need not have an approved nonattainment NSR program, provided that the state demonstrates maintenance of the standard in the area without part D NSR in effect. The rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation dated October 14, 1994, titled, ''Part D New Source Requirements for Areas Requesting Redesignation to Attainment.'' This policy assumes that the state's Prevention of Significant Deterioration (PSD) program will become effective in the area upon redesignation of the area to attainment. Consequently, EPA concludes that an approved part D NSR program is not an applicable requirement for purposes of redesignation. See the more detailed explanations of this issue in the following rulemakings: Detroit, Michigan (60 FR 12467–12468 (March 7, 1995); Cleveland-Akron-Lorain, Ohio

(61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, 53669, October 23, 2001); Grand Rapids, Michigan (61 FR 31831, 31836–31837, June 21, 1996).

The conformity portion of the Court's ruling does not impact the redesignation request for the Illinois portion of the Greater Chicago area except to the extent that the Court, in its June 8, 2007, decision clarified that, for those areas with MVEBs for the 1-hour ozone standard, anti-backsliding requires that these MVEBs must be used for 8-hour conformity determinations until replaced by MVEBs for the 8-hour ozone standard. To meet this requirement, conformity determinations in such areas must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93. Note below that EPA is proposing to find adequate and approve 8-hour MVEBs established by Illinois' 8-hour ozone maintenance plan for the Illinois portion of the Greater Chicago area.

Severe ozone nonattainment areas must meet the CAA requirement for section 185 source penalty fees. Since the Greater Chicago area was classified as severe nonattainment under the 1-hour ozone standard, the Illinois portion of the Greater Chicago area and the Illinois SIP for this area are subject to this CAA requirement. It should be noted, however, that on December 30, 2008 (73 FR 79652), EPA published a final rule making a determination that the Greater Chicago area had attained the 1-hour ozone standard and confirming that this finding of attainment relieved Illinois (and Indiana) of the obligation to adopt section 185 source penalty fee regulations for this area.

Finally, with regard to the contingency measure requirements under sections 172(c)(9) and 182(c)9) of the CAA, it is noted that these requirements must be addressed in state ozone Reasonable Further Progress (RFP) and attainment demonstration plans. Illinois addressed these requirements in the 1-hour ozone RFP and attainment demonstration plans for the Illinois portion of the Greater Chicago area by adopting and implementing extra VOC and NO_X emission controls that go beyond the emission reductions needed for RFP and attainment of the 1-hour ozone standard. EPA approved these ozone control plans, including their contingency elements: VOC-15 percent RFP plan (December 18, 1997, 62 FR 66279); post-1996 RFP plan (December 18, 2000, 65 FR 78961); and, 1-hour ozone attainment demonstration and post-1999 RFP plan (November 13, 2001, 66 FR 56904). Therefore, Illinois has met the contingency requirements of sections 172(c)(9) and 182(c)(9) of the CAA for the 1-hour ozone standard. As noted later in this proposed rule, Illinois has committed to retain and to implement all VOC and NO_X emission control measures under the 1-hour ozone RFP and attainment plans for the Illinois portion of the Greater Chicago area.

IV. What are the criteria for redesignation?

The CAA provides the basic requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA authorizes redesignation provided that: (1) The Administrator determines that the area has attained the applicable NAAQS based on current air quality data; (2) the Administrator has fully approved an applicable state implementation plan for the area under section 110(k) of the CAA; (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable emission reductions resulting from implementation of the applicable SIP, Federal air pollution control regulations, and other permanent and enforceable emission reductions; (4) the Administrator has fully approved a maintenance plan for the area meeting the requirements of section 175A of the CAA; and, (5) the state has met all requirements applicable to the area under section 110 and part D of the CAA.

EPA provided guidance on redesignations in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990 on April 16, 1992 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070).

Two significant policy documents affecting the review of ozone redesignation requests are the following: (1) ''Procedures for Processing Requests To Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (the September 4, 1992 Calcagni memorandum); and, (2) ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard,'' Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995 (the May 10, 1995 Clean Data Policy memorandum). Additional guidance on processing redesignation requests is included in the following documents:

- ''Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas,'' Memorandum from G.T. Helms, Chief Ozone/Carbon Monoxide Programs Branch, April 30, 1992;
- ''Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;
- ''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (Act) Deadlines,'' Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;
- ''Technical Support Documents (TSDs) for Redesignation of Ozone and Carbon Monoxide (CO) Nonattainment Areas,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;
- ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992,'' Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993;
- ''Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas,'' Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, November 30, 1993; and,
- ''Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994.

V. What is EPA's analysis of the State's ozone redesignation request?

EPA is proposing to approve Illinois' ozone redesignation request for the Illinois portion of the Greater Chicago area with a determination that the Greater Chicago area has attained the 1997 8-hour ozone standard based on current ozone monitoring data for 2008–2010 and that the State of Illinois and the Illinois portion of this area have met all other applicable redesignation criteria for the 1997 8-hour ozone standard under section 107(d)(3)(E) of the CAA. The basis for EPA's proposed approval of the redesignation request is discussed in more detail as follows.

A. Has the Greater Chicago area attained the 1997 8-hour ozone NAAQS?

An area may be considered to be attaining the 1997 8-hour ozone NAAQS if there are no violations of the NAAQS, as determined in accordance with 40 CFR 50.10 and appendix I, based on the most recent 3 consecutive years of complete, quality-assured air quality monitoring data at all ozone monitoring sites in the area and in its nearby downwind environs. To attain this standard, the average of the annual fourth-high daily maximum 8-hour average ozone concentrations measured and recorded at each monitoring site over the most recent 3-year period (the monitoring site's ozone design value) must not exceed 0.084 ppm. The data must be collected and quality-assured in accordance with 40 CFR part 58, and must be recorded in EPA's Air Quality System (AQS).

As part of the July 23, 2009, ozone redesignation request, IEPA summarized the annual fourth-high daily maximum 8-hour ozone concentrations and the 3-year 8-hour ozone design values for the period of 2006–2008 for all ozone monitoring sites in the Greater Chicago area. This ozone data summary also includes ozone concentration data for the Chiwaukee Prairie monitoring site in Wisconsin, an ozone peak downwind impact site for ozone precursor emissions originating in the Greater Chicago area. The September 16, 2011, updated ozone redesignation request from Illinois also summarized the annual fourth-high ozone data for all monitoring sites for the period of 2006–2008.

Table 1 summarizes the monitoring site-specific annual fourth-high daily maximum 8-hour ozone concentrations and 3-year ozone design values for all monitoring sites covered in Illinois' ozone redesignation request for the period of 2006–2010. Note that we have included 2009 and 2010 ozone monitoring data in this summary. These additional data were obtained from EPA's AQS. Since Illinois' July 23, 2009, submittal of the ozone redisignation request, 2009 and 2010 ozone monitoring data have been quality assured and submitted to EPA's AQS.

TABLE 1—ANNUAL FOURTH-HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS IN PARTS PER MILLION (PPM) AND 3-YEAR AVERAGES

State/County	Monitoring site (AQS Site ID)	2006	2007	2008	2009	2010	3-Year average 2006–2008	3-Year average 2008–2010
Illinois:								
Cook	Alsip (170310001)	0.078	0.085	0.066	0.069	0.073	0.076	0.69
Cook	Chicago—SWFP (170310032)	0.075	0.082	0.067	0.065	0.074	0.074	0.069
Cook	Chicago—University of Chicago (170310064)	0.070	0.079	0.063	0.060	0.071	0.070	0.065
Cook	Chicago—Jardine (170310072)	0.065	0.075	0.063	0.062	0.071	0.067	0.065
Cook	Chicago—Commonwealth Edison (170310076)	0.075	0.080	0.066	0.067	0.068	0.073	0.067
Cook	Chicago—Taft (170311003)	0.077	0.079	0.064	0.064	0.070	0.073	0.066
Cook	Lemont (170311601)	0.070	0.085	0.071	0.067	0.073	0.075	0.070
Cook	Cicero (170314002)	0.060	0.068	0.060	0.067	0.068	0.062	0.065
Cook	Des Plaines (170314007)	0.065	0.078	0.057	0.050	0.064	0.066	0.057
Cook	Northbrook (170314201)	0.068	0.076	0.065	0.069	0.072	0.069	0.069
Cook	Evanston (170317002)	0.072	0.080	0.058	0.064	0.067	0.070	0.063
DuPage	Lisle (170436001)	0.062	0.072	0.057	0.059	0.064	0.063	0.060
Kane	Elgin (170890005)	0.062	0.075	0.061	0.068	0.069	0.066	0.066
Lake	Waukegan (170971002)	0.071	0.081	0.063	0.057	0.074	0.071	0.065
Lake	Zion (170971007)	0.068	0.080	0.069	0.075	0.078	0.072	0.074
McHenry	Cary (171110001)	0.057	0.074	0.065	0.066	0.065	0.065	0.065
Will	Braidwood (171971011)	0.068	0.071	0.060	0.063	0.065	0.066	0.063
Indiana:								
Lake	Gary (180890022)	0.073	0.085	0.062	0.058	0.064	0.073	0.061
Lake	Whiting (180890030)	0.081	0.088	0.062	0.062	0.069	0.077	0.064
Lake	Hammond (180892008)	0.075	0.077	0.068	0.065	0.069	0.073	0.067
Porter	Valparaiso (181270026)	0.071	0.080	0.061	0.064	0.061	0.070	0.062
Wisconsin:								
Kenosha	Chiwaukee Prairie (550590019)	0.079	0.085	0.072	0.071	0.081	0.078	0.075

IEPA notes that the 2006–2008 ozone design values for all monitoring sites are below the 0.084 ppm attainment level. We also note that the 2008–2010 ozone design values for all monitoring sites are below the 0.084 ppm attainment level. Therefore, the ozone monitoring data for the Greater Chicago area and for Chiwaukee Prairie in Wisconsin show attainment of the 1997 8-hour ozone standard.

IEPA commits to continue ozone monitoring at the Illinois monitoring sites in accordance with EPA-approved monitoring plans, as required to confirm maintenance of the 1997 8-hour ozone standard. Should changes in the ozone monitoring system become necessary, IEPA commits to work with the EPA to assure the continued adequacy of the ozone monitoring network in the Illinois portion of the Greater Chicago area.

Based on the available ozone monitoring data, we conclude that the Greater Chicago area has attained the 1997 8-hour ozone standard, and has continued to attain this ozone standard through the most recent three years of quality-assured ozone monitoring data.

B. Has State of Illinois met all applicable requirements of Section 110 and Part D of the CAA for the Illinois portion of the Greater Chicago area, and does the Illinois portion of the Greater Chicago area have a fully approved SIP under Section 110(k) of the CAA?

In April 2004, the Greater Chicago area was designated as a moderate nonattainment area with a June 15, 2010, attainment deadline for the 1997 8-hour ozone standard. Prior to this, the Greater Chicago area had been designated as a severe nonattainment area with a November 15, 2007,

attainment deadline for the 1-hour ozone standard. As a result of these nonattainment designations, the State of Illinois was required to submit SIP revisions that meet certain ozone planning and emission control requirements of the CAA.

The September 4, 1992, Calcagni memorandum confirms that a state with an area seeking redesignation to attainment has to fully adopt rules and meet SIP requirements that come due prior to the submittal of a complete redesignation request. See also 60 FR 12459, 12465–66 (March 7, 1995) (redesignation of Detroit-Ann Arbor, Michigan); 68 FR 25424, 25427 (May 12, 2003) (redesignation of St. Louis); *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004); and, 70 FR 19895, 19900 (April 15, 2005) (redesignation of Cincinnati). Furthermore, requirements of the CAA that come due subsequent to the state's submittal of a complete redesignation request would continue to be applicable to the area until redesignation to attainment is approved, but are not required as a prerequisite for redesignation (see section 175A(c) of the CAA). If the redesignation is disapproved or is not completed due to a subsequent violation of the ozone standard in the area prior to final approval of the state's ozone redeignation request, the state remains obligated to fulfill these CAA requirements.

We are proposing to determine that the State of Illinois and the Illinois portion of the Greater Chicago area have met all currently applicable SIP requirements for purposes of redesignation of the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone standard under section 110 and part D of the CAA. We have determined that the Illinois SIP, with the exception of the 2002 base year VOC and NO_X emission inventories and certain VOC RACT rules: (1) Meets all SIP requirements currently applicable for purposes of redesignation under part D of title I of the CAA, in accordance with section 107(d)(3)(E)(v) of the CAA; and, (2) is fully approved with respect to all applicable requirements for purposes of redesignation to attainment of the 1997 8-hour ozone standard, in accordance with section 107(d)(3)(E)(ii) of the CAA.

As discussed below in section VII, EPA is proposing to approve Illinois' 2002 base year VOC and NO_X emission inventories as meeting the SIP emission inventory requirement of section 182(a)(1) of the CAA. If EPA approves the emission inventories in a final rule, Illinois will have met the ozone precursor emission inventory requirements of the CAA.

In the September 16, 2011, submittal the IEPA submitted VOC emission control regulations and other rule revisions needed to meet the VOC RACT requirements of the CAA.[3] On November 30, 2011, EPA proposed to approve all of these regulations and rule revisions as revisions of the Illinois SIP. If these VOC emission control regulations and revised rules are approved through a final rulemaking and are incorporated into the Illinois SIP, Illinois will have met the CAA requirements for VOC RACT.

Recognizing that the base year VOC and NO_X emission inventories and VOC RACT rules must be approved on or before we complete final rulemaking approving Illinois' ozone redesignation request, we determine here that, assuming that these approvals occur, Illinois will have met all applicable section 110 and part D SIP requirements of the CAA for purposes of approval of Illinois' ozone redesignation request for the Illinois portion of the Greater Chicago area. In making this determination, we have ascertained what SIP requirements are applicable to the Illinois portion of the Greater Chicago area for purposes of redesignation.

1. The Illinois Portion of the Greater Chicago Area Has Met All Applicable Requirements of Section 110 and Part D of the CAA for Purposes of Redesignation

a. Section 110: General Requirements for Implementation Plans

Section 110(a) of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the SIP implemented by a state must have been adopted by the state after reasonable public notice and hearing, and that, among other things, it must: (1) Include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; (2) provide for establishment and operation of appropriate devices, methods, systems and procedures necessary to monitor ambient air quality; (3) provide for implementation of a source permit program to regulate the modification and construction of stationary sources within the areas covered by the plan; (4) include provisions for the implementation of part C PSD and part D NSR permit programs; (5) include criteria for stationary source emission control measures, monitoring, and reporting; (6) include provisions for air quality modeling; and, (7) provide for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires SIPs to contain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address transport of certain air pollutants, e.g., NO_X SIP call.[4] However, the section 110(a)(2)(D) SIP requirements are not linked with a particular area's designation and classification. EPA concludes that the SIP requirements linked with an area's designation and classification are the relevant measures to evaluate when reviewing a redesignation request for the area. The section 110(a)(2)(D) requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area within the state. Thus, we believe these requirements are not applicable requirements for purposes or redesignation. See 65 FR 37890 (June 15, 2000), 66 FR 50399 (October 19, 2001), 68 FR 25418, 25426–27 (May 13, 2003).

Further, we believe that section 110(a)(2) elements, other than those described above that are not connected with nonattainment plan submissions and that are not linked with an area's attainment status are also not applicable requirements for purposes of redesignation. A state remains subject to these requirements regardless of an area's designation and after the area is redesignated to attainment. We conclude that only the section 110 and part D requirements that are linked with an area's designation and classification are the relevant measures for evaluating this aspect of a redesignation request. This approach is consistent with EPA's policy on applicability of conformity and oxygenated fuel requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See: Reading, Pennsylvania proposed and final rulemakings (61 FR 53174–53176, October 10, 1996 and 62 FR 24826, May

[3] Required VOC RACT rule revisions were also submitted by the IEPA on July 29, 2010 and September 29, 2011.

[4] On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP call requiring the District of Columbia and 22 States to reduce emissions of NO_X in order to reduce the transport of ozone and ozone precursors. In compliance with EPA's NO_X SIP Call, IEPA developed rules governing the control of NO_X emissions from Electric Generating Units (EGUs), major non-EGU industrial boilers and turbines, and major cement kilns. EPA approved Illinois' rules as fulfilling the requirements of the NO_X SIP call on November 8, 2001, at 66 FR 56449 and 66 FR 56454.

7, 1997); Cleveland-Akron-Loraine, Ohio final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati, Ohio ozone redesignation (65 FR 37890, June 19, 2000), and the Pittsburgh, Pennsylvania ozone redesignation (66 FR 50399, October 19, 2001).

We have reviewed the Illinois SIP and conclude that it meets the general SIP requirements under section 110 of the CAA applicable to the State's request for redesignation. EPA has previously approved provisions of the Illinois SIP addressing section 110 elements under the 1-hour ozone standard (40 CFR 52.720 and 40 CFR 52.722). Further, in a submittal dated December 12, 2007, Illinois confirmed that the State continues to meet the section 110(a)(2) infrastructure requirements for the 8-hour ozone standard. EPA approved elements of this Illinois submittal on July 13, 2011, at 76 FR 41075. The requirements of section 110(a)(2), however, are statewide requirements that are not linked to the 8-hour ozone nonattainment status of the Illinois portion of the Greater Chicago area. Therefore, EPA concludes that these infrastructure elements are not applicable requirements for purposes of review of the State's 8-hour ozone redesignation request.

b. Part D Requirements

EPA has determined that, if EPA finalizes the approval of the 2002 base year VOC and NO_X emission inventories and the Illinois VOC RACT rules, discussed below under the heading ''Subpart 2 Section 182(a) and (b) Requirements,'' the Illinois SIP will meet the SIP requirements applicable for purposes of redesignation under part D of the CAA for the Illinois portion of the Greater Chicago area. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment area requirements applicable to all nonattainment areas. Subpart 2 of part D, which includes section 182 of the CAA, establishes additional, specific requirements for ozone nonattainment areas depending on an area's ozone nonattainment classification.

As noted above, the Greater Chicago area was classified as moderate nonattainment for the 1997 8-hour ozone standard under subpart 2 of part D of the CAA. Therefore, Illinois must meet the requirements of subpart 1 and subpart 2 of part D of the CAA applicable for purposes of redesignation. The applicable subpart 1 requirements are contained in sections 172(c)(1)–(9) and 176 of the CAA. The applicable subpart 2 requirements are contained in sections 182(a)–(b) (moderate nonattainment area requirements) of the CAA.

Subpart 1 Section 172 Requirements

A thorough discussion of the requirements contained in section 172 can be found in the General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992).

Section 172(c)(1) requires the state plans for all nonattainment areas to provide for the implementation of Reasonably Available Control Measures (RACM), including RACT at a minimum, as expeditiously as practicable. EPA interprets this requirement to impose a duty on all states with nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in the areas as components of the areas' attainment demonstrations (the attainment demonstrations must address RACM). Because attainment of the 1997 8-hour ozone standard has been reached in the Greater Chicago area, no additional RACM measures, beyond RACT, are needed to provide for attainment, and section 172(c)(1) requirements (other than RACT) are no longer considered to be applicable as a prerequisite for approval of Illinois' redesignation request, provided the Greater Chicago area continues to attain the standard until redesignation of the Illinois portion of the area occurs. See 57 FR 13498, 13564 (April 16, 1991), 40 CFR 51.918.

Section 172(c)(2) requires plans for all nonattainment areas to provide for RFP toward attainment of the NAAQS. This requirement is not relevant to the Greater Chicago area for purposes of redesignation because the Greater Chicago area has monitored attainment of the 1997 8-hour ozone standard. General Preamble, 57 FR 13564. In addition, pursuant to EPA's determination of attainment of the 1997 8-hour ozone standard for the Greater Chicago area, the requirement for RFP under section 172(c)(2), as well as the section 172(c)(9) contingency measure requirement, is suspended pursuant to 40 CFR 51.918.

Section 172(c)(3) requires submission and EPA approval of a comprehensive, accurate, and current inventory of actual emissions. This requirement is superseded by the emission inventory requirement in section 182(a)(1) of the CAA. See the discussion of Illinois' emissions inventory for the Illinois portion of the Greater Chicago area below in section VII of this proposed rule.

Section 172(c)(4) requires the identification and quantification of emissions for major new and modified stationary sources to be allowed in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources in the nonattainment area. EPA approved the Illinois NSR program [5] on December 17, 1992 (57 FR 59928), September 27, 1995 (60 FR 49780), and May 13, 2003 (68 FR 25504). Further, EPA has determined that, since PSD requirements [6] will apply after redesignation, an area being redesignated to attainment need not comply with the requirement that a NSR program be approved prior to redesignation, provided that the state demonstrates maintenance of the NAAQS in the area without implementation of part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, titled ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' Illinois has demonstrated that the Greater Chicago area will be able to maintain the 1997 8-hour ozone standard without the continued implementation of the State's part D NSR program. Therefore, EPA concludes that the State need not have a fully approved part D NSR program as an applicable requirement for approval of the State's ozone redesignation request. The State's PSD program will become effective in the Chicago area upon redesignation to attainment of the 1997 8-hour ozone standard. See redesignation rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and, Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

Section 172(c)(6) requires the SIP to contain emission control measures necessary to provide for attainment of the standard. Because attainment has been reached in the Greater Chicago area, no additional emission control measures are needed to provide for attainment of the standard.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, in

[5] The NSR program controls the growth and permitting of major source emissions in ozone nonattainment areas.

[6] PSD requirements control the growth of new source emissions in areas designated as attainment for a NAAQS.

section V.B.1.a, we conclude the Illinois SIP meets the requirements of section 110(a)(2) applicable for purposes of redesignation.

Section 176 Conformity Requirements

Section 176(c) of the CAA requires States to establish criteria and procedures to ensure that Federally-supported or funded activities, including highway projects, conform to the air quality planning goals of the SIPs. The requirement to determine conformity applies to transportation plans, programs, and projects developed, funded, or approved under title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity). State conformity SIP revisions must be consistent with Federal conformity regulations relating to consultation, enforcement, and enforceability, which EPA promulgated pursuant to CAA requirements.

EPA thinks that it is reasonable to interpret the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) for two reasons. First, the requirement to submit SIP revisions to comply with the conformity provisions of the CAA continues to apply to areas after redesignation to attainment since such areas would be subject to section 175A maintenance plans. Second, EPA's Federal conformity rules require the performance of conformity analyses in the absence of Federally-approved state rules. Therefore, because areas are subject to the conformity requirements regardless of whether they are redesignated to attainment and, because they must implement conformity under Federal rules if state rules are not yet approved, EPA believes it is reasonable to view these requirements as not applying for purposes of evaluating a redesignation request. See *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. See also 60 FR 62748, 62749–62750 (December 7, 1995) (Tampa, Florida).

EPA approved Illinois' general conformity SIP on December 23, 1997 (62 FR 67000). Illinois does not have a Federally-approved transportation conformity SIP. However, Illinois performs conformity analyses pursuant to EPA's Federal conformity rules. Illinois has submitted on-road motor vehicle emission budgets for the Illinois portion of the Greater Chicago area of 117.23 tons VOC per ozone season weekday and 373.52 tons NO_X per ozone season weekday for 2008 and 48.13 tons VOC per ozone season weekday and 125.27 tons NO_X per ozone season weekday for 2025, respectively. Illinois must use these MVEBs in any conformity determination that is effective on or after the effective date of the ozone maintenance plan approval.

Subpart 2 Section 182(a) and (b) Requirements

As set forth in the September 4, 1992, and September 17, 1993, EPA guidance memoranda referenced in section IV of this action, only those requirements which came due prior to Illinois' July 23, 2009, submittal of the request for redesignation of the Illinois portion of the Greater Chicago area must be fully approved into the SIP by the time EPA approves the redesignation of the area to attainment. These requirements are discussed below.

Comprehensive Emissions Inventory. Section 182(a)(1) requires the submission of a comprehensive, accurate, current emission inventory of ozone precursor emissions as a revision of the SIP. IEPA submitted inventories of 2002 VOC and NO_X emissions for the Illinois portion of the Greater Chicago area on June 21, 2006, to meet the requirements of section 182(a)(1). On September 16, 2011, IEPA supplemented the 2002 emissions inventory with updated on-road mobile source emission estimates based on the use of EPA's MOVES model. As discussed below, EPA is proposing to approve the 2002 emission inventories as meeting the section 182(a)(1) emission inventory requirement.

Emission Statements. Section 182(a)(3)(B) requires a State to adopt provisions in the SIP to require the owners or operators of stationary sources of VOC or NO_X to provide the state with annual statements of actual emissions from the sources. EPA approved Illinois' emission statement SIP revisions on September 9, 1993 (58 FR 47379), and May 15, 2002 (67 FR 34614).

Reasonable Further Progress and Attainment Demonstrations. On July 2, 2007, IEPA submitted an attainment demonstration for the Greater Chicago area and an RFP plan for the Illinois portion of the Greater Chicago area as required by section 182(b)(1) of the CAA. Because attainment has been reached,[7] section 182(b)(1) planning requirements are no longer considered to be applicable for purposes of redesignation as long as the area continues to attain the standard. If EPA finalizes approval of the redesignation of the Illinois portion of the Greater Chicago area, EPA will take no further action on the ozone attainment demonstration and RFP plan submitted by Illinois for this area.

VOC RACT. Section 182(b)(2) requires states with moderate ozone nonattainment areas to implement RACT under section 172(c)(1) with respect to each of the following: (1) All sources covered by a Control Technology Guideline (CTG) document issued between November 15, 1990, and the date of attainment; (2) all sources covered by a CTG document issued prior to November 15, 1990; and, (3) all other major non-CTG stationary sources.[8]

As required under the 1-hour ozone standard, Illinois submitted VOC RACT rules covering the second and third source categories above. EPA approved these VOC RACT rules on February 21, 1980 (45 FR 11472), November 21, 1987 (52 FR 45333), and September 9, 1994 (59 FR 46562).

EPA issued CTGs for five source categories in September 2006, three source categories in September 2007, and five source categories in September 2008. States with ozone nonattainment areas classified as moderate and above were required to submit VOC RACT for the source categories covered by these CTGs within one year after the release of each CTG, by September 2007, September 2008, and September 2009, respectively.

Illinois submitted a SIP revision to address all of the new CTGs on July 29, 2010, September 16, 2011, and September 29, 2011. EPA is taking action on these revisions in a separate rulemaking action. Full approval of IEPA's VOC RACT submittals is a prerequisite for approval of the redesignation of the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone standard.

NO_X RACT. Section 182(f) of the CAA establishes NO_X requirements for ozone nonattainment areas. Section 182(f)(1) generally requires major sources of NO_X to be covered by the same levels of emission controls as required for major sources of VOC. Since moderate (or above) ozone nonattainment areas are required to be covered by RACT rules for major VOC sources, these ozone nonattainment areas are also required to have NO_X RACT rules. Section 182(f)(1) of the CAA, however, also provides that the requirement for such NO_X emission

[7] EPA proposed, on September 24, 2009 (74 FR 48703), to find that the Greater Chicago nonattainment area had attained the 1997 8-hour ozone standard. EPA finalized this determination of attainment on March 12, 2010 (75 FR 12088).

[8] In moderate ozone nonattainment areas, major stationary sources of VOC are those that have a potential emit 100 tons VOC per year or more.

controls does not apply (can be waived) in an area if the Administrator determines that net air quality benefits are greater in the absence of the NO_X emission reductions. The NO_X emission control requirements can also be waived if the Administrator determines that additional reductions of NO_X emissions would not contribute to attainment of the ozone NAAQS.

In its July 29, 2010, submittal, IEPA requested a waiver from the NO_X RACT requirements based on the fact that the 1997 8-hour ozone standard had been attained in the Greater Chicago area and additional NO_X emission reductions in this area are not needed to attain the ozone standard. Based on a clean air determination for this area for the 1997 8-hour ozone standard, EPA granted Illinois a waiver from NO_X RACT for this area on February 22, 2011 (76 FR 9655).

Stage II Vapor Recovery. Section 182(b)(3) of the CAA requires states with moderate nonattainment areas to submit Stage II vapor recovery rules (requiring the capture of gasoline vapor at service stations during vehicle refueling). EPA approved Illinois' Stage II vapor recovery regulations on January 12, 1993 (58 FR 3841). Illinois has implemented and continues to implement Stage II vapor recovery rules in the Illinois portion of the Greater Chicago area.

Vehicle Inspection and Maintenance (I/M). Section 182(b)(4) of the CAA and EPA's final I/M regulations in 40 CFR part 85 require states with moderate (or above) ozone nonattainment areas to submit a fully adopted I/M programs as a revision of the SIP. EPA approved Illinois' enhanced I/M program on February 22, 1999 (64 FR 8517).

Thus, as discussed above, with EPA approval of the 2002 base year emission inventories and Illinois' VOC RACT submittals, the Illinois portion of the Greater Chicago area will satisfy the requirements applicable for purposes of redesignation under section 110 and part D of the CAA.

2. The Illinois Portion of the Greater Chicago Area Has a Fully Approved SIP for Purposes of Redesignation Under Section 110 of the CAA

If EPA issues a final approval of the 2002 base year emission inventories and the Illinois VOC RACT submittals, EPA will have fully approved the Illinois SIP for the Illinois portion of the Greater Chicago area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. EPA may rely on prior SIP approvals when rulemaking on a redesignation request (see page 3 of the September 4, 1992, John Calcagni memorandum; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998), *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)) plus any additional measures it may approve in conjunction with a redesignation action. See 68 FR 25412, 25426 (May 12, 2003).

Since the passage of the CAA of 1970, Illinois has adopted and submitted, and EPA has fully approved, SIP provisions addressing various required SIP elements under the 1-hour ozone standard. In this action, EPA is proposing to approve Illinois' 2002 base year emission inventories for the Illinois portion of the Greater Chicago area as meeting the requirement of section 182(a)(1) of the CAA. As noted above, in a separate rule, EPA is proposing action on the Illinois VOC RACT submittals.

No SIP provisions for the Illinois portion of the Greater Chicago area are currently disapproved, conditionally approved, or partially approved.

3. The Illinois Portion of the Greater Chicago Area Has a Fully Approved SIP and Meets Anti-Backsliding Requirements Under the 1-Hour Ozone Standard

The anti-backsliding provisions at 40 CFR 51.905(a)(1) prescribe 1-hour ozone NAAQS requirements that continue to apply after the revocation of the 1-hour ozone NAAQS for former 1-hour ozone nonattainment areas. 40 CFR 51.905(a)(1) provides that:

> The area remains subject to the obligations to adopt and implement the applicable requirements defined in 40 CFR 51.900(f), except as provided in paragraph (a)(1)(iii) of this section and except as provided in paragraph (b) of this section.

40 CFR 51.900(f), as amended by 70 FR 30592, 30604 (May 26, 2005), provides that:

> Applicable requirements means that for an area that the following requirements, to the extent such requirements applied to the area for the area's classification under section 181(a)(1) of the CAA for the one-hour NAAQS at the time of designation for the eight-hour NAAQS, remain in effect:
> (1) RACT.
> (2) I/M.
> (3) Major source applicability cut-offs for purposes of RACT.
> (4) ROP reductions.
> (5) Stage II vapor recovery.
> (6) Clean fuels fleet program under section 182(c)(4) of the CAA.
> (7) Clean fuels for boilers under section 182(e)(3) of the CAA.
> (8) TCMs during heavy traffic hours as provided under section 182(e)(4) of the CAA.
> (9) Enhanced (ambient) monitoring under section 182(c)(1) of the CAA.
> (10) TCMs under section 182(c)(5) of the CAA.
> (11) VMT provisions of section 182(d)(1) of the CAA.
> (12) NO_X requirements under section 182(f) of the CAA.
> (13) Attainment demonstration or alternative as provided under 40 CFR 51.905(a)(1)(ii).

In addition to applicable requirements listed under 40 CFR 51.900(f) and as discussed above, the state must also comply with the 1-hour anti-backsliding requirements discussed in the Court's decisions in *South Coast Air Quality Management Dist.* v. *EPA:* (1) NSR requirements based on the area's 1-hour ozone nonattainment classification; (2) section 185 source penalty fees; (3) contingency measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA for areas not making reasonable further progress toward attainment of the 1-hour ozone NAAQS, or for failure to attain the 1-hour ozone NAAQS; and, (4) transportation conformity requirements for certain types of Federal actions.

Pursuant to 40 CFR 51.905(c), the Illinois portion of the Greater Chicago area is subject to the obligations set forth in 40 CFR 51.905(a) and 40 CFR 51.900(f). The following paragraphs address the 1-hour ozone SIP requirements applicable to the Illinois portion of the Greater Chicago area pursuant to these anti-backsliding requirements and those discussed in the Court's decision in *South Coast Air Quality Management Dist.* v. *EPA.* Note that Illinois commits to continue to comply with these requirements unless revised through SIP revisions approved by EPA.

Prior to the revocation of the 1-hour ozone standard on June 15, 2005, the Greater Chicago area was classified as a severe nonattainment area for the 1-hour ozone standard with an attainment deadline of November 15, 2007, and, therefore, was subject to ozone SIP requirements for severe 1-hour ozone nonattainment areas (sections 182(a) through 182(d) of the CAA). In reviewing Illinois' ozone redesignation request for the Illinois portion of the Greater Chicago area, we assessed whether the area satisfied the CAA requirements under the 1-hour ozone standard. We conclude that this area and the State of Illinois have satisfied all anti-backsliding CAA requirements applicable to a severe ozone nonattainment area by complying with all applicable 1-hour ozone SIP requirements. The following discusses how the applicable CAA requirements have been met in the Illinois portion of the Greater Chicago area.

40 CFR 51.900(f)(1) RACT

Section 182(a)(2)(A) of the CAA requires RACT corrections. Section 182(b)(2) requires RACT for each category of VOC sources covered by a CTG and for all other major sources of VOC within an ozone nonattainment area. Section 182(d) specifies requirements for severe ozone nonattainment areas, including a major source emissions cut-off of 25 tons per year. Section 182(f), as discussed above in section V.B.2, requires major sources of NO_X in an ozone nonattainment area to be covered by emission control requirements equivalent to those required for major sources of VOC, unless EPA waives the NO_X emission control requirements as provided in section 182(f). The section 182(f) NO_X emission control requirements include NO_X RACT in ozone nonattainment areas required to implement VOC RACT for 1-hour ozone nonattainment areas classified as moderate or above.

Under the 1-hour ozone standard, EPA fully approved Illinois' VOC RACT regulations as SIP revisions for CTG sources and for major non-CTG sources through rulemakings on the following dates: February 21, 1980 (45 FR 11472); November 21, 1987 (52 FR 45333); and, September 9, 1994 (59 FR 46562). As noted elsewhere in this proposed rule, on September 16, 2011, Illinois EPA submitted final, adopted VOC emission control regulations covering CTG-source categories not yet addressed and covered by the Illinois ozone SIP. As noted above, on July 29, 2010, Illinois submitted a NO_X RACT waiver request for the Illinois portion of the Chicago area. On February 22, 2011, at 76 FR 9655, we approved Illinois' NO_X RACT waiver request for this area based on an ozone clean air determination. This suspended the NO_X RACT requirement for the Illinois portion of the Greater Chicago area for as long the Greater Chicago area continues to attain the 1997 8-hour ozone standard, and becomes permanent for the 1997 8-hour ozone standard if EPA approves the redesignation of the Illinois portion of the Greater Chicago area to attainment of this standard.

As noted elsewhere in this proposed rule, we cannot approve Illinois' ozone redesignation request in a final rule until we can also approve all of Illinois' required VOC RACT rules through a final rule. With these new final rule approvals, we can conclude that Illinois has met all RACT requirements under the 1-hour ozone standard, as well as the 1997 8-hour ozone standard.

40 CFR 51.900(f)(2) Vehicle I/M

Through rulemaking on February 22, 1999 (64 FR 8517), EPA fully approved Illinois' vehicle I/M program as meeting the enhanced I/M requirements of section 182(c)(3) of the CAA. Therefore, the Illinois portion of the Greater Chicago area meets the I/M requirements for severe 1-hour ozone nonattainment areas.

40 CFR 51.900(f)(3) Major Source Size Cutoff for RACT

We have determined that Illinois' VOC RACT rules for CTG source categories already incorporated into Illinois' ozone SIP and the new CTG-based VOC RACT rules currently being reviewed by the EPA cover source size cut-offs that are well below CTG-recommended major source cut-offs for severe ozone nonattainment areas. In addition, Illinois' major non-CTG source RACT rule covers all sources with the potential to emit VOC at or in excess of 25 tons per year. Therefore, Illinois' RACT rules meet the major source size cut-off requirement of section 182(d) of the CAA.

40 CFR 51.900(f)(4) ROP

Sections 182(b)(1)(A) and 182(c)(2)(B) of the CAA establish the ROP requirements for ozone nonattainment areas. EPA has fully approved Illinois' SIP revisions that demonstrate that Illinois achieved ROP in the Illinois portion of the Greater Chicago area. On December 18, 1997, at 62 FR 66279, EPA approved Illinois' plan to achieve a 15 percent reduction in VOC emissions in the Illinois portion of the Greater Chicago area, as required in section 182(b) of the CAA. On December 18, 2000, at 65 FR 78961, EPA approved Illinois' plan to achieve ROP between 1996 and 1999 in this area, meeting the ROP requirements of section 182(c) of the CAA. Finally, on November 13, 2001, at 66 FR 56904, EPA approved Illinois' plan to achieve ROP emission reductions for the period of 1999 through 2007. Therefore, Illinois has met all 1-hour ozone ROP requirements for the Illinois portion of the Greater Chicago area.

40 CFR 51.900(f)(5) Stage II Gasoline Vapor Recovery

On January 12, 1993 (58 FR 3841), EPA approved Illinois' Stage II gasoline vapor recovery rules for the Illinois portion of the Greater Chicago area as required by section 182(b)(3) of the CAA.

40 CFR 51.900(f)(6) Clean Fuel Fleet Program

On March 19, 1996, at 61 FR 11139, EPA approved Illinois' clean fuel fleet program rules as required by section 182(c)(4) of the CAA. Therefore, the State of Illinois has met this CAA requirement under the 1-hour ozone standard.

40 CFR 51.900(f)(7) Clean Fuels for Boilers

Section 182(e)(3) of the CAA, which requires clean fuels for boilers, does not apply to the Greater Chicago area. This CAA requirement only applies to extreme ozone nonattainment areas.

40 CFR 51.900(f)(8) Traffic Control Measures During Heavy Traffic Hours

This requirement applies to areas subject to section 182(e)(4) of the CAA, which covers extreme ozone nonattainment areas, and, therefore, does not apply to the Greater Chicago area.

40 CFR 51.900(f)(9) Enhanced Ambient Monitoring

On February 25, 1994, EPA fully approved Illinois' SIP revision establishing an enhanced monitoring program for ozone in the Illinois portion of the Greater Chicago area. Therefore, Illinois has complied with the enhanced monitoring requirement of section 182(c)(1) of the CAA.

40 CFR 51.900(f)(10) Transportation Control Measures

Within six months of November 15, 1990, and every three years thereafter, section 182(c)(5) of the CAA requires states to submit a demonstration that current aggregate vehicle mileage, aggregate vehicle emissions, congestion levels, and other relevant traffic-related and vehicle emissions-related factors (collectively ''relevant parameters'') are consistent with those used for the area's ozone attainment demonstration for serious and above 1-hour ozone nonattainment areas. If the levels of relevant parameters that are projected in the attainment demonstration are exceeded, a state has 18 months to develop and submit a revision to the SIP to include TCMs to reduce mobile source emissions to levels consistent with the emission levels in the attainment demonstration.

On December 26, 2000, Illinois submitted a SIP revision request consisting of an adopted emissions control strategy and a demonstration that the Greater Chicago area would attain the 1-hour ozone standard by November 15, 2007, the statutory attainment deadline for the area. EPA

approved this requested SIP revision on November 13, 2001 (66 FR 56904). This SIP revision provided base period mobile source information for the Chicago area that can be compared to subsequent mobile source information needed to demonstrate compliance with section 182(c)(5) of the CAA. Through revisions to State's emissions inventory data, submitted to EPA every three years, Illinois has updated the mobile source emissions, and related mobile source data, in the Illinois portion of the Greater Chicago area on a three-year cycle. These updated mobile source emissions can be compared to those documented in the December 26, 2000 Illinois submittal to show the downward trend in mobile source emissions. EPA, therefore, concludes that Illinois has complied with the requirements of section 182(c)(5), has no currently due section 182(c)(5) obligations.

In addition, the section 182(c)(5) requirements are also included in those measures subject to EPA's interpretation under EPA's May 10, 1995, Clean Data Policy memorandum. That is, attainment of the 1-hour ozone standard suspends the need for the State to submit additional TCMs under section 182(c)(5) of the CAA. EPA, therefore, concludes that, since the Greater Chicago area is attaining the 1-hour ozone standard,[9] any requirement for submitting the section 182(c)(5) measures for the Illinois portion of the Greater Chicago area is suspended. See also 40 CFR 51.918.

40 CFR 51.900(f)(11) Vehicle Miles Travelled

Section 182(d)(1)(A) of the CAA requires severe ozone nonattainment areas to offset the growth in emissions attributed to growth in VMT; to select and implement TCMs necessary to comply with the periodic emission reduction requirements of sections 182(b) and (c); and, to consider TCMs specified in section 108(f) of the CAA, and implement TCMs as necessary to demonstrate attainment with the ozone standard. Through rulemaking on September 21, 1995, at 60 FR 48896, EPA approved Illinois' TCMs as meeting these requirements of the CAA.

40 CFR 51.900(f)(12) NO_X Requirements Under Section 182(f)

As noted above, EPA approved a NO_X emissions control waiver for the Illinois portion of the Greater Chicago area for the 1-hour ozone standard. See 61 FR 2428, January 26, 1996. In addition, we have approved Illinois' NO_X emission control regulations, adopted in response to EPA's NO_X SIP call. See 66 FR 56449 and 66 FR 56454, both published on November 8, 2001.

40 CFR 51.900(f)(13) Ozone Attainment Demonstration

As noted above, on November 13, 2001, at 66 FR 56904, EPA fully approved Illinois' 1-hour ozone attainment demonstration SIP revision for the Greater Chicago area. Therefore, Illinois has met the ozone attainment demonstration requirements of sections 182(b)(1)(A) and 182(c)(2)(A) of the CAA for the 1-hour ozone standard.

New Source Review

As noted elsewhere in this proposed rule, EPA believes that a part D NSR program is not an applicable requirement for purposes of evaluating an ozone redesignation request. EPA has determined that states with areas being redesignated to attainment need not have an approved part D NSR program, provided that the states demonstrate maintenance of the standard without part D NSR programs in effect.

Nonetheless, as also discussed above, the Court's decision in *South Coast Air Management Dist.* v. *EPA* preserved 1-hour part D NSR requirements as an anti-backsliding requirement. Section 182(a)(2)(C) of the CAA requires states to adopt part D NSR permit programs and to correct the existing part D NSR permit programs to meet EPA NSR guidance issued prior to 1990. EPA approved Illinois' NSR permit program as meeting EPA's guidance and CAA part D NSR requirements for the 1-hour ozone standard, including the requirements in sections 182(c)(6), (c)(7) and (c)(8), and the source offset requirements in section 182(d)(2), through rulemakings on September 27, 1995 (60 FR 49778).

Regardless of how one views the part D NSR requirements of the CAA for purposes of redesignation, we concluded that Illinois has met the NSR requirements with regard to Illinois' ozone redesignation request. The State has an approved NSR program, and the approval status of this NSR program is not relevant to Illinois' ozone redesignation request.

Section 185 Source Emission Penalty Fees

On December 30, 2008 (73 FR 79652), EPA finalized a determination that the Greater Chicago area had attained the 1-hour ozone standard based on 2005–2007 ozone data. Based on the determination of attainment, the section 185 fee requirements no longer apply to the Illinois portion of the Greater Chicago area and to the State of Illinois.

Contingency Measures

Sections 172(c)(9) and 182(c)(9) of the CAA require the ozone control portion of SIPs to contain measures to be implemented in the event that any milestone (standard attainment date, rate-of-progress emission reduction milestone dates, etc.) in the SIP is missed. EPA approved Illinois' contingency measures for attainment of the 1-hour ozone standard in the Greater Chicago area in our approval of the State's 1-hour ozone attainment plan. See 66 FR 56904, November 13, 2001.

Transportation Conformity

The transportation conformity portion of the court's ruling in *South Coast Air Quality Management District* v. *EPA* does not impact the redesignation request for the Illinois portion of the Greater Chicago area because there are no transportation conformity requirements that are relevant to redesignation requests for any standard, including the requirement for a state to submit a transportation conformity SIP.[10] Under longstanding EPA policy, EPA thinks that it is reasonable to interpret the conformity SIP requirements as not applying for purposes of evaluating a redesignation request under section 107(d) because State conformity rules are still required after redesignation and Federal conformity rules apply where state rules have not been approved. See 40 CFR 51.390. Also see *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation, and 60 FR 62748 (December 7, 1995) (Tampa, Florida ozone redesignation).

Conclusions

For the above reasons, EPA concludes that Illinois has met all applicable part D SIP requirements for the 1-hour ozone standard as addressed in the court's and EPA's anti-backsliding requirements for the purposes of redesignation of the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone standard. It is again noted that the State of Illinois has committed in its maintenance plan to maintain the VOC and NO_X emission controls already in place and included in Illinois' ozone SIP, as approved by EPA.

[9] See 73 FR 79652 (December 30, 2008).

[10] CAA section 176(c)(4)(E) requires states to submit revisions to their SIPs to reflect certain Federal criteria and procedures for determining transportation conformity. Transportation conformity SIPs are different from MVEBs that are established in control strategy SIPs and maintenance plans.

C. Are the air quality improvements in the Greater Chicago area due to permanent and enforceable emission reductions?

EPA finds that Illinois has demonstrated that the observed air quality improvement in the Greater Chicago area is due to permanent and enforceable reductions in emissions resulting from the implementation of the Illinois and Indiana SIPs, Federal measures, and other State-adopted measures. As discussed below, Illinois made this demonstration by considering VOC and NO_X emissions in the entire Greater Chicago area as well as emission reductions in upwind areas (primarily resulting from the implementation of EPA's NO_X SIP call) contributing to pollution transport into the Greater Chicago area.

In making this demonstration, Illinois first determined and documented the changes in VOC and NO_X emissions in the Illinois portion of the Greater Chicago area between 2002 (a standard-violation year) and 2008 (an attainment year). Second, the State documented the VOC and NO_X emission controls that have been implemented in the Greater Chicago area. Illinois demonstrated that the reductions in emissions and the corresponding improvement in air quality over the intervening period (2002–2008) can be attributed to a number of regulatory control measures that the Greater Chicago area and upwind areas have implemented in recent years.

1. Permanent and Enforceable Controls Implemented

The following is a discussion of the permanent and enforceable emission control measures that have been implemented in the Greater Chicago area and in upwind areas that have resulted in VOC and NO_X emission reductions subsequent to the ozone standard violation period (2001–2003) in the Greater Chicago area.

a. Attainment Demonstration Emission Control Measures

On March 18, 2009, IEPA submitted an ozone attainment demonstration plan for the Greater Chicago area to EPA. Even though EPA has not taken action on this attainment demonstration as a revision of the Illinois SIP,[11] Illinois notes that the VOC and NO_X emission controls contained in the attainment plan have been implemented, resulting in VOC and NO_X emission reductions that have contributed to attainment of the 1997 8-hour ozone standard in the Greater Chicago area. The implemented emission control measures include the following:

- NO_X SIP call emission controls
- New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPS), and Maximum Available Control Technology (MACT) standards for new sources
- VOC Solvent Category Emission Controls: Aerosol Coatings; Architectural and Industrial Maintenance (AIM) Coatings; and Consumer Solvents
- Enhanced Vehicle Inspection and Maintenance
- Reformulated Gasoline
- Federal Tier 2 Motor Vehicle Emission Standards and Gasoline Sulfur Control Requirements
- Federal On-Highway Heavy-Duty Engine and Vehicle Standards, and Federal Highway Diesel Fuel Sulfur Control Requirements
- Federal Off-Road Mobile Source Emission Control Programs Incorporated into EPA's NONROAD Emissions Model, including EPA's Nonroad Diesel Emissions Control Rule and Evaporative Large Spark Ignition and Recreational Vehicle Standards
- Federal Tier 4 Nonroad Diesel Engine Standards and Diesel Fuel Sulfur Content Restrictions
- Marine Compression-Ignition Engine Standards and Locomotive Engine Standards
- Consent Decrees requiring emission controls for: Dynergy Midwest Generation; Conoco Phillips; CITGO; Exxon-Mobil; Marathon Ashland; and Archer Daniels Midland.

All of these emission controls are permanent and are currently being enforced by the State or by the Federal government.

b. Reasonable Further Progress (RFP)

Since the Greater Chicago area was classified as a moderate nonattainment area for the 1997 8-hour ozone standard, Illinois was required to achieve a 15 percent net reduction in VOC emissions in the Illinois portion of the Greater Chicago area between 2002 and 2008 to meet the RFP requirements of CAA section 182(b)(1)(A). These emission reductions were primarily achieved through the implementation of the emission controls listed above for the ozone attainment demonstration plan. These emission controls resulted in a 15.7 percent reduction in VOC emissions in the Illinois portion of the Greater Chicago area between 2002 and 2008, and continued to provide additional VOC emission controls in 2009 and 2010. IEPA estimates that these VOC emission controls resulted in a VOC emission reduction of 210 tons per day between 2002 and 2008 in the Illinois portion of the Greater Chicago area.

c. Reasonably Available Control Technology

RACT is required for all major stationary sources of VOC in the Greater Chicago area. Since the Greater Chicago area was designated as a moderate nonattainment area for ozone under the 1997 8-hour ozone standard, a major stationary source is any source that has a potential to emit VOC equal to or greater than 100 tons per year. EPA defines RACT as the lowest emission limitation that a source is capable of meeting by the application of control technology that is reasonably available considering technological feasibility and economic reasonableness (70 FR 71612, November 29, 2005). The sum of emissions from all emission units at a source facility determines if the source facility is a major source and, therefore, subject to RACT requirements.

Sections 172 and 182(b)(2) of the CAA required implementation of VOC RACT for sources that are subject to CTGs that have been published by the EPA. In addition to CTG source categories, major VOC sources that are not covered by any CTG must also be covered by State RACT regulations.

Illinois has adopted and implemented all required VOC RACT regulations with the exception of source categories covered by CTGs published in 2006, 2007, and 2008. The State has documented that the implemented VOC RACT rules have reduced VOC emissions in the Illinois portion of the Greater Chicago area, contributing to the attainment of the 1997 8-hour ozone standard in the Greater Chicago area.

d. Additional Emission Control Measures

In addition to VOC emission reductions resulting from the implementation of VOC RACT in the Illinois portion of the Greater Chicago area, IEPA points out that additional VOC emission reductions were achieved in this area as the result of the implementation of MACT and achieving NESHAPS for VOC sources that also emit toxic chemicals, and implementation of NSPS for new VOC sources. Illinois believes that all of these emission control requirements are more stringent than RACT, and, therefore, have resulted in additional VOC

[11] Since EPA has determined that the Greater Chicago nonattainment area has attained the 1997 8-hour ozone standard (March 12, 2010, 75 FR 12088), EPA concludes that it is not necessary for it to take action on Illinois' ozone attainment demonstration.

reductions in the Illinois portion of the Greater Chicago area.[12]

e. Federal Emission Control Measures

Reductions in VOC and NO_X emissions have occurred statewide and in upwind areas as a result of Federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include the following.

Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards. 40 CFR part 86, subpart S. These emission control requirements result in lower VOC and NO_X emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. EPA has estimated that, by the end of the phase-in period, the following vehicle NO_X emission reductions will occur nationwide: Passenger cars (light duty vehicles) (77 percent); light duty trucks, minivans, and sports utility vehicles (86 percent); and larger sports utility vehicles, vans, and heavier trucks (69 to 95 percent). VOC emission reductions are expected to range from 12 to 18 percent, depending on vehicle class, over the same period. Although some of these emission reductions occurred by the attainment years (2006–2008) in the Greater Chicago area, additional emission reductions will occur during the maintenance period for the Illinois portion of the Greater Chicago area. For example, the Tier 2 emission standards for passenger vehicles weighing over 8,500 pounds were not implemented until 2008 or later.

Heavy-Duty Diesel Engine Rule. EPA issued this rule in January 2001 (66 FR 5002). This rule includes standards limiting the sulfur content of diesel fuel, which went into effect in 2004. A second phase took effect in 2007, which further reduced the highway diesel fuel sulfur content to 15 parts per million, leading to additional reductions in combustion NO_X and VOC emissions. This rule is expected to achieve a 95 percent reduction in NO_X emissions from diesel trucks and buses.

Non-Road Diesel Rule. EPA issued this rule in June 2004 (69 FR 38958), which applies to diesel engines used in industries, such as construction, agriculture, and mining. It is estimated that compliance with this rule will cut NO_X emissions from non-road diesel engines by up to 90 percent. The non-road diesel rule was fully implemented by 2010.

NSPS, NESHAPS, and MACT. A broad range of emission sectors are subject to Federal NSPS, NESHAPS, and MACT standards with compliance deadlines that led to VOC emission reductions after 2002 and prior to 2008/2009.

f. Controls To Remain in Effect

Illinois commits to maintain all of the current emission control measures for VOC and NO_X after the Illinois portion of the Greater Chicago area is redesignated to attainment. Illinois also commits to submit any emission control revisions needed for maintenance of the ozone standard in the Greater Chicago area to the EPA as requested SIP revisions. Illinois has the legal authority and necessary resources to actively enforce against any violations of the State's air pollution emission control rules.

2. Emission Reductions

Illinois chose 2008 (the end of the 3-year period in which the Greater Chicago area first attained the 1997 8-hour ozone standard) as the attainment year. IEPA compared 2002 and 2008 VOC and NO_X emissions to show that emission reductions have occurred in the area, explaining the ozone air quality improvement in the area.

As required by sections 172(c)(3) and 182(a)(1) of the CAA and EPA's Phase 2 ozone implementation rule (November 29, 2005, at 70 FR 71612), IEPA prepared comprehensive VOC and NO_X emission inventories for 2002. These emission inventories and their documentation were submitted to the EPA in June 2006. Table 2 summarizes the 2002 VOC and NO_X emissions by source category and by pollutant for the Illinois portion of the Greater Chicago area. For a discussion of emission inventory preparation methods used to develop these emission inventories, see the discussion of 2002 base year emission inventories below in section VII of this proposed rule.

TABLE 2—TOTAL ANTHROPOGENIC VOC AND NO_X EMISSIONS IN THE ILLINOIS PORTION OF THE GREATER CHICAGO AREA IN 2002

[Tons per ozone season weekday]

Source category	VOC	NO_X
Point Sources	76.62	307.73
Area Sources	520.21	42.93
On-Road Mobile Sources	168.06	540.13
Off-Road Mobile Sources	233.77	326.65
Total	998.66	1217.44

To demonstrate that VOC and NO_X emissions have decreased between a standard violation year and the attainment year, IEPA documented the VOC and NO_X emissions in the Illinois portion of the Greater Chicago area for 2008 and compared these emissions to those in 2002.

For the attainment year, point source emissions were compiled from 2008 annual emission reports submitted to the IEPA, in compliance with the State's point source emission statement reporting regulations, and from EPA's Clean Air Markets Division emissions database for electric utilities. Area sources were projected from the 2002 area source emissions using source type-specific growth factors. On-road mobile source emissions were calculated using EPA's MOVES emissions model and vehicle miles travelled data provided by the Illinois Department of Transportation. Off-road emissions were calculated using EPA's NONROAD emissions model. These emission estimation procedures are consistent with those used to develop the 2002 emission inventories. Biogenic emissions were not included in the 2008 emission inventories (and also not in the 2002 emission inventories) because it was assumed that these emissions are

[12] It should be noted that Illinois' VOC RACT rules generally exclude sources subject to MACT, NSPS, and NESHAPS from VOC RACT rules' emission reduction requirements. Nonetheless, we agree that additional emission reduction requirements have further lowered VOC emissions in the subject area.

approximately constant over the time period (2002–2008) considered.

Table 3 summarizes the 2008 VOC and NO_X emissions in the Illinois portion of the Greater Chicago area. From this table and table 2, it can be seen that VOC and NO_X emissions have decreased significantly in the Illinois portion of the Greater Chicago area between 2002 and 2008. IEPA concludes that the decrease in VOC and NO_X emissions during the 2002–2008 period are primarily due to the implementation of permanent and enforceable emission controls, and are the primary cause (along with emission reductions in the Indiana portion of the Greater Chicago area) of the ozone air quality improvement in the Greater Chicago area. We concur with the State's conclusion.

TABLE 3—TOTAL ANTHROPOGENIC VOC AND NO_X EMISSIONS IN THE ILLINOIS PORTION OF THE GREATER CHICAGO AREA IN 2008

[Tons per ozone season weekday]

Source category	VOC	NO_X
Point Sources	53.27	154.50
Area Sources	351.51	38.56
On-Road Mobile Sources	117.23	373.52
Off-Road Mobile Sources	265.44	330.18
Total	787.45	896.76

One must also consider the total VOC and NO_X emissions for the Greater Chicago area. EPA has consistently concluded that emissions from all portions of ozone nonattainment areas have the potential to contribute to ozone standard violations anywhere within the ozone nonattainment areas. Therefore, for the Greater Chicago area, it is important to also consider the changes in VOC and NO_X emissions from the Indiana portion of the Greater Chicago area. In a March 12, 2010, proposed rulemaking (75 FR 12090) addressing an ozone redesignation request from the State of Indiana, we discussed the 2002, 2006, and 2010 VOC and NO_X emissions for Lake and Porter Counties, Indiana. Table 2 of that proposed rule (75 FR 12103) lists 2002 VOC and NO_X emissions for Lake and Porter Counties, and table 7 of that proposed rulemaking (75 FR 12106) lists 2006 and 2010 VOC and NO_X emissions for these counties. The 2006 and 2010 emissions may be interpolated to estimate the 2008 emissions for Lake and Porter Counties. Adding 2002 and estimated 2008 Lake and Porter Counties' emissions to those in tables 2 and 3 for the Illinois portion of the Greater Chicago area above gives the total 2002 and 2008 VOC and NO_X emissions for the Greater Chicago area. The total 2002 and 2008 VOC and NO_X emissions for the Greater Chicago area are listed in table 4 of this proposed rule. The change in emissions between 2002 and 2008 emissions for the Greater Chicago area shows that VOC and NO_X emissions have significantly decreased in this area between 2002 and 2008. We conclude that these emission reductions have contributed to attainment of the ozone standard in this area.

TABLE 4—2002 AND 2008 VOC AND NO_X EMISSIONS TOTALS IN THE GREATER CHICAGO AREA

[Tons per ozone season/summer weekday]

Source category	VOC 2002	VOC 2008
Point Sources	101.18	71.87
Area Sources	555.30	382.15
On-Road Mobile Sources	188.06	129.65
Off-Road Mobile Sources	268.86	281.06
Total VOC	1113.4	864.7
	NO_X 2002	NO_X 2008
Point Sources	494.17	272.82
Area Sources	48.65	45.08
On-Road Mobile Sources	595.13	422.89
Off-Road Mobile Sources	365.26	360.02
Total NO_X	1503.2	1100.8

Besides the 2002–2008 reductions in VOC and NO_X emissions in the Illinois and Indiana portions of the Greater Chicago area, IEPA also notes that upwind areas have lowered their VOC and NO_X emissions during this period. Illinois, however, has not documented these emission reductions in the redesignation request.

D. Does Illinois have a fully approvable ozone maintenance plan?

1. Maintenance Plan Requirements

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the maintenance plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the state must submit a revised maintenance plan which demonstrates that attainment of the NAAQS will continue to be maintained for 10 years following the initial 10-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation, as EPA deems necessary, to assure prompt correction of any future standard violations.

The September 4, 1992, John Calcagni memorandum provides additional guidance on the content of maintenance plans. The memorandum clarifies that an ozone maintenance plan should, at minimum, address the following: (1) The attainment VOC and NO_X emission inventories; (2) a maintenance demonstration showing maintenance for the 10-year maintenance period; (3) a commitment to maintain the existing monitoring network; (4) factors and procedures to be used for verification of continued attainment of the NAAQS; and, (5) a contingency plan to prevent or correct future violations of the NAAQS.

2. Attainment Inventory

As noted above, 2008 is the final year of the 3-year period (2006–2008) in which all ozone monitors in the Greater Chicago nonattainment area recorded attainment of the 1997 8-hour ozone standard. Therefore, IEPA chose 2008 as an attainment year. The discussion above describes how Illinois derived the 2008 VOC and NO_X emission inventories for the Illinois portion of the Greater Chicago area.

3. Has the State documented maintenance of the ozone standard in the Illinois portion of the Greater Chicago area?

The maintenance plan, as revised in the State's September 16, 2011, submittal, shows maintenance of the 1997 8-hour ozone standard through 2025 by showing that future (2015, 2020, and 2025) VOC and NO_X emissions for the Illinois portion of the Greater Chicago area remain at or below attainment year (2008) emission levels.[13]

Point source emissions in the Illinois portion of the Greater Chicago area were projected to 2015, 2020, and 2025 using 2002 and 2008 point source emissions and source category-specific growth factors. Area source emissions were similarly projected to 2015, 2020, and 2025 using the 2002 and 2008 area source emissions and source category-specific growth factors. Area source category emissions, determined using county populations, were projected by

[13] A maintenance demonstration need not be based on ozone modeling. See *Wall* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). See also 66 FR 53094, 53099–53100 (October 19, 2001), and 68 FR 25413, 25430–25432 (May 12, 2003).

using projected growth in county-specific populations. Off-road mobile source emissions were projected using the 2002 emissions and growth factors contained in EPA's NONROAD model. On-road mobile source emissions were estimated using projected VMT levels and the MOVES model. The projected mobile source emissions assumed the continued use of reformulated gasoline, the phase-in of Tier 2 motor vehicle emission standards, and the operation of an enhanced vehicle inspection and maintenance program in the Illinois portion of the Greater Chicago area.

Table 5 compares the VOC and NO_X emissions estimated for the Illinois portion of the Greater Chicago area for 2008 with those for 2015, 2020, and 2025 by source category. The projected VOC and NO_X emissions show that VOC and NO_X emissions in Illinois portion of the Greater Chicago area are expected to remain below the attainment levels throughout the 10-year-plus maintenance period.

TABLE 5—2008 AND PROJECTED VOC AND NO_X EMISSIONS IN THE ILLINOIS PORTION OF THE GREATER CHICAGO AREA

[Tons per ozone season weekday]

Source Category	VOC 2008	VOC 2015	VOC 2020	VOC 2025
Point Sources	53.27	62.02	67.63	72.79
Area Sources	351.51	363.86	385.73	406.96
On-Road Mobile Sources	117.23	50.33	37.98	41.35
Off-Road Mobile Sources	265.44	90.83	84.16	90.25
Total	787.45	567.04	575.50	611.85
	NO_X 2008	NO_X 2015	NO_X 2020	NO_X 2025
Point Sources	154.50	150.06	171.13	180.13
Area Sources	38.56	39.85	40.57	41.35
On-Road Mobile Sources	373.52	197.14	116.69	108.93
Off-Road Mobile Sources	330.18	106.36	84.34	96.70
Total	896.76	493.41	412.73	427.11

Illinois has successfully demonstrated maintenance of the 1997 8-hour ozone standard between 2008 and 2025. In addition, VOC and NO_X emissions in the Greater Chicago area are projected to decline between 2006 and 2020 (see table 8 in the proposed rule to redesignate Lake and Porter Counties, Indiana to attainment of the 1997 8-hour ozone standard, March 12, 2010, 75 FR 12106).

IEPA has demonstrated maintenance of the 1997 8-hour ozone standard during the 10-year ozone maintenance period for the Illinois portion of the Greater Chicago area through projected VOC and NO_X emissions that show that the emissions will remain below the 2008 attainment levels during the maintenance period.

4. What is the Contingency Plan for the Illinois Portion of the Greater Chicago Area?

Section 175A of the CAA requires the maintenance plan to include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that might occur after redesignation. The maintenance plan must identify the contingency measures to be considered for possible adoption, a schedule and procedure for adoption and implementation of the selected contingency measures, and a time limit for action by the state. The state should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the state will implement all measures with respect to control of pollutant(s) that were controlled through the SIP before the redesignation of the area to attainment. See section 175A(d) of the CAA.

As required by section 175A of the CAA, Illinois has adopted a contingency plan to address possible future ozone air quality problems. The contingency plan has two levels of actions/responses depending on whether a violation of the 1997 8-hour ozone standard is only threatened (Level I) or has actually occurred (Level II).

A Level I response will be triggered whenever: (1) An annual (1-year) fourth-high daily maximum 8-hour ozone concentration of 84 parts per billion (ppb) (0.084 ppm) is monitored at any site in the Greater Chicago area; or, (2) the Illinois portion of the Greater Chicago area's NO_X or VOC emissions increase more than 5 percent above the 2006 emissions levels.[14] A Level I action will consist of a study of whether adverse air quality or adverse emission trends are likely to continue. If so, Illinois will determine what and where emission controls will be needed to avoid a violation of the 1997 8-hour ozone standard. The study will be completed within 9 months after the action is triggered. If necessary, emission control measures will be adopted within 18 months of determination of the Level I triggering and implemented as expeditiously as practicable, taking into consideration the ease of implementation and the technical and economic feasibility of the selected measures.

A Level II response will be triggered when a violation of the 1997 8-hour ozone standard is monitored at any monitoring site in the Greater Chicago area. If triggered, the IEPA will conduct a thorough study to determine the appropriate emission control measures to address the cause of the ozone standard violation. Analysis will be completed within 6 months of the triggering of the Level II response. Selected emission control measures will be implemented within 18 months of the determination of the ozone standard violation.

[14] Illinois commits to compiling VOC and NO_X emission inventories every three years for the duration of the maintenance period to facilitate emission trends analyses. The 2006 emissions levels were derived as part of the three-year cycle of updating emission estimates. Although 2008 is the year used to demonstrate the emission reductions leading to the attainment of the 1997 8-hour ozone standard and as the base year for the demonstration of maintenance of this ozone standard, IEPA chose the 2006 emissions levels as the base year for the Level I contingency emissions growth trigger. 2006 is part of the 2006–2008 period in which the Greater Chicago area first attained the 1997 8-hour ozone standard.

Adoption of any additional emission control measures prompted by either of the contingency triggers will be subject to the necessary administrative and legal processes dictated by State law. This process will include publication of public notices, public hearings, and other measures required by Illinois law.

Contingency measures contained in the maintenance plan are those emission controls or other measures that the State chooses to adopt and implement in response to either of the contingency triggers discussed above. Possible contingency measures contained in Illinois' contingency plan include, but are not limited to, the following:

- Illinois' Multi-Pollutant Program for electric generating units.
- NO_X RACT.
- Cross-State Air Pollution Rule.
- Best Available Retrofit Technology.
- Broader geographic applicability of existing measures.
- Tier 2 vehicle standards and low sulfur fuel.
- High-enhanced vehicle I/M.
- Federal railroad/locomotive standards.
- Federal commercial marine vessel engine standards.
- Portable fuel containers (replacement with low leak containers)
- AIM Coatings
- Commercial and consumer products standards
- Aerosol coatings standards
- Other measures to be identified.

5. Monitoring Network and Verification of Continued Attainment

In the State's ozone redesignation request and maintenance plan, IEPA has committed to continue to monitor ozone levels in the Illinois portion of the Greater Chicago area according to an EPA-approved monitoring plan. Should changes in the locations of ozone monitors become necessary, IEPA commits to work with EPA to ensure the adequacy of the ozone monitoring network in this area. Illinois remains obligated to continue to quality assure ozone monitoring data in accordance with 40 CFR part 58 and to enter all ozone data into EPA's Air Quality System in accordance with Federal guidelines.

Application of Illinois' ozone maintenance plan for the Illinois portion of the Greater Chicago area and continued attainment of the 1997 8-hour ozone standard in the Greater Chicago area depend, in part, on the State's efforts in tracking of ozone monitoring data to verify continued attainment of the ozone standard. IEPA's plan for verifying continued attainment of the 1997 8-hour ozone standard in the Greater Chicago area (Indiana is similarly tracking continued attainment of the standard in this area) consists of plans to continue ambient ozone monitoring in accordance with the requirements of 40 CFR part 58. IEPA will also continue to develop, review, and submit periodic emission inventories as required by the Federal Consolidated Emissions Reporting Rule (67 FR 19602, June 10, 2002) to track future levels of emissions.

VI. Has the State adopted approvable motor vehicle emission budgets?

Under the CAA, States are required to submit, at various times, SIP revisions, such as ozone attainment demonstrations and RFP plans, and ozone maintenance plans for applicable areas (for ozone nonattainment areas and for areas seeking redesignation to attainment of the ozone standard). These SIP revisions, including ozone maintenance plans, must create and document MVEBs based on on-road mobile source emissions allocated to highway and transit vehicle use that, together with emissions from other sources in the area, will provide for attainment and maintenance of the ozone NAAQS.

Under 40 CFR part 93, a MVEB for an area seeking a redesignation to attainment is established for the last year of the maintenance plan (MVEBs may also be specified for additional years during the maintenance period). The MVEB serves as a ceiling on emissions that would result from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188). The preamble describes how to establish the MVEB in the SIP and how to revise the MVEB if needed.

Under section 176(c) of the CAA, new transportation projects, such as the construction of new highways, must ''conform'' to (i.e., be consistent with) the SIP. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, or delay timely attainment of the NAAQS. CAA section 176(c)(1). If a transportation plan does not conform, most new transportation projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

When reviewing SIP revisions containing MVEBs, including attainment strategies, rate-of-progress plans, and maintenance plans, EPA must affirmatively approve or find that the MVEBs are ''adequate'' for use in determining transportation conformity. Once EPA affirmatively approves or finds the submitted MVEBs to be adequate for transportation conformity purposes, the MVEBs must be used by state and Federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of MVEBs are set out in 40 CFR 93.118(e)(4).

EPA's process for determining adequacy of a MVEB consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period; and, (3) making a finding of adequacy. The process for determining the adequacy of a submitted MVEB is codified at 40 CFR 93.118.

The ozone maintenance plan submitted by Illinois for the Illinois portion of the Greater Chicago area, as revised in Illinois' September 16, 2011, supplemental submittal, contains new VOC and NO_X MVEBs for the Illinois portion of the Greater Chicago area for 2008 and 2025. The availability of the SIP submission with MVEBs was announced for public comment on EPA's Adequacy Web site on September 26, 2011, at: *http://www.epa.gov/otaq/stateresources/tansconf/currsips.htm,* which provided a 30-day public comment period. The comment period for this notification ended on October 26, 2011, and EPA received no comments from the public. Note, however, that a second mechanism is also provided for EPA review and public comment on MVEBs, as described in 40 CFR 93.118(f)(2). This mechanism provides for EPA's review of the adequacy of an implementation plan MVEB simultaneously with its review and approval and disapproval of the implementation plan itself. In this action, EPA used the web notification discussed above to solicit public comments on the adequacy of Illinois' MVEBs for the Illinois portion of the Greater Chicago area, but is taking comment on the approvability of the submitted MVEBs through this proposed rule.

Illinois' ozone maintenance plan for the Illinois portion of the Greater Chicago area contains VOC and NO_X MVEBs for 2008 and 2025. Any and all comments on the approvability of the MVEBs should be submitted during the comment period stated in the **DATES** section of this notice.

EPA intends to approve 2008 and 2025 MVEBs for the Illinois portion of the Greater Chicago area for transportation conformity purposes in the final rulemaking on Illinois' ozone redesignation request. If EPA approves the MVEBs in the final rulemaking action, the new MVEBs must be used in future transportation conformity determinations for the Illinois portion of the Greater Chicago area. The new MVEBs, if approved in the final rulemaking, will be effective on the date of EPA's final rulemaking in the **Federal Register**. For required regional emission analysis years that involve 2013 (the year after EPA is expected to approve the ozone maintenance plan and Illinois' VOC and NO_X MVEBs) or beyond, the applicable VOC and NO_X MVEBs for the Chicago area are defined in table 6.

TABLE 6—MVEBS FOR THE ILLINOIS PORTION OF THE GREATER CHICAGO AREA

[Tons per ozone season weekday]

Year	VOC	NO_X
2008	117.23	373.52
2025	48.13	125.27

The MVEBs are the on-road mobile source VOC and NO_X emissions for the Illinois portion of the Greater Chicago area for 2008 and 2025, including 15 percent safety margins for 2025. The MVEBs are compatible with the 2008 and 2025 on-road mobile source VOC and NO_X emissions included in Illinois' 2008 and 2025 VOC and NO_X emission inventories, as summarized above in table 5. The derivation of the MVEBs is thoroughly discussed in appendix B of IEPA's April 5, 2009, ozone maintenance plan and in Illinois' September 16, 2011, supplement to the ozone maintenance plan.

EPA is proposing to approve the MVEBs for 2008 and 2025 as part of Illinois' 1997 8-hour ozone standard maintenance plan. EPA has determined that the MVEB emission targets are consistent with emission control measures in the SIP and that the Greater Chicago area can maintain attainment of the 1997 8-hour ozone NAAQS.

VII. 2002 Emissions Inventories

Section 182(a)(1) of the CAA requires States with ozone nonattainment areas to submit a comprehensive, accurate, and current inventory of actual emissions (emissions of VOC and NO_X) from all sources in the nonattainment areas, in accordance with guidance provided by the EPA. On June 21, 2006, IEPA submitted 2002 base year emissions inventories for the Illinois portion of the Greater Chicago nonattainment area. Emissions contained in that submittal cover the general source categories of point sources, area sources, on-road mobile sources, and non-road mobile sources. All emission summaries were accompanied by source-specific descriptions of emission calculation procedures and sources of input data.

IEPA prepared the point source emissions using source-reported actual 2002 emissions data for VOC and NO_X. The emissions were adjusted for a typical summer day at each emissions unit within the source facilities. The annual emission reports provided ozone season hourly emissions and operating schedules that enabled the calculations of ozone season weekday emissions.

Illinois used several methods to estimate area source activity levels and emissions, including applying local activity levels, apportioning national or statewide activity levels to the local level, and applying per capita emission factors considering county-specific populations. The documentation supplied in the emissions inventory submittal shows how the county-specific emissions were calculated for each area source category.

Non-road mobile source emissions were generated using EPA's NONROAD model. In addition, separate emission estimates were developed for commercial marine vessels, aircraft, and railroads, non-road source categories not included in the NONROAD model.

On-road mobile source emissions contained in the June 21, 2006, submittal were prepared by the IEPA using EPA's MOBILE6 emissions model and daily VMT and speed estimates provided by the Illinois Department of Transportation. Note, however, that the 2002 on-road mobile source emissions documented in the September 16, 2011, submittal were derived using the MOVES mobile source emissions model rather than MOBILE6. MOVES is the currently EPA-accepted model for the determination of on-road mobile source emissions.

Illinois' September 16, 2011, submittal documents 2002 emissions for the Illinois portion of the Greater Chicago area in units of tons per summer day. These emissions were modified relative to those included in the June 21, 2006, submittal, reflecting revised mobile source emissions calculated using MOVES (the mobile source emissions included in the June 21, 2006 submittal were calculated using MOBILE6 mobile source emission factors). The 2002 emissions are summarized in table 2 above in section V.C.

EPA is proposing to approve this 2002 base year emissions inventory, as revised in the September 16, 2011, submittal, as meeting the requirements of section 182(2)(1) 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 CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

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

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: January 31, 2012.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2012–2991 Filed 2–8–12; 8:45 am]

BILLING CODE 6560–50–P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Parts 821 and 826

[Docket No. NTSB–GC–2011–0001]

Rules of Practice in Air Safety Proceedings; Rules Implementing the Equal Access to Justice Act of 1980

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The NTSB proposes various amendments to our regulations, which sets forth rules of procedure for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA); and rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act of 1980 (EAJA). The NTSB previously issued an advance notice of proposed rulemaking (ANPRM) and has carefully considered comments submitted in response to the ANPRM concerning these procedural rules. This document contains both a discussion of the comments and explanations for the changes proposed herein.

DATES: Send your comments on or before April 9, 2012.

ADDRESSES: You may send comments identified by Docket ID Number NTSB–GC–2011–0001 using any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

Mail: Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East, SW., Washington, DC 20594–2003.

Facsimile: Fax comments to 202–314–6090.

Hand Delivery: Bring comments to 490 L'Enfant Plaza East, SW., 6th Floor, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314–6080.

SUPPLEMENTARY INFORMATION:

I. Background—Advance Notice of Proposed Rulemaking

On December 22, 2010, the NTSB published an ANPRM inviting public comments concerning the NTSB procedural rules codified at 49 CFR parts 821 and 826. 75 FR 80452. The NTSB specifically sought comments concerning the standard of review for emergency determinations, discovery and exchanges of information between parties, and electronic filing of documents in air safety enforcement cases before the Board. The NTSB also sought comments concerning outdated rules in 49 CFR part 826, governing claims brought under the EAJA.

The ANPRM included a discussion of the rationale for the Board's procedure for handling certain aspects of emergency cases. The FAA issues emergency orders when it determines the interests of aviation safety require that the order take effect immediately, and, in those cases, the certificate holder may not exercise certificate privileges during the pendency of an appeal with the NTSB. Section 716 of the Aviation Investment and Reform Act for the 21st Century [1] (hereinafter, ''the Act'') amended 49 U.S.C. 44709 by granting the NTSB authority to review such emergency determinations. The ANPRM sought comments concerning this review process. Specifically, the NTSB described the considerations, including Federal court rulings and comments received in response to the NTSB's Interim Rule (published on July 11, 2000 (64 FR 42637), initially implementing section 716 of the Act) resulting in the adoption, in the Final Rule (published on April 29, 2003 (68 FR 22623)), of the standard of review found in 49 CFR 821.54(e). Section 821.54(e) directs NTSB's law judges to dispose of petitions for review of the FAA's emergency determinations by ''consider[ing] whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal.'' 75 FR at 80452–80453. The aspect of the standard relating to the law judges' assumption of the truth of the FAA's allegations of fact prompted much feedback from commenters.

The ANPRM also sought comments pertaining to other matters. With regard to discovery and the parties' exchanges of information, the ANPRM requested feedback as to whether law judges should routinely issue prehearing orders to govern discovery, and whether a standard sanction should apply if parties fail to comply with a prehearing order or discovery obligation. *Id.* at 80453. On the subject of the electronic filing of documents, the ANPRM sought comments as to how to fashion electronic filing rules that could apply to *pro se* litigants, who may not have computer or Internet access. Finally, with regard to procedural rules applicable to applications for attorney's fees and expenses under the EAJA, the ANPRM sought general comments concerning updates to outdated provisions in 49 CFR part 826. For example, the ANPRM cited 49 CFR 826.40, which provides incorrect contact information for the FAA office overseeing the payment of fee awards under the EAJA. Id. at 80453–80454. The language of the ANPRM indicated, however, that the Board welcomed all comments relating to the procedural rules found in 49 CFR parts 821 and 826.

II. Comments Received

The NTSB received 20 relevant comments in response to the ANPRM, which are available at *http://www.regulations.gov* (Docket No. NTSB–GC–2011–0001). The Board has carefully reviewed and considered all comments it received, and greatly appreciates the time and thought the commenters devoted to providing detailed comments, as the comments

[1] Public Law 106–181, section 716 (2000) (codified at 49 U.S.C. 44709(e)(3)).

proved helpful in analyzing the aspects of 49 CFR parts 821 and 826 identified in the ANPRM. Our responses to the comments we received are included in the section below entitled ''Proposed Changes.''

The comments received primarily focus on the first issue set forth above, concerning the NTSB's review of emergency determinations. Some comments asserted the FAA must utilize its authority to issue immediately effective orders taking action against a certificate, and that the NTSB's current rules for review of the FAA's choice of taking such immediately effective action are appropriate. Other comments, however, maintain the current standard for review of emergency determinations is fundamentally unfair because it requires the NTSB's law judges to assume the truth of the factual allegations the FAA makes in its certificate orders.

A. Comments in Favor of Not Changing 49 CFR 821.54(e) (Standard for Disposition of Petitions for Review of Emergency Determinations of the Federal Aviation Administration)

The FAA Deputy Chief Counsel submitted comments urging the NTSB to refrain from changing the language of 49 CFR 821.54(e). The submission quotes the NTSB's 2003 adoption of the Final Rule for the provision, in which the NTSB stated as follows:

> An emergency determination is not * * * a finding or conclusion that easily lends itself to evidentiary proof. And the right to challenge an emergency determination before the Board should neither be seen as, nor be allowed to become, an opportunity to contest the factual predicate underlying the Administrator's judgment that considerations of aviation safety require an individual or an entity to be deprived of certificate privileges pending adjudication of the charges. The Board's rules provide a contemporaneous, expedited review process designed for that very purpose which must, by statute, be fully completed within 60 days. We are aware of no Congressional desire to supplant that process with the 5-day emergency determination review process under the Board's new rules.

68 FR 22623–22624. The FAA contends the statutory basis and overall Congressional mandate concerning the process for review of emergency determinations have not changed, and the NTSB should, therefore, not change 49 CFR 821.54(e). The FAA also quotes portions of the FAA statute wherein Congress authorized it to take immediate action when the Administrator believes an emergency exists relating to aviation safety. 49 U.S.C. 46105(c). The submission further provides that, as a matter of policy, the FAA adheres to publicly available criteria for determining whether certain circumstances amount to an emergency, under FAA Order 2150.3B, Ch. 6, p. 6–8, ¶ d (available at: *http://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentID/17213*). The FAA also emphasizes, given the challenging time constraints of emergency cases, the NTSB does not have the time to engage in preliminary fact-finding in order to determine whether the Administrator's use of authority to pursue an emergency action was appropriate, and cites the Board's 60-day time limit for disposing of emergency cases on the merits in further support of this consideration.

An FAA Aviation Safety Inspector (ASI) also submitted comments. The ASI's submission includes several policy reasons for the current emergency enforcement procedure, and states:

> The determining factor is safety, if the operator continues to operate in violation there is a serious problem. The only way [to] prevent an accident and the safety of others on the ground is to prevent the operator from breaking rules. The emergency action is the last resort to stop an operator from continuing to break rules.

The ASI's comments also summarize the internal FAA procedure through which an FAA Flight Standards District Office (FSDO) proceeds in an emergency case, and highlights FAA inspectors perception they are subject to a heavy burden in providing ample evidence in emergency cases to draft an enforcement investigation report (EIR) and initiate an emergency enforcement action against a certificate. Overall, the commenter urges the Board to maintain the current rule governing reviews of FAA emergency determinations.

Another commenter, who identified himself as part of ''DOT/FAA,'' submitted comments similar to the previously described comments. The DOT/FAA commenter asserts the FAA does not abuse its authority in taking emergency action against a certificate, and states emergency cases are ''discussed at length at all levels of management'' within the FAA. The commenter also maintains the FAA only chooses to take emergency action ''when public safety is jeopardized'' and when the evidence shows such jeopardy.

Another individual commenter also urges the NTSB to maintain the current standard of review for emergency determinations. His concise submission made several points, including: (1) The expedited process for reviewing emergency determinations ensures a certificate holder is not deprived of due process; (2) the certificate holder's continued ability to exercise certificate privileges ''must be considered in light of the public's far greater right to expect safety in air transportation;'' (3) the NTSB has found the FAA's decision to take emergency action valid in the vast majority of cases; and (4) the NTSB's mission of advancing transportation safety would be ''jeopardized if reckless airmen are permitted to exercise the privileges of their certificates without fear of a swift penalty.''

The law firm of Carstens and Cahoon submitted comments stating Congress never intended the language of 49 U.S.C. 44709(e) to provide for a separate evidentiary hearing to determine whether the FAA's action in emergency cases is justified. The commenter states the NTSB should view dispositions of cases via summary judgment [2] as similar to emergency review determinations: ''The facts pled by FAA should be assumed and only when the facts offered by the movant (respondent) are 'signifcantly probative' [*sic*], contrasted with the facts pled by the government, should the 'emergency' finding be disturbed. Otherwise, justice allows this determination to continue only for 60 days anyway, if the evidential [*sic*] trial finds it should be reversed.'' Overall, the commenter urges the NTSB to maintain the current standard of review found at 49 CFR 821.54(e).

B. Comments in Favor of Changing the Standard Set Forth in 49 CFR 821.54(e)

The NTSB received many comments advocating a change to the standard of review for FAA emergency determinations. The Transport Workers Union of America (TWU) posited that the current rules are ''too deferential to the [FAA],'' and compared reviews of emergency determinations to temporary restraining orders and preliminary injunctions. TWU's comment urges the NTSB to adopt rules similar to those proceedings with the standard of review being whether the FAA can show a likelihood of success on the merits of a case.

The NTSB also received comments from the Air Line Pilots Association, International (ALPA). ALPA's submission stated, ''[n]early eight years of unsatisfactory experience under [49 CFR 821.54(e)] demonstrates that the procedure has failed to meet either the spirit or intent of the legislation'' under which the NTSB promulgated section 821.54(e). ALPA's submission includes a policy discussion as to how an FAA emergency action against a pilot's airman certificate could cost the pilot

[2] *See* 49 CFR 821.17(d) and Federal Rule of Civil Procedure 56.

his or her livelihood, as well as a number of recommendations:

> We recommend that the Board substantively amend Rule 54(e) [49 CFR 821.54(e)] to delete the language requiring the Administrator's factual allegations to be assumed to be true. We also recommend that Rule 54(e) be substantively amended to reflect the statutory authority delegated the Board to make an independent determination of whether or not an emergency exists. This may be accomplished by deleting the phrasing in current Rule 54(e) that refers to a review of ''whether the Administrator's emergency determination was appropriate under the circumstances,'' and changing the language in Rule 54(e) to reflect the language of the statute, [49 U.S.C. 44709(e)(3)] (''[i]f the Board finds that an emergency does not exist * * * the [Administrator's] order shall be stayed'').

ALPA's submission further urges the NTSB to ''require that upon receiving a petition for review challenging the emergency nature of an order under Rule 54(e) that the FAA should be required to forthwith provide a showing of the evidence underlying its emergency determination'' (emphasis in original).

The NTSB Bar Association (NTSBBA) submitted comments providing arguments similar to those provided by ALPA, as described above. Initially, NTSBBA urges the NTSB to delete the ''assumption of the truth'' language of 49 CFR 821.54(e), so the subsection would read, ''the [law judge] * * * shall consider whether the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal.'' Also with regard to emergency cases, NTSBBA requests the NTSB to require the FAA to provide a copy of the EIR in tandem with its service of an emergency order. The NTSBBA asserts that immediate disclosure of the EIR would promote settlement discussions and result in fewer discovery disputes. Finally, NTSBBA suggests that a certificate holder seeking review of an FAA emergency determination ''be allowed to concurrently submit evidence, affidavits and/or declarations in response to the FAA's factual allegations, in order to enable the law judge to properly consider whether the Administrator's emergency determination was appropriate under the circumstances.'' Michael L. Dworkin and Associates submitted comments which contained the same language as the NTSBBA submission.

Similarly, the law offices of Hoff and Herran submitted comments asserting the FAA utilizes its authority to issue emergency orders too frequently and in an unfair manner. The commenter urges the NTSB to change the rules applicable to emergency cases, by requiring the FAA to provide a copy of the EIR with every emergency order; and to delete from section 821.54(e) the phrase in which the truth of the allegations set forth in emergency orders is assumed and, instead, require the FAA to prove ''by clear and convincing evidence that aviation safety would be likely compromised by proceeding in the normal procedure with the due process safeguards left in play during the pendency of the respondent's appeal.''

The National Business Aviation Association (NBAA) also submitted comments urging the NTSB to delete from section 821.54(e) the provision assuming the truth of the FAA's allegations. The submission states:

> NBAA proposes that when reviewing the FAA's determination that an emergency exists, the NTSB ALJ's should not be required to assume that all the facts alleged in the FAA's complaint are true, and should be able to consider facts not alleged in the FAA's complaint that the certificate holder believes are important. One such fact in particular that the NTSB ALJ's should be able to consider, regardless of whether it is mentioned in the FAA's complaint, is the length of time the FAA was aware of the alleged facts on which it bases its determination before the FAA initiated emergency action.

NBAA included an appendix to its submission containing a summary of ''legislative and regulatory history'' concerning the standard of review for emergency determinations. The appendix cites many of the same sources the NTSB listed in the ANPRM on this topic. The appendix also asserts that the NTSB's promulgation of 49 CFR 821.54(e), particularly with regard to the ''assumption of truth'' standard, is both contrary to legislative intent and unnecessary.

The Aircraft Owners and Pilots Association (AOPA) submitted comments urging the NTSB to delete the standard in section 821.54(e) requiring the law judge to assume the truth of the allegations in the Administrator's order. In setting forth its rationale for this proposed deletion, AOPA asserts many of the same points articulated by the NBAA. AOPA's comments suggests the NTSB's rules provide its law judges with the discretion to determine whether they should assume the truth of the factual allegations contained in the FAA's emergency orders; in this regard, the comment makes an analogy to Federal Rule of Civil Procedure 65, which relates to preliminary injunctions and temporary restraining orders. In addition, AOPA proposes the NTSB amend the rules to provide specific permission for the submission of evidentiary records, ''such as affidavits or other records,'' in conjunction with petitions for review of FAA emergency determinations. As to the process for reviewing those determinations, AOPA urges the NTSB to adopt a rule providing for further Board review; in particular, AOPA appears to suggest the full Board should either comment on the law judge's determination in every case in which a party requests it do so, or the rule provide for ''an accelerated appeal to the full Board'' of the law judge's determination.

The National Air Transport Association (NATA) also submitted comments, which do not specifically ask the NTSB to delete the ''assuming the truth'' language from section 821.54(e), but, instead, suggest requiring law judges to consider all facts contained in ''pleadings and evidence'' presented by either party. NATA's submission also proposes adding a sentence to section 821.54(e), which would state the law judge should consider, but is not required to follow, the FAA's interpretation of the Federal Aviation Regulations. NATA's comments include many policy arguments, similar to those articulated in other comments, as justification for the suggested changes. The language of NATA's justification suggests the practical effect of its proposed changes would be the same as deleting the ''assuming the truth'' phrase from section 821.54(e). NATA also believes law judges should consider the amount of time the FAA has taken to issue an emergency order in determining whether the FAA's decision to take emergency action was appropriate. With regard to the amount of information available to certificate holders in emergency cases, NATA encourages the NTSB to issue a rule requiring the FAA to disclose the releasable portions of the EIR when the FAA issues an emergency order.

MMO Legal Services, LLC, (MMO) submitted two separate sets of comments. In one, MMO proposes the NTSB's rules should require the FAA to ''allege, under oath, that its investigations have revealed 'that there is a good faith belief that one or more conditions represent an imminent threat to the safety of innocent persons or property on the ground, or to pilots or passengers aboard aircraft.' '' MMO opines that, after providing this sworn statement, ''FAA should be entitled to a rebuttable presumption the facts it has asserted are true,'' in lieu of the

requirement that NTSB law judges assume the allegations are true. MMO also suggests the NTSB's rules should provide an opportunity for the certificate holder to ''cure the condition'' the FAA alleges gives rise to the emergency. This suggestion is based upon the policy concern that certificate holders may lose their business and livelihood upon the FAA's issuance of an emergency order.

The Helicopter Association International (HAI) also submitted comments urging the NTSB to delete the phrase involving the assumption of the truth of the FAA's allegations in section 821.54(e). HAI's submission states:

> It is difficult to see how there can be any ''meaningful'' review of an FAA emergency determination, if the certificate holder is unable to challenge the facts, or regulatory interpretations included in the FAA complaint or to present facts outside the FAA's complaint that the certificate holder believes are important and pertinent to the FAA revocation action.

The comment suggests allowing NTSB law judges to consider facts not alleged in the FAA's order when determining whether the FAA's decision to take immediate action was appropriate. In addition, HAI's submission maintains that law judges should consider the length of time it took for the FAA to issue an emergency order after learning of the violation(s) involved.

Air Trek, Inc., submitted a comment urging the NTSB to take action to prevent the FAA from issuing emergency orders. It cites a recent Board case involving the FAA's emergency revocation of its air carrier certificate. NTSB Order No. EA–5440 (2009) (available at *http://www.ntsb.gov/legal/o_n_o/docs/Aviation/5440.pdf*). There, the Board determined the FAA's case was unsupported, and later awarded attorney's fees to Air Trek under the EAJA. NTSB Order No. EA–5510 (2010) (available at: *http://www.ntsb.gov/legal/o_n_o/docs/Aviation/5510.pdf*). Air Trek summarizes the facts of its case and argues the NTSB should revise part 821 ''to allow input from the respondent,'' and require its law judges to rule in favor of respondents ''if there is any doubt which way a judgment should be made.''

Similarly, a former FAA ASI submitted comments arguing the NTSB is not an impartial arbiter of certificate cases. The former ASI urges the NTSB to implement a standard without the ''assumption of truth'' language; however, beyond this, he does not suggest any specific language or standard that should be used to evaluate the propriety of the FAA's emergency determinations.

Air Tahoma submitted comments containing various details regarding the FAA's emergency revocation of its air carrier certificate. Air Tahoma's submission contains attachments of sections entitled ''FAA misconduct—corroborating facts,'' ''revocation report analysis,'' ''revocation analysis chart,'' and ''recent FAA operator violations.'' Air Tahoma principally contends the FAA is unfair in taking action against some certificate holders, and chooses to utilize its authority to issue emergency orders in an inequitable manner.

C. Electronic Filing of Documents

Several commenters also addressed electronic filing in their responses to the ANPRM. The text of the ANPRM stated the NTSB is committed to creating an electronic filing system for certificate enforcement cases. All commenters who addressed electronic filing agreed the ability to file documents electronically in air safety enforcement actions would be helpful. The FAA's comments suggested electronic filing would not be an additional burden on *pro se* respondents, as other agencies that utilize electronic filing systems have made the method of electronic filing optional, and all that is required of a party for filing documents in an electronic system is registering to use the system. The FAA referred to the Merit Systems Protection Board and Equal Employment Opportunity Commission as examples of agencies that have successfully implemented electronic filing procedures, and opined that the vast majority of respondents will be familiar enough with electronic systems to utilize an electronic filing system.[3] The comment praised the Board for considering a new electronic filing system, but stated that the FAA understands implementing such a new system will likely be time-consuming; as a result, the FAA suggested allowing parties to submit documents via electronic mail in the interim.

HAI's comments proposed the NTSB implement an electronic filing and docketing system similar to the Federal courts' Public Access to Court Electronic Records (PACER) system. Other comments simply observed that electronic filing would be helpful, and suggested allowing parties the option of filing either electronically or in paper format for a certain period of time, such as 2 years, before requiring all parties to file documents electronically.

D. Availability of Evidence and Discovery

The FAA's comments also addressed pre-hearing orders by stating that the Board's rules sufficiently cover the parties' discovery obligations, and asserting that a specific requirement in the rules for each judge to issue a pre-hearing order is unnecessary. The FAA's submission further notes 49 CFR 821.19(d) already contains an adequate enforcement mechanism for failure to comply with discovery, as it provides noncompliance with a law judge's order compelling discovery may result in a negative inference, or other relief the law judge may deem appropriate. The FAA contends that no changes to the rules relating to discovery are necessary, but, if anything, the only change the FAA might support would be limited to an initial exchange of information among the parties. The FAA's submission states, as an example, ''in an emergency case, the rule might specify that no later than 5 days after the answer to the complaint is served, the Complainant would provide the Respondent with copies of all non-privileged documents relied on to support the factual allegations in the complaint,'' and the certificate holder would be required to provide it with all discoverable documents related to all affirmative defenses upon which the certificate holder expects to rely.

As has been noted above, many comments urge the NTSB to require the FAA to provide a copy of the EIR in tandem with the FAA's issuance of a certificate order, or soon thereafter. AOPA's comments advocate for a rule applicable to both emergency and non-emergency cases that would require the FAA to disclose the releasable portions of the EIR when the FAA issues a notice of proposed certificate action, which precedes the FAA's issuance of a certificate order. AOPA's submission includes its rationale for this suggestion: respondents who are not represented by experienced counsel may not know how to obtain a copy of the releasable portions of the FAA's EIR, and may attempt to obtain such information by filing a Freedom of Information Act request, which is unnecessarily burdensome to both parties.

TWU's comments indicate it favors a requirement that law judges issue prehearing orders, to provide sufficient clarity to parties concerning deadlines and discovery obligations. In discussing potential sanctions for failure to comply with a discovery requirement, TWU

[3] Specifically, the comment stated, ''In this technology-based age, the Board should feel confident that a party's *pro se* status is not an automatic impediment to accessing the technology through which electronic filing would occur. Aviation is a technology driven endeavor. All certificate holders, regardless of their level of experience and technological sophistication, have access to a myriad of opportunities to conduct their FAA business electronically.''

suggests the law judges should issue orders barring evidence or creating presumptions. Other commenters take the position that the current system of allowing law judges the discretion to issue prehearing orders should not change, as it accomplishes the necessary objectives.

E. Rules Concerning the EAJA (49 CFR Part 826)

With respect to the EAJA, many commenters suggest the standard for receiving an award of attorney's fees is too difficult to fulfill. The current standard is based upon a collection of several NTSB and Federal court cases, all of which have consistently held that a certificate holder is eligible for fees under the EAJA if the certificate holder prevailed in the underlying certificate action and can show the FAA was not substantially justified in pursuing it. The comments specifically discussing the part 826 EAJA rules did not distinguish the cases that form the basis for this standard, but instead opined that obtaining fees under the EAJA is sufficient to discourage the Administrator from pursuing meritless certificate actions.

A number of commenters ask the NTSB to adopt a bright-line standard in part 826 that a law judge's dismissal of a certificate action after the FAA voluntarily withdraws the complaint should be *with prejudice.* This suggestion is the result of a decision of the U.S. Court of Appeals for the District of Columbia Circuit in a case in which the Board determined two applicants were not ''prevailing parties'' for purposes of the EAJA when the FAA withdrew its case against them prior to hearing. *Turner and Coonan* v. *NTSB,* 608 F.3d 12 (2010). In *Turner and Coonan,* the D.C. Circuit applied a three-part test from *District of Columbia* v. *Straus,* 590 F.3d 898, 901 (D.C. Cir. 2010), for the purpose of determining whether a party has, for purposes of the EAJA, prevailed in an underlying proceeding: (1) There must be a ''court-ordered change in the legal relationship'' of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief. In *Turner and Coonan,* the D.C. Circuit indicated a law judge's dismissal of a case ''with prejudice'' might have provided the applicants with judicial relief sufficient to fulfill the third prong of that test. As a result, some comments encourage the NTSB to implement a rule stating such dismissals will always occur ''with prejudice.''

MMO's second set of comments specifically suggests how the NTSB should handle cases in which the FAA withdraws a complaint just prior to the hearing. The submission states:

> Once the Respondent has made a good faith, honest showing that there is no prima [facie] case, FAA should proceed at its peril if it elects to ignore the Respondent's showing. This will deter a lot of cases which are based on misinformation at the FSDO inspector level. If a Respondent shows FAA Counsel that the underlying facts and conclusions are incorrect, FAA should have a duty to require its inspector(s) to re-evaluate their information to make sure it is correct before forcing the Respondent to defend the case further.

MMO also suggests awards of attorney fees be made ''based on the average fees [charged] by aviation defense counsel having experience approximately equal to those of actual defense counsel for the prevailing Respondent.'' The commenter further suggests that awards of legal fees be made to all certificate holders who can show the FAA proceeded when it did not have a prima facie case, ''regardless of the net worth of the Respondent.''

With regard to other proposed amendments to part 826, the FAA's submission suggests changing the rule that contains outdated information as to where a successful applicant should seek payment after the Board issues a decision awarding fees and expenses under the EAJA. The FAA suggests the NTSB change 49 CFR 826.40 to ''specify only that the applicant shall comply with all FAA administrative requirements for payment (*i.e.,* providing the FAA with bank routing and account numbers, tax identification numbers, address, *etc.*) and that the FAA should pay promptly.'' Further, the FAA suggests the NTSB delete from section 826.40 the language stating ''the agency will pay the amount awarded to the applicant within 60 days,'' and, instead, include the ''pay promptly'' language suggested above.

F. Other Matters

The FAA's submission also requests the NTSB make a ''technical correction'' to subpart B of 49 CFR part 821, in order to clarify the general rules of practice also apply to appeals in cases involving civil penalties. The FAA correctly notes section 821.2 (''Applicability and description of part'') states, ''[t]he provisions of this part also govern all proceedings on appeal from an order of the Administrator imposing a civil penalty.'' Subpart B, however, does not reference the statutory section under which the FAA may impose a civil penalty, and the FAA, therefore, suggests the NTSB clarify it applies to appeals of civil penalties.

III. Proposed Changes

A. Electronic Filing

As the NTSB stated in the ANPRM, we are committed to implementing an electronic filing system. The NTSB carefully considered the comments received concerning electronic filing, and determined the least costly and most effective manner of introducing the practice of electronic filing is to propose incremental changes, commencing with the acceptance of filings via electronic mail.

1. Section 821.7(a)(1) (Filing of Documents With the Board)

The NTSB proposes the addition of two new sentences at the end of section 821.7(a)(1), to provide parties the option to submit documents electronically. With this addition, section 821.7(a)(1) would read as follows: ''(1) Except as provided in paragraph (2), documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, SW., Room 4704, Washington, DC 20594, and addressed to the assigned law judge, if any. If the proceeding has not yet been assigned to a law judge, documents shall be addressed to the Case Manager. Filings may be made by paper (hard copy), including by facsimile at (202) 314–6158, or (except as otherwise provided in Subpart I) by electronic mail at *alj@ntsb.gov*. Filings made by facsimile or electronic mail are subject to additional requirements set forth in paragraphs (a)(3) and (4) of this section.''

2. Section 821.7(a)(2) (Filings of Documents With the Board)

The NTSB proposes to amend section 821.7(a)(2) as follows: ''(2) Subsequent to the filing of a notice of appeal with the Office of Administrative Law Judges from a law judge's initial decision or appealable order, the issuance of a decision permitting an interlocutory appeal, or the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, all documents are to be filed with the Office of General Counsel, National Transportation Safety Board, 490 L'Enfant Plaza East, SW., Room 6401, Washington, DC 20594. Filings may be made by hard copy, including by facsimile at (202) 314–6090, or by electronic mail at *enforcement@ntsb.gov*. Filings made by facsimile or electronic mail are subject to additional requirements set forth in

paragraphs (a)(3) and (4) of this section.''

3. Section 821.7(a)(3) (Filing of Documents With the Board)

As described above, the NTSB would like to accommodate parties who prefer to submit documents to the NTSB via facsimile and electronic mail. To do so, the NTSB proposes to amend section 821.7(a)(3) as follows: ''(3) Except as otherwise provided in Subpart I (governing emergency proceedings), documents shall be filed: By personal delivery, by U.S. Postal Service first-class mail, by overnight delivery service, by facsimile or by electronic mail. Documents filed by electronic mail must be signed and transmitted in a commonly accepted format, such as Adobe Portable Document Format (PDF). ''

4. Section 821.7(a)(4) (Filing of Documents With the Board)

The NTSB proposes amending the language of section 821.7(a)(4) to reflect electronic service of documents, as follows: ''(4) Documents shall be deemed filed: On the date of personal delivery; on the send date shown on the facsimile or the item of electronic mail; and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Where the document bears a postmark that cannot reasonably be reconciled with the mailing date shown on the certificate of service, the document will be deemed filed on the date of the postmark.''

5. Section 821.8(b) (Service of Documents)

The NTSB proposes adding the option for parties to receive documents only by electronic mail to subsection (1) of § 821.8(b) with the following language: ''(1) Service of documents by any party on any other party shall be accomplished by any method prescribed in § 821.7(a)(3) for the filing of documents with the Board. A party may waive the applicability of this paragraph, and elect to be served with documents by the other parties to the proceeding solely by electronic mail, without also receiving a hard copy of the original by personal delivery, first-class mail or overnight delivery service, by filing a written document with the Board (with copies to the other parties) expressly stating such a preference.''

6. Section 821.57(b) (Procedure on Appeal)

The NTSB also proposes to amend this section to provide electronic mail transmission as an option to parties submitting briefs in emergency cases. The NTSB proposes the following addition: ''* * * Unless otherwise authorized by the Board, all briefs in connection with appeals governed by this subpart must be filed and served by overnight delivery service, or by facsimile or electronic mail. Aside from the time limits and methods of filing and service specifically mandated by this paragraph, the provisions of § 821.48 shall apply.''

B. Emergency Cases

As noted above, many comments we received in response to the ANPRM encouraged the NTSB to change the standard of review for emergency determinations (found at section 821.54(e)), and to allow certificate holders to obtain certain evidence from the FAA and submit their own evidence into the record in support of petitions for review of FAA emergency determinations. We have carefully considered these comments, and acknowledge the FAA maintains the authority to take action affecting a certificate that is immediately effective ''[w]hen the Administrator is of the opinion that an emergency exists related to safety in air commerce and requires immediate action.'' 49 U.S.C. 46105(c). The NTSB is also mindful of the viewpoints expressed in some comments that the standard of review is unfair and may result in irrevocable harm to certificate holders, and in other comments urging the NTSB to treat reviews of emergency determinations like requests for temporary restraining orders or preliminary injunctions. We do not believe reviews of emergency determinations made by an administrative agency such as the FAA in consideration of the public interest in aviation safety raise questions of a similar nature to civil proceedings in which injunctive relief is sought.

Although the rules provide the facts alleged in the order are assumed as true for the limited, preliminary purpose of determining whether the Administrator's emergency determination was warranted in the interest of aviation safety, the law judges have always considered evidence submissions relevant to the propriety of the emergency determination itself. For example, in a recent case involving revocation of a respondent's pilot and airman medical certificates based on an alleged ''refusal'' to submit to a random drug test by allegedly leaving the testing facility before the testing process was completed, the respondent submitted evidence showing he had passed a breath test and passed a drug test taken at his own expense and at the same facility within approximately 3 hours of furnishing the insufficient sample. Such evidence was offered to show the respondent did not present an immediate threat to aviation safety related to alcohol or drug use. The law judge considered it favorably in granting the respondent's petition. Nevertheless, the number of comments requesting the rules permit the submission of evidence relevant to the FAA's emergency determination suggests clarification of this point would be useful.

The NTSB therefore proposes including explicit language in the rules permitting the attachment of such evidence to petitions for review of emergency determinations. Finally, we propose adding a requirement for the FAA to provide certificate holders with certain releasable information many commenters believe necessary for a certificate holder to obtain a full understanding of the basis for a certificate action and/or an emergency determination as soon as possible. We note some commenters believe such information will significantly reduce the need for discovery, especially in the compressed time frame environment of emergency cases.

1. Section 821.54(e) (Petition for Review of Administrator's Determination of Emergency)

As explained above, the NTSB currently does not intend to remove the ''assuming the truth of the allegations'' language from section 821.54(e), but proposes including explicit language permitting the respondent to present evidence challenging the emergency nature of the proceedings in the form of affidavits or other records. However, the NTSB reminds parties that a law judge's review of an emergency determination is separate and distinct from a review of the underlying certificate action on the merits. Parties should be mindful of this distinction in submitting evidence under this provision, and should only provide evidence helpful in resolving the issue of whether the FAA's decision to take immediately effective action was appropriate, and avoid presenting evidence that goes to the merits of the underlying certificate action.

The NTSB proposes changing section 821.54(e) as follows: ''(e) Disposition. Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge other than the chief law judge, the

law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal. In making this determination, however, the law judge is not so limited to the order's factual allegations themselves, but also should permit evidence, if appropriate, pertaining to the propriety of the emergency determination presented by the respondent with the petition and the Administrator with the reply to the petition. This evidence can include affidavits or other such records.''

2. Section 821.55 (Complaint, Answer to Complaint, Motions and Discovery)

The NTSB proposes adding a new subsection, replacing current subsection (d), to section 821.55 that will make a complaint subject to dismissal if the FAA, without good cause, failed to provide a certificate holder against whom an emergency order was issued with the releasable portions of its enforcement investigation report (EIR) by the date on which the emergency order was issued. Additionally, subsection (c) will be amended to permit the filing of such a motion to dismiss, and current subsection (d) will be redesignated as subsection (e). The NTSB proposes the following language: ''(c) Motion to dismiss and motion for more definite statement. Except as provided in paragraph (d) of this section, in proceedings governed by this subpart, no motion to dismiss the complaint or for a more definite statement of the complaint's allegations shall be made, but the substance thereof may be stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any pleading at the hearing, upon good cause shown and upon just and reasonable terms.

(d) Motion to dismiss for failure to include copy of releasable portion of Enforcement Investigative Report (EIR) with emergency or other immediately effective order. (1) Where the Administrator has failed to include a copy of the releasable portion of the FAA's EIR with an emergency or other immediately effective order, or to provide the respondent with a copy of the releasable portion of the EIR prior to the issuance of such an order, the respondent may move to dismiss the complaint and, unless the Administrator establishes good cause for that failure, the law judge shall dismiss the complaint. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from failure to provide the releasable portions of the EIR should be deemed to occur with or without prejudice.

(2) The releasable portion of the EIR shall include all information in the EIR, except for the following: (i) information that is privileged; (ii) information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency; (iii) information that would disclose the identity of a confidential source; (iv) information of which applicable law prohibits disclosure; (v) information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or (vi) sensitive security information, as defined at 49 U.S.C. 40119 and 49 CFR § 15.5.

(3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR.''

3. Section 821.57(c) (Procedure on Appeal)

In rare cases, the Board may determine it necessary to remand an emergency case to a law judge. Therefore, the NTSB proposes changing section 821.57(c) to clarify that both subsections (a) and (b) of section 821.49 apply to emergency cases. The NTSB proposes amending subsection 821.57(c) to read: ''(c) Issues on appeal. The provisions of § 821.49 (a) and (b) shall apply in proceedings governed by this subpart.''

C. Equal Access to Justice Act (EAJA)

Several commenters who responded to the ANPRM suggested the NTSB implement changes with regard to 49 CFR part 826. The NTSB has reviewed part 826 and proposes the changes discussed below, in order to ensure the rules are updated and consistent with 49 CFR part 821.

1. Section 826.1 (Purpose of these Rules)

In order to make 49 CFR part 826 consistent with the terminology used in 49 CFR part 821, the NTSB proposes replacing each reference to ''the Agency'' with the term ''the Administrator.'' This will necessitate a minor change to section 826.1, and the NTSB proposes that it read: ''The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board. An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the FAA's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards this Board will use to make them. As used hereinafter, the term ''Administrator'' refers to the Administrator of the FAA.

In addition to the change to section 826.1, the NTSB proposes additional changes to sections 821 and 826 as follows.

2. Section 821.12(b) (Amendment and Withdrawal of Pleadings)

As discussed above, the NTSB received several comments in response to the ANPRM concerning the EAJA, which specifically suggested the NTSB's rules should address the status of cases the FAA withdraws immediately prior to hearing. In a recent opinion involving an issue concerning whether the certificate holder was the ''prevailing party'' when the FAA withdrew its order just before the hearing, the Board stated it would not adopt a bright-line rule to determine when such a withdrawal should result in a dismissal with or without prejudice. *Administrator* v. *Koch,* NTSB Order No. EA–5571 (2011) (available at: *http://www.ntsb.gov/legal/o_n_o/docs/Aviation/5571.pdf*). The NTSB believes it best to allow its law judges to assess the facts of each case and determine whether the withdrawal was with or without prejudice. The Board will review such a determination *de novo,* as it does with most other issues parties present on appeal. Based on this reasoning, the NTSB proposes changing section 821.12(b) as follows: ''(b) Withdrawal. Except in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from a law judge's initial decision or appealable order, pleadings may be withdrawn only upon approval of the law judge or the Board. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from the withdrawal of a complaint should be deemed to occur with or without prejudice.''

3. Section 826.40 (Payment of Award)

As was stated in the ANPRM, the address listed for sending applications for EAJA award grants in section 826.40 is outdated. The FAA's comment in response to the ANPRM recommends section 826.40 simply state the FAA will pay funds via electronic fund transfer, because this is the only manner in which the FAA now provides funds. The NTSB believes this change will provide sufficient flexibility to allow for the FAA to change its payment process in the future. In each case, the FAA's provision of detailed instructions to each applicant will ensure the applicant has the updated, relevant information needed to obtain payment.

Therefore, the NTSB proposes the following change to section 826.40: ''Within 5 days of the Board's service of a final decision granting an award of fees and expenses to an applicant, the Administrator shall transmit to the applicant instructions explaining how the applicant may obtain the award. These instructions may require, but are not limited to, the submission of the following information to the Administrator: a statement that the applicant will not seek review of the decision in the United States courts, bank routing numbers to which the Administrator may transmit payment, and the applicant's tax identification or Social Security number. The Administrator will pay the applicant the amount awarded within 60 days of receiving the necessary information from the applicant, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.''

D. Miscellaneous Technical Changes

In undertaking a detailed review of both parts 821 and 826, the NTSB has identified several sections of the rules we believe should be updated. Many of the provisions in question are either no longer practical or simply out-of-date. Some contain ambiguities the NTSB has recently identified in encountering unique situations. Therefore, this NPRM proposes to amend those sections of the rules to resolve the identified issues. Below are summaries of the proposed changes.

1. Section 821.6(b) (Appearances and Rights of Witnesses)

The NTSB proposes to delete the phrase, ''in person,'' because some matters, including rulings on motions and, where the parties consent, hearings (or sessions thereof), are conducted telephonically. The NTSB proposes deleting the phrase, ''in person,'' to clarify the rule and make it consistent with such case practice. With this change, section 821.6(b) would read, ''(b) Any person appearing in any proceeding governed by this part may be accompanied, represented and advised, and may be examined by, his or her own counsel or representative.''

2. Section 821.6(d) (Appearances and Rights of Witnesses)

In a recent case, the NTSB granted reconsideration of a previous order due to a misunderstanding regarding which attorney was representing the respondent. *Administrator* v. *Ricotta,* NTSB Order No. EA–5569 (2011)(available at: *http://www.ntsb.gov/legal/o_n_o/docs/Aviation/5569.pdf*). Therefore, to make entrances of appearance clear and assure the attorney's or representative's contact information is current and more easily located within the record, the NTSB proposes adding the phrase, ''in a separate written document'' to the first sentence of section 821.6(d). The FAA already regularly submits separate filings with the relevant information, and many respondents' attorneys do so, as well. However, the NTSB believes it best to require such a filing in section 821.6, and to keep the attorney's or representative's contact information current. A provision has also been added to require immediate written notification when any attorney or representative withdraws from representation in a case. With these changes, section 821.6(d) would read, ''(d) Any party to a proceeding who is represented by an attorney or representative shall, in a separate written document, notify the Board of the name, address and telephone number of that attorney or representative. In the event of a change in representation or a withdrawal of representation, the party shall immediately, in a separate written document, notify the Board (in the manner provided in § 821.7) and the other parties to the proceeding (pursuant to § 821.8), before the new attorney or representative may participate in the proceeding in any way. Parties, and their attorneys and representatives, must notify the Board immediately of any changes in their contact information.''

3. Section 821.7(e) (Filing of Documents With the Board)

The NTSB proposes deleting the word ''other'' immediately preceding the word ''representative'' in current § 821.7(e). This word is unnecessary. With this change, § 821.7(e) will read as follows: ''(e) Subscription. The original of every document filed shall be signed by the filing party, or by that party's attorney or representative.''

4. Section 821.7(f)(Filing of Documents With the Board)

Consistent with the change to section 821.6(d) suggested above, the NTSB proposes adding the phrase ''and any subsequent document advising the Board of any representation or change in representation of a party pursuant to § 821.6(d)'' to section 821.7(f). With this change, section 821.7(f) would read, ''(f) Designation of person to receive service. The initial document filed by a party in a proceeding governed by this part, and any subsequent document advising the Board of any representation or change in representation of a party that is filed pursuant to § 821.6(d), shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf.''

5. Section 821.8(a) (Service of Documents)

The NTSB proposes adding the word ''simultaneously'' to subsection (a) of § 821.8, to state as follows: ''(a) Who must be served. (1) Copies of all documents filed with the Board must be simultaneously served on (*i.e.,* sent to) all other parties to the proceeding, on the date of filing, by the person filing them.'' The remainder of § 821.8(a) shall remain unchanged.

6. Section 821.8(c) (Service of Documents)

The NTSB proposes deleting parts of this section to ensure consistency with the changes proposed to § 821.7(f). We propose § 821.8(c) should include only the following language: ''(c) Where service shall be made. Except for personal service, parties shall be served at the address appearing in the official record, which the Board must receive under §§ 821.6(d) and 821.7(f). In the case of an agent designated by an air carrier under 49 U.S.C. 46103, service may be accomplished only at the agent's office or usual place of residence.''

7. Section 821.8(d) (Service of Documents)

The NTSB proposes adding a subsection (3) to § 821.8(d), to ensure consistency with other sections in part 821 that will provide for transmission of documents via electronic mail. With the new subsection (3), § 821.8(d) will read as follows: (d) Presumption of service. There shall be a presumption of lawful service:

(1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under § 821.7(f);

(2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused; or

(3) When a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.

9. Section 821.35(b)(10) (Assignment, Duties and Powers)

In addition to initial decisions, law judges may dispose of cases by dispositional order, where appropriate. Therefore, the NTSB proposes adding the phrase ''and dispositional orders'' to this subsection, to state as follows: ''(b) Powers of law judge. Law judges shall have the following powers: * * * (10) To issue initial decisions and dispositional orders.''

10. Section 821.50(c) (Petition for Rehearing, Reargument, Reconsideration or Modification of an Order of the Board)

Recently, the NTSB has received an increased number of petitions for reconsideration. Most of these petitions do not contain ''new matter'' under the rule, but instead challenge the Board's legal reasoning and may contain legal arguments the parties could have made in their appeal briefs. The NTSB proposes clearly addressing this issue by adding the following to the end of Section 821.50(c): ''To the extent the petition is not based upon new matter, the Board will not consider arguments that could have been made in the appeal or reply briefs received prior to the Board's decision.''

11. Section 821.64(b) (Judicial Review)

The NTSB recently encountered a situation in which the respondent filed a motion for a stay pending judicial review on the 29th day following the date of service of the Board's decision, and this circumstance highlighted the ambiguity of the current language in this subsection. To ensure the deadline is clear, the NTSB proposes amending this subsection to give the respondent 20 days to file a motion for a stay, and the FAA 2 days to reply to the motion, as follows: ''(b) Stay pending judicial review. No request for a stay pending judicial review will be entertained unless it is served on the Board within 20 days after the date of service of the Board's order. The Administrator may, within 2 days after the date of service of such a motion, file a reply thereto.''

12. Other Matters

The changes proposed below do not include any changes indicating the rules of subpart B apply to civil penalty actions. The NTSB declines to propose any such change because it believes that the language of section 821.2 sufficiently indicates that 49 CFR part 821 applies to civil penalty cases. In addition, we note that, in the definitions section of subpart A (section 821.1), the term ''complaint'' is defined as ''an order of the Administrator * * * from which an appeal to the Board has been taken pursuant to sections 49 U.S.C. 44106, 44709, 46301.'' This last cited provision, section 46301 of title 49, United States Code, concerns civil penalties for violations of various provisions in subtitle VII (Aviation Programs) of that title.

E. Regulatory Analyses

1. Executive Order 12866 (Regulatory Planning and Review); Executive Order 13579 (Regulation and Independent Regulatory Agencies); Unfunded Mandates Reform Act; and the Environmental Policy Act

This notice of proposed rulemaking is not a significant regulatory action under Executive Order 12866. Therefore, Executive Order 12866 does not require a Regulatory Assessment. As such, the Office of Management and Budget (OMB) has not reviewed this proposed rule under Executive Order 12866. In addition, on July 11, 2011, the President issued Executive Order 13579, ''Regulation and Independent Regulatory Agencies,'' 76 FR 41587, July 14, 2011. Section 2(a) of the Executive Order states:

> Independent regulatory agencies ''should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.''

76 FR at 41587.

Consistent with Executive Order 13579, the NTSB's proposed amendments to 49 CFR parts 821 and 826 reflect its judgment that these rules should be updated and streamlined.

This rule does not require an analysis under the Unfunded Mandates Reform Act, 2 United States Code (U.S.C.) 1501–1571, or the National Environmental Policy Act, 42 U.S.C. 4321–4347.

2. Executive Order 13132 (Federalism)

The NTSB has analyzed this NPRM in accordance with the principles and criteria contained in Executive Order 13132. Any rulemaking proposal resulting from this notice would not propose any regulations that would: (1) Have a substantial direct effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; (2) impose substantial direct compliance costs on state and local governments; or (3) preempt state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires each agency to review its rulemaking to assess the potential impact on small entities, unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The NTSB certifies this NPRM will not have a significant economic impact on a substantial number of small entities. However, the NTSB will consider comments to facilitate any further analysis on this issue, should commenters believe otherwise.

4. Other Executive Orders and Statutory Provisions

This NPRM also complies with all 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. In addition, the NTSB has evaluated this rule under: Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this rule does not contravene any of the requirements set forth in these Executive Orders or statutes, nor does this rule prompt further consideration with regard to such requirements.

List of Subjects

49 CFR Part 821

Administrative practice and procedure, Airmen, Aviation safety.

49 CFR Part 826

Claims, Equal access to justice, Lawyers.

For the reasons discussed in the preamble, the NTSB proposes to amend 49 CFR parts 821 and 826 as follows:

PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

1. The authority citation for 49 CFR part 821 continues read as follows:

Authority: 49 U.S.C. 1101–1155, 44701–44723, 46301, unless otherwise noted.

2. In § 821.6, revise paragraphs (b) and (d) to read as follows:

§ 821.6 Appearances and rights of witnesses.

* * * * *

(b) Any person appearing in any proceeding governed by this part may be accompanied, represented and advised, and may be examined by, his or her own counsel or representative.

* * * * *

(d) Any party to a proceeding who is represented by an attorney or representative shall, in a separate written document, notify the Board of the name, address and telephone number of that attorney or representative. In the event of a change in representation or a withdrawal of representation, the party shall immediately, in a separate written document, notify the Board (in the manner provided in § 821.7) and the other parties to the proceeding (pursuant to § 821.8), before the new attorney or representative may participate in the proceeding in any way. Parties, and their attorneys and representatives, must notify the Board immediately of any changes in their contact information.

3. In § 821.7, revise paragraphs (a), (e) and (f) to read as follows:

§ 821.7 Filing of documents with the Board.

(a) *Filing address, method and date of filing.*

(1) Except as provided in paragraph (a)(2) of this section, documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East SW., Room 4704, Washington, DC 20594, and addressed to the assigned law judge, if any. If the proceeding has not yet been assigned to a law judge, documents shall be addressed to the Case Manager. Filings may be made by paper (hard copy), including by facsimile at (202) 314–6158, or (except as otherwise provided in Subpart I) by electronic mail at *alj@ntsb.gov*. Filings made by facsimile or electronic mail are subject to additional requirements set forth in paragraphs (a)(3) and (4) of this section.

(2) Subsequent to the filing of a notice of appeal with the Office of Administrative Law Judges from a law judge's initial decision or appealable order, the issuance of a decision permitting an interlocutory appeal, or the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, all documents are to be filed with the Office of General Counsel, National Transportation Safety Board, 490 L'Enfant Plaza East SW., Room 6401, Washington, DC 20594. Filings may be made by hard copy, including by facsimile at (202) 314–6090, or by electronic mail at *enforcement@ntsb.gov*. Filings made by facsimile or electronic mail are subject to additional requirements set forth in paragraphs (a)(3) and (4) of this section.

(3) Except as otherwise provided in Subpart I (governing emergency proceedings), documents shall be filed: By personal delivery, by U.S. Postal Service first-class mail, by overnight delivery service, by facsimile or by electronic mail. Documents filed by electronic mail must be signed and transmitted in a commonly accepted format, such as Adobe Portable Document Format (PDF).

(4) Documents shall be deemed filed on the date of personal delivery; on the send date shown on the facsimile or the item of electronic mail; and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Where the document bears a postmark that cannot reasonably be reconciled with the mailing date shown on the certificate of service, the document will be deemed filed on the date of the postmark.

* * * * *

(e) *Subscription.* The original of every document filed shall be signed by the filing party, or by that party's attorney or representative.

(f) *Designation of person to receive service.* The initial document filed by a party in a proceeding governed by this part, and any subsequent document advising the Board of any representation or change in representation of a party that is filed pursuant to § 821.6(d), shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf.

* * * * *

4. In § 821.8, revise paragraphs (a), (b)(1), (c), (d) and (e) to read as follows:

§ 821.8 Service of documents.

(a) *Who must be served.*

(1) Copies of all documents filed with the Board must be simultaneously served on (*i.e.,* sent to) all other parties to the proceeding, on the date of filing, by the person filing them. A certificate of service shall be a part of each document and any copy or copies thereof tendered for filing, and shall certify concurrent service on the Board and the parties. A certificate of service shall be in substantially the following form:

''I hereby certify that I have this day served the foregoing [specify document] on the following party's counsel or designated representatives [or party, if without counsel or representative], at the address indicated, by [specify the method of service (*e.g.,* first-class mail, personal service, etc.)]

[List names and addresses of all persons served]

Dated at ____, this ____ day of _____, 20__

(Signature) _____

For (on behalf of) _____

(2) Service shall be made on the person designated in accordance with § 821.7(f) to receive service. If no such person has been designated, service shall be made directly on the party.

(b) *Method of Service.*

(1) Service of documents by any party on any other party shall be accomplished by any method prescribed in § 821.7(a)(3) for the filing of documents with the Board. A party may waive the applicability of this paragraph, and elect to be served with documents by the other parties to the proceeding solely by electronic mail, without also receiving a hard copy of the original by personal delivery, first-class mail or overnight delivery service, by filing a written document with the Board (with copies to the other parties) expressly stating such a preference.

* * * * *

(c) *Where service shall be made.* Except for personal service, parties shall be served at the address appearing in the official record, which the Board must receive under §§ 821.6(d) and 821.7(f). In the case of an agent designated by an air carrier under 49 U.S.C. 46103, service may be accomplished only at the agent's office or usual place of residence.

(d) *Presumption of service.* There shall be a presumption of lawful service:

(1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under § 821.7(f);

(2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused; or

(3) When a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.

(e) *Date of service.* The date of service shall be determined in the same manner as the filing date is determined under § 821.7(a)(4).

5.In § 821.12, revise paragraph (b) to read as follows:

§ 821.12 Amendment and withdrawal of pleadings.

* * * * *

(b) *Withdrawal.* Except in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from a law judge's initial decision or appealable order, pleadings may be withdrawn only upon approval of the law judge or the Board. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from the withdrawal of a complaint should be deemed to occur with or without prejudice.

6. In § 821.35, revise paragraph (b)(10) to read as follows:

§ 821.35 Assignment, duties and powers.

* * * * *

(b) * * *

(10) To issue initial decisions and dispositional orders.

* * * * *

7. In § 821.50, revise paragraph (c) to read as follows:

§ 821.50 Petition for rehearing, reargument, reconsideration or modification of an order of the Board.

* * * * *

(c) *Content.* The petition shall state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon. If the petition is based, in whole or in part, upon new matter, it shall set forth such new matter and shall contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable, and shall explain why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed. To the extent the petition is not based upon new matter, the Board will not consider arguments that could have been made in the appeal or reply briefs received prior to the Board's decision.

* * * * *

8. In § 821.54, revise paragraph (e) to read as follows:

§ 821.54 Petition for review of Administrator's determination of emergency.

* * * * *

(e) *Disposition.* Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge other than the chief law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal. In making this determination, however, the law judge is not so limited to the order's factual allegations themselves, but also should permit evidence, if appropriate, pertaining to the propriety of the emergency determination presented by the respondent with the petition and the Administrator with the reply to the petition. This evidence can include affidavits or other such records.

* * * * *

9. In § 821.55, revise paragraphs (c) and (d) to read as follows:

§ 821.55 Complaint, answer to complaint, motions and discovery.

* * * * *

(c) *Motion to dismiss and motion for more definite statement.* Except as provided in paragraph (d) of this section, in proceedings governed by this subpart, no motion to dismiss the complaint or for a more definite statement of the complaint's allegations shall be made, but the substance thereof may be stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any pleading at the hearing, upon good cause shown and upon just and reasonable terms.

(d) *Motion to dismiss for failure to include copy of releasable portion of Enforcement Investigative Report (EIR) with emergency or other immediately effective order.*

(1) Where the Administrator has failed to include a copy of the releasable portion of the FAA's EIR with an emergency or other immediately effective order, or to provide the respondent with a copy of the releasable portion of the EIR prior to the issuance of such an order, the respondent may move to dismiss the complaint and, unless the Administrator establishes good cause for that failure, the law judge shall dismiss the complaint. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from failure to provide the releasable portions of the EIR should be deemed to occur with or without prejudice.

(2) The releasable portion of the EIR shall include all information in the EIR, except for the following:

(i) Information that is privileged;

(ii) Information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency;

(iii) Information that would disclose the identity of a confidential source;

(iv) Information of which applicable law prohibits disclosure;

(v) Information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or

(vi) Sensitive security information, as defined at 49 U.S.C. 40119 and 49 CFR 15.5.

(3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR.

10. In § 821.57, revise paragraphs (b) and (c) to read as follows:

§ 821.57 Procedure on appeal.

* * * * *

(b) *Briefs and oral argument.* Each appeal in proceedings governed by this subpart must be perfected, within 5 days after the date on which the notice of appeal was filed, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. Any other party to the proceeding may file a brief in reply to the appeal brief within 7 days after the date on which the appeal brief was served on that party. A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. Unless otherwise authorized by the Board, all briefs in connection with appeals governed by this subpart must be filed and served by overnight delivery service, or by facsimile or electronic mail. Aside from the time limits and methods of filing and service

specifically mandated by this paragraph, the provisions of § 821.48 shall apply.

(c) *Issues on appeal.* The provisions of § 821.49(a) and (b) shall apply in proceedings governed by this subpart.

* * * * *

11. In § 821.64, revise paragraph (b) to read as follows:

§ 821.64 Judicial Review.

* * * * *

(b) *Stay pending judicial review.* No request for a stay pending judicial review will be entertained unless it is served on the Board within 20 days after the date of service of the Board's order. The Administrator may, within 2 days after the date of service of such a motion, file a reply thereto.

PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

12. The authority citation for 49 CFR part 826 continues read as follows:

Authority: Section 203(a)(1) Pub. L. 99–80, 99 Stat. 186 (5 U.S.C. 504).

13. Section 826.1 is revised to read as follows:

§ 826.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board. An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the FAA's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards this Board will use to make them. As used hereinafter, the term ''Administrator'' refers to the Administrator of the FAA.

14. Section 826.40 is revised to read as follows:

§ 826.40 Payment of award.

Within 5 days of the Board's service of a final decision granting an award of fees and expenses to an applicant, the Administrator shall transmit to the applicant instructions explaining how the applicant may obtain the award. These instructions may require, but are not limited to, the submission of the following information to the Administrator: A statement that the applicant will not seek review of the decision in the United States courts, bank routing numbers to which the Administrator may transmit payment, and the applicant's tax identification or Social Security number. The Administrator will pay the applicant the amount awarded within 60 days of receiving the necessary information from the applicant, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Dated: January 27, 2012.

Deborah A.P. Hersman,

Chairman.

[FR Doc. 2012–2278 Filed 2–8–12; 8:45 am]

BILLING CODE 7533–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

RIN 0648–BB14

Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to U.S. Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar

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

ACTION: Proposed rule; extension of comment period.

SUMMARY: On January 6, 2012, the NMFS published its proposed regulations to govern the take of marine mammals, by harassment, incidental to conducting operations of Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active (LFA) sonar in areas of the world's oceans (with the exception of Arctic and Antarctic waters and certain geographic restrictions), from August 16, 2012, through August 15, 2017.

The **Federal Register** notice indicated that written comments were due by February 6, 2012, which allowed 30 calendar days for public input. In response to a request from the Natural Resources Defense Council, NMFS has decided to extend the public comment period by 15 days, to February 21, 2012, which allows a total of 45 days for public input.

DATES: NMFS has extended the public comment period for this action from February 6, 2012, to February 21, 2012. NMFS must receive written comments and information no later than February 21, 2012.

ADDRESSES: You may submit comments, identified by 0648–BB14, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov,* using the Keyword or ID 0648–BB14.
- Hand delivery or mailing of paper, disk, or CD–ROM comments should be addressed 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.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. To help NMFS process and review comments more efficiently, please use only one method to submit comments.

FOR FURTHER INFORMATION CONTACT: Jeannine Cody, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION: NMFS refers the reader to the January 6, 2012, **Federal Register** notice (77 FR 842) for background information concerning the proposed regulations. The information in the notice of proposed rulemaking is not repeated here. For additional information regarding the Navy's associated draft Supplemental Environmental Impact Statement/Supplemental Overseas Environmental Impact Statement (DSEIS/SOEIS) for employment of SURTASS LFA sonar, please visit *http://www.surtass-lfa-eis.com.*

Dated: February 3, 2012.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–3051 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 77, No. 27

Thursday, February 9, 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. # AMS–FV–10–0047]

United States Standards for Grades of Cauliflower

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS), of the Department of Agriculture (USDA), is soliciting comments on the proposed revision to the United States Standards for Grades of Cauliflower. AMS is reviewing all fresh fruit and vegetable grade standards for usefulness in serving the industry. As a result, AMS has noted the current U.S. grade standards do not have provisions for grading purple, orange or green cauliflower. The proposed revision will amend the color requirement for curds to allow all colors of cauliflower to be certified to a U.S. grade. In addition, AMS proposes to permit mixed color packs, heads less than 4 inches in diameter, and to remove the unclassified section.

DATES: Comments must be received by April 9, 2012.

ADDRESSES: Interested persons are invited to submit written comments to the Standardization and Training Branch, Fresh Products Division, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, National Training and Development Center, Riverside Business Park, 100 Riverside Parkway, Suite 101, Fredericksburg, VA 22406: Fax (540) 361–1199, or on the Web at: *www.regulation.gov.* Comments should make reference to the dates and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours. Comments can also be viewed on the *www.regulations.gov* Web site. The current United States Standards for Grades of Cauliflower will be available either through the address cited above or by accessing the AMS, Fresh Products Division Web site at *www.ams.usda.gov/freshinspection.*

FOR FURTHER INFORMATION CONTACT: Dr. Carl Newell, at the above address or call (540) 361–1120.

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627), as amended, directs and authorizes the Secretary of Agriculture ''to develop and improve standards of quality, condition, quantity, grade and packaging and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.'' AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities and makes copies of official standards available upon request. The United States Standards for Grades of Fruits and Vegetables not connected with Federal Marketing Orders or U.S. Import Requirements, no longer appear in the Code of Federal Regulations, but are maintained by USDA, AMS, Fruit and Vegetable Programs.

AMS is proposing to revise the voluntary United States Standards for Grades of Cauliflower using procedures that appear in Part 36, Title 7 of the Code of Federal Regulations (7 CFR part 36).

Background and Proposed Notice

AMS is reviewing all fresh fruit and vegetable grade standards for usefulness in serving the industry. As a result, AMS has identified the U.S. Standards for Grades of Cauliflower color requirement for possible updating.

Different colors of cauliflower, such as purple, green, and orange, are currently being packed, including specialty packs consisting of mixed colors. The U.S. grade standards presently require curds to be white, creamy white, or cream color; they do not have provisions for grading other colors of cauliflower. AMS proposes to amend U.S. No. 1 color provisions by adding ''unless otherwise specified;'' to the basic requirement for color. This revision will also affect the U.S. Commercial grade. AMS believes that permitting other colors and mixed color packs will facilitate the marketing of cauliflower by providing the industry with more flexibility that reflects current marketing practices and consumer demand.

In addition, California produce growers, packers, and shippers requested that the USDA provide more flexibility regarding the minimum size. Currently, curds are required to be not less than 4 inches in diameter. In order to allow for smaller sized heads of cauliflower, AMS proposes to amend provisions concerning U.S. No. 1 size by adding ''unless otherwise specified'' to the basic requirement for size. This revision will also affect the U.S. Commercial grade.

AMS also proposes to eliminate the ''Unclassified'' category from the standards. The unclassified section is being removed from all standards when they are revised. This category is not a grade and only serves to show that no grade has been applied to the lot. It is no longer considered necessary.

This notice provides for a 60 day comment period for interested parties to comment on the proposed revisions in the standards.

Authority: 7 U.S.C. 1621–1627.

Dated: February 3, 2012.

Robert C. Keeney,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2012–3027 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Document No. AMS–FV–11–0054]

United States Standards for Grades of Okra

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS), prior to undertaking research and other work associated with revising official grade standards, is soliciting comments on the possible revisions to the United States Standards for Grades of Okra. AMS has been reviewing the Fresh Fruit and Vegetable grade standards for usefulness in serving the industry. As a result, AMS has identified the United States

Standards for Grades of Okra for possible revisions. AMS would remove the ''Unclassified'' category from the standards. AMS is seeking comments regarding this change as well as any other possible revisions that may be necessary to better serve the industry.

DATES: Comments must be received by April 9, 2012.

ADDRESSES: Interested persons are invited to submit written comments to the Standardization and Training Branch, Fresh Products Division, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, National Training and Development Center, Riverside Business Park, 100 Riverside Parkway, Suite 101, Fredericksburg, VA 22406; Fax (540) 361–1199, or on the Web at: *www.regulations.gov*. Comments should make reference to the dates and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours.

FOR FURTHER INFORMATION CONTACT: Contact Dr. Carl Newell, Standardization and Training Branch, Fresh Products Division, (540) 361–1120. The United States Standards for Grades of Okra are available by accessing the Fresh Products Branch Web site at: *http://www.ams.usda.gov/freshinspection*.

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627), as amended, directs and authorizes the Secretary of Agriculture ''to develop and improve standards of quality, condition, quantity, grade and packaging and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.'' AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities. AMS makes copies of official standards available upon request. The United States Standards for Grades of Fruits and Vegetables not connected with Federal Marketing Orders or U.S. Import Requirements no longer appear in the Code of Federal Regulations, but are maintained by USDA, AMS, Fruit and Vegetable Programs.

AMS is revising the United States Standards for Grades of Okra using the procedures that appear in Part 36, Title 7 of the Code of Federal Regulations (7 CFR Part 36). These standards were last revised December 18, 1928.

Background and Proposed Notice: AMS has been reviewing the fresh fruit and vegetable grade standards for usefulness in serving the industry and has identified that the ''Unclassified'' section needs to be eliminated from the United States Standards for Grades of Okra. AMS is removing this section in all standards as they are revised. This category is not a grade and only serves to show that no grade has been applied to the lot. It is no longer considered necessary. Therefore, AMS is soliciting comments on this proposed revision and any other comments regarding revisions to the United States Standards for Grades of Okra.

This notice provides for a 60 day comment period for interested parties to comment on the proposed revisions in the standard. Should AMS go forward with the revisions, it will develop the proposed revised standards that will be published in the **Federal Register** with a request for comments in accordance with 7 CFR part 36.

Authority: 7 U.S.C. 1621–1627.

Dated: February 3, 2012.

Robert C. Keeney,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2012–3029 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Document No. AMS–FV–11–0050, FV–12–327]

United States Standards for Grades of Grapefruit Juice

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: The Agricultural Marketing Service (AMS) of the Department of Agriculture (USDA) is soliciting comments on the proposed revision to the United States Standards for Grades of Grapefruit Juice. The proposal includes changes to the grade standards for grapefruit juice to remove the parameters for maximum ''free and suspended pulp'' to account for advances in industry processing technology.

DATES: Comments must be submitted on or before April 9, 2012.

ADDRESSES: Interested persons are invited to submit written comments on the Internet at *http://www.regulations.gov* or to Brian E. Griffin, Inspection and Standardization Branch, Processed Products Division, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue SW., Room 0709, South Building; STOP 0247, Washington, DC 20250; telephone (202) 720–4693; fax (202) 690–1527, email *brian.griffin@ams.usda.gov*. Comments should make reference to the date and page number of this issue of the **Federal Register** and will be made available for public inspection at the above office during regular business hours.

Please be advised that all comments submitted in response to this notice will be included in the record and will be made available to the public on the Internet via *http://www.regulations.gov*. Also, the identity of the individuals or entities submitting the comments will be made public. The U.S. Standards for Grades of Grapefruit Juice identified in this notice are available either at the above address or by accessing the AMS Web site at: *http://www.ams.usda.gov/processedinspection*.

FOR FURTHER INFORMATION CONTACT: Brian E. Griffin, Inspection and Standardization Branch, Processed Products Division, Agricultural Marketing Service, U.S. Department of Agriculture, telephone (202) 720–5021; or fax (202) 690–1527.

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946, as amended, directs and authorizes the Secretary of Agriculture ''to develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.''

AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities and makes copies of official grade standards available upon request. Those voluntary U.S. standards for grades of fruits and vegetables no longer appear in the Code of Federal Regulations, 7 CFR Part 52, but are maintained by USDA, AMS, Fruit and Vegetable Programs. AMS is revising the U.S. Standards for Grades of Grapefruit Juice using the procedures that appear in part 36 of Title 7 of the Code of Federal Regulations (7 CFR part 36).

Background

AMS received a petition from the Florida Citrus Processors Association, an association of citrus producers, requesting revisions to the U.S. Standards for Grades of Grapefruit Juice. The petitioners requested the removal of the maximum limit for ''free and suspended pulp'' (referred to in the industry as ''sinking pulp'') from the U.S. grade standards for all forms of grapefruit juice.

The grade standards, effective since September 12, 1983, provided that grapefruit juice from concentrate, grapefruit juice, and frozen concentrated grapefruit juice establish limits for maximum free and suspended pulp as follows: ''Grade A''—10 percent by volume, ''Grade B''—15 percent by volume. Concentrated grapefruit juice for manufacturing requirements for maximum free and suspended pulp are as follows: ''Grade A''—10 percent by volume, and ''Grade B''—12 percent by volume.

The petitioners believe that, with respect to maximum values for ''free and suspended pulp'', the existing U.S. Standards for Grades of Grapefruit Juice do not take into account modern extraction and finishing technologies, nor are they supported by evidence of a correlation between these criteria and acceptable flavor. The petitioners also believe that removing the ''free and suspended pulp'' values from the grade standards would allow processors to process the entire grapefruit crop without resorting to expensive technologies that increase the cost of juice with no concomitant benefit. More mature grapefruit tends to be sweeter, but when juiced tends to cause the product to exceed maximum free and suspended pulp values.

Processing technologies used in the early 1940's were considerably different than the technologies in place today. In the developmental stages of the citrus industry, the amount of sinking pulp was an indication of excessive pressures used in extraction and finishing of citrus juice, resulting in bitter flavor. It was noted that sinking pulp levels could be correlated to bitter flavor. The bitter flavors are due to the naturally occurring naringin and limonin components found in grapefruit juice. Although bitterness is an inherent contributor to what we know as ''grapefruit flavor,'' an excessive amount of bitterness can be objectionable to some consumers.

Current industry practices have shown us that sinking pulp levels can be greatly influenced by modern processing techniques, which eliminate the correlation between sinking pulp and excessive bitterness.

The petitioners submitted research data covering a six season period which illustrates levels of sinking pulp vs. naringin, and levels of sinking pulp vs. limonin using variations in extractor settings. The petitioners also submitted data on a sensory evaluation performed by the University of Florida on consumer acceptability of grapefruit juice with two free and suspended pulp levels. The petitioner's research data supports the premise that modern extraction and finishing technologies produce a product where there is no correlation between grapefruit juice flavor components associated with bitter and off flavor, *i.e.,* naringin and limonin, and free and suspended pulp levels.

Prior to undertaking research and other work associated with revising the grade standards, AMS sought public comments on the petition (see 76 FR 51343).

Two comments were received regarding this petition. One comment was from a trade association with international membership; and one comment was from a trade association in the U.S. representing over 8,000 citrus growers. Both comments were in support of the petition to remove the maximum limit for ''free and suspended pulp'' from the U.S. Standards for Grades of Grapefruit Juice.

AMS is soliciting comments on the proposed revision of the U.S. Standards for Grades of Grapefruit Juice. Further details are provided in the petition and are available from Brian E. Griffin at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section or can be found on the Internet at *http://www.regulations.gov.* This notice provides for a 60-day comment period for interested parties to comment on the proposed revision of the U.S. Standards for Grades of Grapefruit Juice.

Authority: 7 U.S.C. 1621–1627.

Dated: February 3, 2012.

Robert C. Keeney,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2012–2970 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. # AMS–FV–11–0052]

United States Standards for Grades of Eggplant

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS), of the Department of Agriculture (USDA), is soliciting comments on the proposed revision to the United States Standards for Grades of Eggplant. AMS is reviewing the fresh fruit and vegetable grade standards for usefulness in serving the industry. As a result, AMS has noted the current grade standards do not have provisions for mixed or specialty packs. Therefore, AMS is proposing to amend the similar varietal characteristic requirement in the U.S. Fancy and No. 1 grades to allow mixed colors and/or types of eggplant when designated as a mixed or specialty pack. In addition, AMS proposes to remove the unclassified section.

DATES: Comments must be received by April 9, 2012.

ADDRESSES: Interested persons are invited to submit written comments to the Standardization and Training Branch, Fresh Products Division, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, National Training and Development Center, Riverside Business Park, 100 Riverside Parkway, Suite 101, Fredericksburg, VA 22406: Fax (540) 361–1199, or on the Web at: *www.regulations.gov.* Comments should make reference to the dates and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours. Comments can also be viewed on the *www.regulations.gov* Web site. The current United States Standards for Grades of Eggplant will be available either through the address cited above or by accessing the AMS, Fresh Products Division Web site at *www.ams.usda.gov/freshinspection.*

FOR FURTHER INFORMATION CONTACT: Dr. Carl Newell, at the above address or call (540) 361–1120.

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627), as amended, directs and authorizes the Secretary of Agriculture ''to develop and improve standards of quality, condition, quantity, grade and packaging and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.'' AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities and makes copies of official standards available upon request. The United States Standards for Grades of Fruits and Vegetables not connected with Federal Marketing Orders or U.S. Import Requirements, no longer appear in the Code of Federal Regulations, but are maintained by USDA, AMS, Fruit and Vegetable Programs.

AMS is proposing to revise the voluntary United States Standards for Grades of Eggplant using procedures that appear in Part 36, Title 7 of the Code of Federal Regulations (7 CFR part 36).

Background and Proposed Notice

AMS is reviewing all fresh fruit and vegetable grade standards for usefulness in serving the industry. As a result, AMS has identified the U.S. Standards for Grades of Eggplant similar varietal characteristic requirement for possible updating. AMS has observed that mixing colors and/or types of eggplant in a specialty pack is a current marketing practice. The U.S. grade standards presently require eggplant to be packed with eggplant of similar type, color and character of growth; there are no provisions for mixed or specialty packs. AMS proposes to revise the similar varietal characteristic requirement for the U.S. Fancy and No. 1 grades to allow mixed colors and/or types of eggplant when designated as a mixed or specialty pack. The following language would be added to these two grades: ''* * * consists of eggplants of similar varietal characteristics, except when specified as a mixed or specialty pack * * *.'' AMS believes that permitting mixed colors and/or type packs will facilitate the marketing of eggplant by providing the industry with more flexibility that reflects current marketing practices and consumer demand.

AMS also proposes to eliminate the ''Unclassified'' category from the standards. The unclassified section is being removed from all standards when they are revised. This category is not a grade and only serves to show that no grade has been applied to the lot. It is no longer considered necessary.

This notice provides for a 60 day comment period for interested parties to comment on the proposed revisions to the standards.

Authority: 7 U.S.C. 1621–1627.

Dated: February 3, 2012.

Robert C. Keeney,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2012–3013 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities; Proposed Collection; Comment Request: Commodity Supplemental Food Program, the Food Distribution Program on Indian Reservations, and the Supplemental Nutrition Assistance Program; Title VI Civil Rights Collection Reports

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This collection is a revision of a currently approved collection under OMB No.0584–0025, Civil Rights Title VI Collection Reports—Forms FNS–191 and FNS–101, for the Commodity Supplemental Food Program, the Food Distribution Program on Indian Reservations, and the Supplemental Nutrition Assistance Program.

DATES: Written comments must be received on or before April 9, 2012.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Jane Duffield, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 818, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Jane Duffield at 703–605–4385 or via email to *Jane.Duffield@fne.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 818, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Jane Duffield at 703–605–4385.

SUPPLEMENTARY INFORMATION:

Title: Civil Rights Title VI Collection Reports.

Form Number: FNS–191 and FNS–101.

OMB Number: 0584–0025.

Expiration Date: May 30, 2012.

Type of Request: Revision of a currently approved collection.

Abstract: Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d–7, prohibits discrimination on the basis of race, color, and national origin in programs receiving Federal financial assistance. Department of Justice (DOJ) regulations, 28 CFR 42.406, require all Federal agencies to provide for the collection of racial/ethnic data and information from applicants for and recipients of Federal assistance sufficient to permit effective enforcement of Title VI. For purposes of the Information Collection Notice only, the Food and Nutrition Service (FNS) employs program terminology in place of the standard Title VI terminology adopted by the U.S. Department of Agriculture (USDA) and codified at 7 CFR 15.2. Thus, ''State agencies,'' ''local agencies,'' and/or ''operators'' are the program entities responsible for fulfilling the data collection requirements associated with ''primary recipients'' and/or ''recipients'' as defined by Title VI. Moreover, the program terms ''respondents,'' ''applicants,'' and/or ''participants'' refer to the ''potential beneficiaries,'' ''applicant beneficiaries,'' and/or ''actual beneficiaries'' of Federal financial assistance as defined by Title VI. In order to conform with the statutory mandates of Title VI of the Civil Rights Act of 1964, DOJ regulations, and USDA regulations on nondiscrimination in Federally assisted programs, the USDA's Food and Nutrition Service (FNS) requires State agencies to submit data on the racial/ethnic categories of persons receiving benefits from FNS food assistance programs.

In all three programs, State and local agencies collect racial/ethnic information on the benefits application form that applicants may complete and file manually or electronically. The application form must clearly indicate that the information is voluntary and that the race and ethnic information will not affect an applicant's eligibility or level of benefits. It must also state that the reason for the collection of the information is to assure that program benefits are distributed without regard to race, color or national origin. All three programs allow the individual to self-identify his or her racial/ethnic status on the application. Visual

observation by a program representative is used to collect the data when the individual does not self-identify. In either case the information is recorded on the application form and entered into the agency's information system. The Federal reporting forms do not identify individual participants. Local agencies use the two forms referenced above (*i.e.,* the FNS–191 and FNS–101) to report data on the Commodity Supplemental Food Program (CSFP), the Food Distribution Program on Indian Reservations (FDPIR), and the Supplemental Nutrition Assistance Program (SNAP) to FNS as explained below. FNS' data collection requirement for operators is found in the regulations for the CSFP at 7 CFR 247.29(b), and for the SNAP at 7 CFR 272.6(g); the requirement for the FDPIR is found in FNS Handbook 501.

Affected Public: State, Local and Tribal agencies. All State or local agencies must submit the appropriate form in order to receive Federal assistance and comply with applicable legislation. If a State or local agency does not comply voluntarily, the State or local agency is subject to fund termination, suspension, or denial, or to judicial action. Respondent groups identified include: (1) CSFP local agencies complete the FNS–191 (FNS requires local agencies to provide annually the actual number and racial/ethnic designations of participants who receive CSFP benefits during the month of April); and (2) SNAP and FDPIR State, local or Tribal agencies complete the FNS–101 (FNS requires State, local or Tribal agencies to report annually the actual number of participants who receive FDPIR and/or SNAP benefits in the month of July).

Estimated Number of Respondents: The total estimated number of respondents is 2,927. This includes: 192 for local CSFP agencies, 134 local FDPIR agencies; and 2,601 for SNAP local agencies.

Estimated Number of Responses per Respondent: The local CSFP agencies respond to the FNS–191 form once a year, both the FDPIR and SNAP local agencies respond to the FNS–101 once a year.

Estimated Total Annual Responses: 2,927 responses.

Estimated Time per Response:

Form FNS–191: The local CSFP agencies submit Form FNS–191 at an estimate of 2 hours per respondent (including respondent time of 1.92 and an additional recordkeeping burden of .08 hours per respondent for maintaining the response) or 384 total hours.

Form–FNS 101: The local FDPIR and SNAP agencies submit Form FNS–101 at an estimate of 2 hours per respondent (including respondent time of 1.92 and an additional burden of .08 hours per respondent for maintaining the responses) or 5,470 hours.

Estimated Total Annual Burden on Respondents: 5,854 hours. See the table below for estimated total annual burden for each type of respondent.

Respondent	Estimated number of respondents	Responses annually per respondent	Total annual responses (Col. bxc)	Estimated avg. number of hours per response	Estimated total hours (Col. dxe)
Reporting Burden					
SNAP local agencies, FNS 101	2,601	1.00	2,601.00	2	5,202
FDPIR local agencies, FNS 101	134	1.00	134.00	2	268
CSFP local agencies, FNS 191	192	1.00	192.00	2	384
Total	2,927	1.00	2,927	6	5,854

Dated: February 3, 2012.

Jeffrey J. Tribiano,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 2012–2960 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—National School Lunch Program and School Breakfast Program Access, Participation, Eligibility, and Certification Study II (APEC–II Study)

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on the proposed information collection for the APEC–II Study.

DATES: Written comments must be received by April 9, 2012.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate, automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Steven Carlson, Office of Research and Analysis, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 1014, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Steven Carlson at 703–305–2576 or via email to *Steve.Carlson@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the Office of Research and Analysis, Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 1014, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection

should be directed to Steven Carlson at 703–305–2017.

SUPPLEMENTARY INFORMATION:

Title: National School Lunch Program and School Breakfast Program Access, Participation, Eligibility, and Certification Study II (APEC–II Study).

OMB Number: 0584–0530.

Expiration Date: Not yet determined.

Type of Request: Reinstatement.

Abstract: The Improper Payments Information Act of 2002, Public Law 107–300, requires the United States Department of Agriculture (USDA) to identify and reduce erroneous payments in various programs, including the National School Lunch Program (NSLP) and School Breakfast Program (SBP). An OMB directive, issued May 21, 2003, states that an annual erroneous payment estimate is the gross (not net) total of both overpayments and underpayments, *i.e.,* the sum of the absolute value of overpayments and underpayments. To comply with the Improper Payments Information Act of 2002, USDA needs a reliable measure to estimate NSLP and SBP erroneous payments on an annual basis. The Access, Participation, Eligibility, and Certification (APEC) study was conducted by FNS under OMB Number 0584–0530, expired August 31, 2008, and provided the first reliable national estimates of erroneous payments for the NSLP and SBP. Information was collected during the 2005–06 school year and results were released in November 2007.

USDA is seeking to renew OMB Clearance 0584–0530 granted on 08/2005 for The Access, Participation, Eligibility, and Certification (APEC) study. The new study will produce national estimates of overpayment, underpayment and overall erroneous payments made under the National School Lunch Program (NSLP) and the School Breakfast Program (SBP). The study will measure certification error and meal counting and claiming error for School Year (SY) 2012–2013; and develop and validate estimation models to be used by USDA's FNS staff for updating the erroneous payment estimate annually with NSLP and SBP administrative records and extant data (i.e. without extensive collection of new data between national studies). Models are being developed because it would be cost prohibitive to conduct a large nationally representative data collection effort to measure improper payments comprehensively on an annual basis. The development of an estimation model to produce updated annual estimates using available extant data is a pragmatic approach to meeting the intent of the Improper Payments Information Act of 2002. In addition, this study will produce separate estimates of erroneous payments for Local Education Agencies participating in the Community Eligibility Option and will examine alternatives to develop estimates of erroneous payment estimates at the State level. Data collected from school districts and households will be used to produce estimates of erroneous payments in at least one state and to create and validate estimation models for generating annual estimates of erroneous payments at the State level.

In School Year 2012–2013, on-site data collection activities will be conducted in a nationally representative sample of school districts and schools across the 48 contiguous States and the District of Columbia. Data to be collected will include school administrative records, household income from parents/guardians, direct observation of school meal transactions and other information that will inform this study. OMB approval will be requested for the data collection instruments to be used for the APEC–II Study.

Affected Public: State Agencies (School district staff, school staff) and Individual/households.

Respondent Type: Staff in school districts and schools participating in the National School Lunch Program and the School Breakfast Program; student households certified for or having applied for free or reduced price meals.

Estimated Number of Respondents: 8,075: Sample members are estimated to include: (a) 176 School Food Service Directors (the total estimated number of respondents to complete the SFA survey and other collected information is 167, FNS anticipates 9 will not complete this survey); (b) 528 school financial administrative staff; (c) 528 school liaisons; and we anticipate 100 percent participation from these two groups (d) 6,843 households (the total estimated number of respondents to the household who will complete the survey is 5,474; we anticipate 1,369 will not complete the survey).

Estimated Number of Responses per Respondent: Most of the respondents will fill out 3 separate instruments at one time and individual household will participant in 1 survey (the number of forms are 3 from School Food Service Directors, 3 from School Financial Administrators, 2 from School Liaisons and 1 from Households). Multiple responses will be obtained from most respondents with the exception of households, who will be interviewed once.

Estimated Time per Response: The estimated average response time will range from 45 minutes for the household interview to 170 minutes for School Food Service Directors to complete fact sheets, provide claim data and be interviewed.

Estimated Total Annual Burden on Respondents: The total estimated response time is 5,836.85 hours. See the table below for estimated total annual burden.

Affected public	Respondent	Estimated number of respondents	Responses annually per respondent	Total annual responses	Estimated average number of hours per response	Estimated total annual hours of response burden
State Agencies	School Food Service Directors					
	Fact Sheet					
	Completed	167	1	167	1.5	250.5
	Attempted	9	1	9	0.033	0.297
	SFA Survey					
	Completed	167	1	167	0.333	55.611
	Attempted	9	1	9	0.083	0.747

Affected public	Respondent	Estimated number of respondents	Responses annually per respondent	Total annual responses	Estimated average number of hours per response	Estimated total annual hours of response burden
	Reimbursement Claims Data					
	Completed	167	1	167	1	167
	Attempted	9	1	9	0.083	0.747
	School Financial Administrators					
	Roster Verification Form					
	Completed	528	1	528	0.25	132
	School Meal Count Verification Form					
	Completed	528	1	528	1	528
	Meal Transaction Observation Form					
	Completed	528	1	528	0.25	132
	School Liaisons					
	Student Certification and Enrollment Form					
	Completed	528	1	528	0.5	264
	Meal Claims					
	Completed	528	1	528	0.25	132
	SUBTOTALS	1,232		3,168		1,662.90
	Households					
	Household Survey					
	Completed	5,474.00	1	5,474	0.75	4,105.50
	Attempted	1,369	1	1,369	0.05	68.45
	SUBTOTALS	6,843		6,843		4,173.95
	GRAND TOTAL	8,075		10,011		5,836.85

Dated: February 3, 2012.

Jeffrey J. Tribiano,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 2012–2966 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Nez Perce-Clearwater National Forests; Idaho; Clear Creek Integrated Restoration Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service gives notice of its intent to prepare an Environmental Impact Statement for the Clear Creek Integrated Restoration Project. The Proposed action would use a combination of timber harvest, pre-commercial thinning, prescribed fire and reforestation to achieve the desired range of age classes, size classes, vegetative species distributions habitat complexity (diversity) and landscape pattern across the forested portions of the project area. Road decommissioning, culvert replacement and road improvements are also proposed to improve watershed health. The EIS will analyze the effects of the proposed action and alternatives. The Nez Perce-Clearwater Forests invites comments and suggestions on the issues to be addressed. The agency gives notice of the National Environmental Policy Act (NEPA) analysis and decision making process on the proposal so interested and affected members of the public may participate and contribute to the final decision.

DATES: Comments concerning the scope of the analysis must be received by February 15th, 2012. The draft environmental impact statement is expected in February 2013 and the final environmental impact statement is expected in November 2013.

ADDRESSES: Send written or electronic comments to Attn: Lois Foster, Interdisciplinary Team Leader; 903 3rd St.; Kamiah, ID 83536; FAX 208–935–4257; Email *comments-northern-nezperce-moose-creek@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Lois Foster, Interdisciplinary Team Leader, (208) 935–4258.

SUPPLEMENTARY INFORMATION: The objective of the Clear Creek Integrated Restoration Project is to manage forest vegetation to restore natural disturbance patterns, improve long term resistance and resilience at the landscape level; restore natural fire regimes and reduce

fuels; improve watershed conditions; improve elk habitat effectiveness; improve habitat for early seral species; and maintain habitat structure, function, and diversity. Outputs (timber) from the proposed action will be used to offset treatment costs and support the economic structure of local communities and provide for regional and national needs.

The Purpose and Need for the Proposal is:

Vegetation and Wildlife Habitat Improvement

Purpose: Trend vegetation species composition, structure, and distributions toward desired conditions described in the Forest Plan.

Need: The project area has a high proportion of grand fir/Douglas fir habitat. These habitats tend to be more susceptible/vulnerable to insects and diseases and grand fir is unlikely to survive in wildfire. There is a need to trend the area towards a more diverse and resilient forest structure by creating a range of age classes, size classes, habitat complexity (diversity) and disturbance patterns that more closely emulate natural mixed severity disturbance. Shifting tree species composition by retaining and planting early seral species (*i.e.,* ponderosa pine, western larch and western white pine) in managed areas would help trend the area toward or maintain desired habitat conditions and would make these habitats more resistant and resilient to change agents such as insects, disease, and fire.

Historical logging practices and fire suppression have created a landscape that is more highly fragmented than what would be expected through natural disturbance. Ladder fuels have increased and there has been a shift to shade tolerant species. Habitat structure and patch sizes of young forests are simplified and smaller than what would have been created through natural disturbance. Edges of patches are straight and even. There is a need to increase diversity within previously harvested areas to begin restoring long-term habitat quality for sensitive and old growth associated species.

There is a shortage of young forest habitats on this landscape. Age classes are dominated by middle-aged and mature forest habitats. Forest management would increase high quality early seral wildlife habitats by retaining large trees and promoting establishment of tall shrubs and hardwood trees by using variable retention regeneration harvest. This would benefit wildlife species using early seral habitats such as: Neotropical migratory birds, resident birds, small mammals, and big game species in the short term. Tree retention would help maintain habitat structure and complexity needed by old growth associated species in the long-term.

Goods and Service

Purpose: To utilize timber outputs produced through restoration activities to support the economic structure of local communities and provide for regional and national needs. (Forest Plan page II–1)

Need: The need to provide a sustained yield of resource outputs is directed in the Forest Plan. Much of the area consists of grand fir dominated stands that have insect and disease infestations that are contributing to increased tree mortality, or are at risk from stand replacing events. Stands proposed for treatment are currently losing volume and value due to insects and disease. Harvest of the timber would provide materials to local industries.

Fire Regime/Natural Disturbance Restoration and Fuel Reduction

Purpose: Reduce ladder fuels created by shade-tolerant species and create more natural patch sizes by emulating mixed severity fire. (Forest Plan page II–2)

Need: Effective fire suppression in this area began in the 1930's. As a result, there has been vegetative shift to less fire resistant species, and an increase in ladder fuels that can contribute to the risk of high intensity and potentially resource damaging wildfire. Some portions of the project area have been identified as being up to five times outside of their normal fire return intervals. Past harvest patterns do not emulate natural disturbance patterns nor do they emulate natural habitat structure. There is a need to increase patch sizes to shift age and size class distributions to increase high quality early seral wildlife habitats. Landscape burning and timber harvest that mimics natural fire would help increase forest resilience, help reduce risk of wildfires, and help create high quality habitats that would benefit neotropical migratory birds, resident birds, small mammals, and big game species. Fire dependent wildlife species would benefit from landscape burning.

Watershed Improvement

Purpose: Reduce potential sediment inputs into the aquatic ecosystem from roads.

Need: There are 283 miles of road within the project area, 200 of which are needed for current and future management. The remaining 83 miles of road have been cleared for decommissioning under the SF/WF Clear Creek Road Decommissioning EA (2011). The roads needed for management can contribute sediment to streams through road surface erosion and potential culvert failures. Surface erosion occurs during spring snowmelt and rain events. Dirt coming off roads is diverted into ditchlines which are often directed into streams. Preliminary surveys show most roads in the area are drained by ditches. Culvert failures can result from undersized, damaged or rusting culverts which can plug with debris and then fail as water saturates the surrounding fill. Failures can contribute large pulses of sediment into streams. Surveys indicate at least 60 miles of road with culverts that are in need of replacement or cleaning. There is a minimum of 40 high or moderate priority culverts in need of replacement, and 12 in need of cleaning. There are an additional 40 low priority culverts in need of replacement and 15 in need of cleaning. The surveyed roads pose the highest risk to streams in the project area.

The desired condition for roads is to have ditchlines that drain road surface water away from streams and onto forest the forest floor. All culverts at stream crossings are appropriately sized to allow for the passage of material within minimal risk of plugging.

There is a need to drain roadside ditchline water away from streams by installing cross drain pipes near live stream crossings. The cross drain pipes collect ditchline water and direct it onto the forest floor. There is also a need to replace existing undersized, damaged, or rusting culverts on streams to minimize failure potential.

The Proposed Action would:

Improve Forest Health, Provide Goods and Services, Reduce Fuels and Improve Wildlife Habitat

- Conduct ''variable retention'' regeneration harvest and post harvest burning activities on up to 2500 acres to create early sucessional plant communities and improve wildlife habitat while re-establishing long-lived early seral tree species. Variable retention harvest would include areas of full retention (clumps), irregular edges, and retention of snags and legacy trees to provide structure and a future source of woody debris. Openings will likely exceed 40 acres.
- Commercially thin approximately 7810 acres to reduce stand densities improve forest health and reduce the chance of crown fire.
- Apply improvement harvest to approximately 311 acres (thin from

below) to remove encroachment and ladder fuels from ponderosa pine dominated stands.

• Construct a minimum temporary road system to carry out the proposed action. Roads would be decommissioned after use.

• Pre-commercially thin approximately 1865 acres to reduce stand densities improve forest health and reduce fuels.

• Restore approximately 42 acres of bunchgrass communities through prescribed burning and revegetation with native grasses to improve wildlife winter range through reestablishment of native grasses and forbs.

• Apply approximately 1,400 acres of low and mixed severity prescribed fire within the Clear Creek Roadless area to restore natural fire regimes, reduce fuels, improve wildlife habitat and create mosaic forest conditions. Proposed activities are consistent with Idaho Roadless Rule. There is no timber cutting planned within the Clear Creek Roadless area.

Reduce Sediment Production and Address Transportation Needs

• Conduct maintenance on or improve 100–130 miles of system roads including culvert installation or replacement, ditch cleaning, and riprap placement for drainage improvement. It may also include gravel placement, road grading and dust abatement.

• Additional site specific maintenance or improvements would occur to improve watershed conditions on up to 20 miles of roads outside of proposed treatment areas.

• Decommission 2–5 miles of system roads no longer considered necessary for transportation needs.

Possible Alternatives the Forest Service will consider include a no-action alternative, which will serve as a baseline for comparison of alternatives. The proposed action will be considered along with additional alternatives that will be developed to meet the purpose and need for action, and to address significant issues identified during scoping.

The Responsible Official is the Nez Perce-ClearwaterForest Supervisor. 12730 Highway 12, Orofinio, ID 83544.

The Decision To Be Made is whether to adopt the proposed action, in whole or inpart, or another alternative; and what mitigation measures and management requirements will be implemented.

The Scoping Process for the EIS is being initiated with this notice. The scoping process will identify issues to be analyzed in detail and will lead to the developemnt of alternatives to the proposal. The Forest Service is seeking information and comments from other Federal, State, and local agencies; Tribal Governments; and organizations and individuals who may be interested in or affected by the proposed action. Comments received in response to this notice, including the names and addresses of those who comment, will be a part of the project record and available for public review.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement will be prepared for comment. The second major opportunity for public input will be when the draft EIS is published. The comment period for the draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The Draft EIS is anticipated to be available for public review in February 2013.

Dated: December 19, 2011.

Rick Brazell,

Forest Supervisor.

[FR Doc. 2012–3004 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Designation for the State of Alabama; Saginaw, TX; Essex, IL; Springfield, IL; Savage, MN; and State of Washington Areas

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

ACTION: Notice.

SUMMARY: GIPSA is announcing the designation of the Alabama Department of Agriculture and Industries (Alabama); Gulf Country Grain Inspection Service, Inc. (Gulf Country); Kankakee Grain Inspection, Inc. (Kankakee); Springfield Grain Inspection, Inc. (Springfield); State Grain Inspection, Inc. (State Grain); and Washington Department of Agriculture (Washington) to provide official services under the United States Grain Standards Act (USGSA), as amended.

DATES: *Effective Date:* January 1, 2012.

ADDRESSES: Eric J. Jabs, Chief, USDA, GIPSA, FGIS, QACD, QADB, 10383 North Ambassador Drive Kansas City, MO 64153.

FOR FURTHER INFORMATION CONTACT: Eric J. Jabs, 816–659–8408 or *Eric.J.Jabs@usda.gov*.

Read Applications: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

SUPPLEMENTARY INFORMATION: In the June 1, 2011 **Federal Register** (76 FR 31580), GIPSA requested applications for designation to provide official services in the geographic areas presently serviced by Alabama, Gulf Country, Kankakee, Springfield, State Grain, and Washington. Applications were due by July 1, 2011.

Alabama, Gulf Country, Kankakee, Springfield, State Grain, and Washington were the sole applicants for designation to provide official services in these areas. As a result, GIPSA did not ask for additional comments.

GIPSA evaluated all available information regarding the designation criteria in section 79(f) of the USGSA (7 U.S.C. 79(f)) and determined that the applicants Alabama, Gulf Country, Kankakee, Springfield, State Grain, and Washington are qualified to provide official services in the geographic area specified in the **Federal Register** on June 1, 2011. This designation action to provide official services in these specified areas is effective January 1, 2012 and terminates on December 31, 2014.

Interested persons may obtain official services by contacting this agency at the following telephone numbers:

Official agency	Headquarters location and telephone	Designation start	Designation end
Alabama	Montgomery, AL, (251) 438–2549	1/1/2012	12/31/2014
Gulf Country	Saginaw, TX, (817) 306–5900	1/1/2012	12/31/2014
Kankakee	Essex, IL, (815) 365–2268 Additional Location: Tiskilwa, IL.	1/1/2012	12/31/2014
Springfield	Springfield, IL, (217) 522–5233	1/1/2012	12/31/2014
State Grain	Savage, MN, (952) 808–8566	1/1/2012	12/31/2014
Washington	Olympia, WA, (360) 753–1484	1/1/2012	12/31/2014

Official agency	Headquarters location and telephone	Designation start	Designation end
	Additional Locations: Colfax, Othello, Pasco, Quincy, Spokane, and Yakima, WA.		

Section 79(f) of the USGSA authorizes the Secretary to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79 (f)).

Under section 79(g) of the USGSA, designations of official agencies are effective for no longer than three years unless terminated by the Secretary; however, designations may be renewed according to the criteria and procedures prescribed in section 79(f) of the USGSA.

Authority: 7 U.S.C. 71–87k.

Alan R. Christian,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2012–3006 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Opportunity for Designation in the Topeka, KS; Cedar Rapids, IA; Minot, ND; and Cincinnati, OH Areas; Request for Comments on the Official Agencies Servicing These Areas

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

ACTION: Notice.

SUMMARY: The designations of the official agencies listed below will end on June 30, 2012. We are asking persons or governmental agencies interested in providing official services in the areas presently served by these agencies to submit an application for designation. In addition, we are asking for comments on the quality of services provided by the following designated agencies: Kansas Grain Inspection Service, Inc. (Kansas); Mid-Iowa Grain Inspection, Inc. (Mid-Iowa); Minot Grain Inspection, Inc. (Minot); and Tri-State Grain Inspection Service, Inc. (Tri-State).

DATES: Applications and comments must be received by March 12, 2012.

ADDRESSES: Submit applications and comments concerning this notice using any of the following methods:

- *Apply for Designation on the Internet:* Use FGISOnline (*https://fgis.gipsa.usda.gov/default_home_FGIS.aspx*) and then click on the Delegations/Designations and Export Registrations (DDR) link. You will need to obtain an FGISOnline customer number and a USDA eAuthentication username and password prior to applying.
- *Submit Comments Using the Internet:* Go to Regulations.gov (*http://www.regulations.gov*). Instructions for submitting and reading comments are detailed on the site.
- *Mail, Courier or Hand Delivery:* Eric J. Jabs, Chief, USDA, GIPSA, FGIS, QACD, QADB, 10383 North Ambassador Drive, Kansas City, MO 64153.
- *Fax:* Eric J. Jabs, 816–872–1258.
- *Email: Eric.J.Jabs@usda.gov.*

Read Applications and Comments: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(c)).

FOR FURTHER INFORMATION CONTACT: Eric J. Jabs, 816–659–8408 or *Eric.J.Jabs@usda.gov.*

SUPPLEMENTARY INFORMATION: Section 79(f) of the United States Grain Standards Act (USGSA) authorizes the Secretary to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79(f)). Under section 79(g) of the USGSA, designations of official agencies are effective for three years unless terminated by the Secretary, but may be renewed according to the criteria and procedures prescribed in section 79(f) of the USGSA.

Areas Open for Designation

Kansas

Pursuant to section 79(f)(2) of the USGSA, the following geographic area, in the States of Colorado, Kansas, Nebraska, and Wyoming, is assigned to this official agency:

1. The entire State of Colorado.
2. The entire State of Kansas.
3. *In Nebraska and Wyoming:* Bounded on the North by the northern Scotts Bluff County line; the northern Morrill County line east to Highway 385; Bounded on the East by Highway 385 south to the northern Cheyenne County line; the northern and eastern Cheyenne County lines; the northern and eastern Deuel County lines; Bounded on the South by the southern Deuel, Cheyenne, and Kimball County lines; and Bounded on the West by the western Kimball, Banner, and Scotts Bluff County lines. Goshen, Laramie, and Platt Counties, Wyoming.

Mid-Iowa

Pursuant to section 79(f)(2) of the USGSA, the following geographic area, in the States of Minnesota and Iowa, is assigned to this official agency:

1. *In Minnesota:* Wabasha, Olmstead, Winona, Houston, and Fillmore Counties.
2. *In Iowa:* Bounded on the North by the northern Winneshiek and Allamakee County lines; Bounded on the East by the eastern Allamakee County line; the eastern and southern Clayton County lines; the eastern Buchanan County line; the northern and eastern Jones County lines; the eastern Cedar County line south to State Route 130; Bounded on the South by State Route 130 west to State Route 38; State Route 38 south to Interstate 80; Interstate 80 west to U.S. Route 63; and Bounded on the West by U.S. Route 63 north to State Route 8; State Route 8 east to State Route 21; State Route 21 north to D38; D38 east to State Route 297; State Route 297 north to V49; V49 north to Bremer County; the southern Bremer County line; the western Fayette and Winneshiek County lines.

Minot

Pursuant to section 79(f)(2) of the USGSA, the following geographic area, in the State of North Dakota, is assigned to this official agency: Bounded on the North by the North Dakota State line east to the eastern Bottineau County line; Bounded on the East by the eastern Bottineau County line south to the northern Pierce County line; the northern Pierce County line east to State Route 3; State Route 3 south to State Route 200; Bounded on the South by State Route 200 west to State Route 41; State Route 41 south to U.S. Route 83; U.S. Route 83 northwest to State Route 200; State Route 200 west to U.S. Route 85; U.S. Route 85 south to Interstate 94; Interstate 94 west to the North Dakota State line; and Bounded on the West by the North Dakota State line.

Tri-State

Pursuant to section 79(f)(2) of the USGSA, the following geographic area,

in the States of Indiana, Kentucky, and Ohio, is assigned to this official agency:

1. *In Indiana:* Dearborn, Decatur, Franklin, Ohio, Ripley, Rush (south of State Route 244), and Switzerland Counties.

2. *In Kentucky:* Bath, Boone, Bourbon, Bracken, Campbell, Clark, Fleming, Gallatin, Grant, Harrison, Kenton, Lewis (west of State Route 59), Mason, Montgomery, Nicholas, Owen, Pendleton, and Robertson Counties.

3. *In Ohio:* Bounded on the North by the northern Preble County line east; the western and northern Miami County lines east to State Route 296; State Route 296 east to State Route 560; State Route 560 south to the Clark County line; the northern Clark County line east to U.S. Route 68; Bounded on the East by U.S. Route 68 south to U.S. Route 22; U.S. Route 22 east to State Route 73; State Route 73 southeast to the Adams County line; the eastern Adams County line; Bounded on the South by the southern Adams, Brown, Clermont, and Hamilton County lines; and Bounded on the West by the western Hamilton, Butler, and Preble County lines.

Opportunity for Designation

Interested persons or governmental agencies may apply for designation to provide official services in the geographic areas specified above under the provisions of section 79(f) of the USGSA and 7 CFR 800.196(d). Designation in the specified geographic areas is for the period beginning July 1, 2012 and ending June 30, 2015. To apply for designation or for more information, contact Eric J. Jabs at the address listed above or visit GIPSA's Web site at *http://www.gipsa.usda.gov.*

Request for Comments

We are publishing this notice to provide interested persons the opportunity to comment on the quality of services provided by the Kansas, Mid-Iowa, Minot, and Tri-State official agencies. In the designation process, we are particularly interested in receiving comments citing reasons and pertinent data supporting or objecting to the designation of the applicants. Submit all comments to Eric J. Jabs at the above address or at *http://www.regulations.gov.*

We consider applications, comments, and other available information when determining which applicants will be designated.

Authority: 7 U.S.C. 71–87k.

Alan R. Christian,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2012–2995 Filed 2–8–12; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Kok Tong Lim, a/k/a Thomas Lim Blk 258A Compassvale Road #07–551 Singapore 541258; Order Denying Export Privileges

On October 9, 2009, in the U.S. District Court, District of Minnesota, Kok Tong Lim, a/k/a Thomas Lim, (''Lim'') of Singapore, pled guilty to one count of violating the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.* (2000)) (''IEEPA''). Specifically, Lim conspired to illegally export wound carbon fiber, an item subject to the Regulations and controlled under Export Control Classification Numbers (''ECCN'') 1C010 and 1C210, to the China Academy of Space Technology. Lim was sentenced for a prison term of time served, which amounted to one year imprisonment, and ordered to serve two years of supervised release.

Section 766.25 of the Export Administration Regulations (''EAR'' or ''Regulations'') [1] provides, in pertinent part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the [Export Administration Act (''EAA'')], the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); see also Section 11(h) of the EAA, 50 U.S.C. app. § 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); see also 50 U.S.C. app. § 2410(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

I have received notice of Lim's conviction for violating IEEPA, and have provided notices and opportunities for Lim to make a written submission to BIS, as provided in Section 766.25 of the Regulations. I have not received a submission from Lim. Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Lim's export privileges under the Regulations for a period of ten years from the date of Lim's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Lim had an interest at the time of his conviction.

Accordingly, it is hereby

Ordered

I. Until October 9, 2019, Kok Tong Lim, a/k/a Thomas Lim, with the last known address at: Blk 258A,Compassvale Road #07–551, Singapore 541258, and when acting for or on behalf of Lim, his representatives, assigns, agents or employees (the ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2011). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. app. §§ 2401–2420 (2000)) (''EAA''). Since August 21, 2001, the EAA has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 12, 2011 (76 FR 50661 (August 16, 2011)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.* (2000)).

II. No person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

III. After notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Lim by affiliation, ownership, control or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order if necessary to prevent evasion of the Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until October 9, 2019.

VI. In accordance with Part 756 of the Regulations, Lim may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

VII. A copy of this Order shall be delivered to the Lim. This Order shall be published in the **Federal Register**.

Issued this 2nd day, of February 2012.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. 2012–2959 Filed 2–8–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–905]

Certain Polyester Staple Fiber From the People's Republic of China: Extension of Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') is extending the time limit for the preliminary results of the administrative review of certain polyester staple fiber from the People's Republic of China (''PRC''). This review covers the period June 1, 2010, through May 31, 2011.

DATES: *Effective Date:* February 9, 2012.

FOR FURTHER INFORMATION CONTACT: Steven Hampton, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0116.

Background

On July 28, 2011, the Department published a notice of initiation of the administrative review of the antidumping duty order on certain polyester staple fiber from the PRC. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocations in Part and Deferral of Administrative Reviews,* 76 FR 45227 (July 28, 2011). The preliminary results are currently due no later than March 1, 2012.

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, issue supplemental questionnaires, and evaluate surrogate value submissions for purposes of the preliminary results. Therefore, the Department is extending the time limit for completion of the preliminary results of this administrative review by 30 days. The preliminary results will now be due no later than March 31, 2012. As that day falls on a Saturday, the preliminary results are due no later than April 2, 2012.[1] 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: February 3, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–3024 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Renewable Energy and Energy Efficiency Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Renewable Energy and Energy Efficiency Advisory Committee (RE&EEAC) will hold a meeting to hear presentations from the Department of State, Office of the U.S. Trade Representative, Ex-Im Bank, and Department of Commerce on efforts to address issues that affect the competitiveness of U.S. renewable

[1] *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant of the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

energy and energy efficiency companies, and to review subcommittee work on recommendations related to the development and administration of programs and policies to enhance the competitiveness of the U.S. renewable energy and energy efficiency industries, including specific challenges associated with exporting.

DATES: February 23, 2012, from 8:30 a.m. to 3:30 p.m. Eastern Standard Time (EST).

ADDRESSES: The meeting will be held at the U.S. Department of Commerce, Room 4830, 1401 Constitution Avenue NW., Washington, DC 20230. The meeting will also be available via conference call.

FOR FURTHER INFORMATION CONTACT: Jennifer Derstine, Office of Energy and Environmental Technologies Industries (OEEI), International Trade Administration, U.S. Department of Commerce at (202) 482–3889; email: *jennifer.derstine@trade.gov*. This meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to OEEI at (202) 482–3889.

SUPPLEMENTARY INFORMATION:

Background: The Secretary of Commerce established the RE&EEAC pursuant to his discretionary authority and in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) on July 14, 2010. The RE&EEAC provides the Secretary of Commerce with consensus advice from the private sector on the development and administration of programs and policies to enhance the international competitiveness of the U.S. renewable energy and energy efficiency industries. The RE&EEAC held its first meeting on December 7, 2010 and several subsequent meetings throughout 2011.

The meeting is open to the public and the room is disabled-accessible. Public seating is limited and available on a first-come, first-served basis. Members of the public wishing to attend the meeting, either in person or through participation in the conference call, must notify Ms. Derstine at the contact information above by 5 p.m. EST on Friday, February 17, in order to pre-register. Registered members of the public who wish to participate in the conference call will receive call-in instructions. Please specify any request for reasonable accommodation by Friday, February 17. Last minute requests will be accepted, but may be impossible to fill. A limited amount of time, from 3 p.m. until 3:30 p.m., will be available for pertinent brief oral comments from members of the public attending the meeting.

Any member of the public may submit pertinent written comments concerning the RE&EEAC's affairs at any time before or after the meeting. Comments may be submitted to *jennifer.derstine@trade.gov* or to the Renewable Energy and Energy Efficiency Advisory Committee, Office of Energy and Environmental Technologies Industries (OEEI), International Trade Administration, Room 4053; 1401 Constitution Avenue NW., Washington, DC 20230. To be considered during the meeting, comments must be received no later than 5 p.m. EST 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.

Copies of RE&EEAC meeting minutes will be available within 30 days of the meeting.

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2012–3008 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Scientific Research, Exempted Fishing, and Exempted Activity Submissions

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before 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 Jason Blackburn, (301) 427–8555 or *Jason.Blackburn@noaa.gov;*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for revision and extension of a current information collection. Fishery regulations do not generally affect scientific research activities conducted by a scientific research vessel. Persons planning to conduct such research are encouraged to submit a scientific research plan to ensure that the activities are considered research and not fishing. The researchers are requested to submit reports of their scientific research activity after its completion. The National Marine Fisheries Service (NMFS) may also grant exemptions from fishery regulations for educational or other activities (*e.g.,* using non-regulation gear). The applications for these exemptions must be submitted, as well as reports on activities.

Revision: Eligible researchers on board federally permitted fishing vessels that plan to temporarily possess fish in a manner not compliant with applicable fishing regulations for the purpose of collecting scientific data on catch may submit a request for a temporary possession letter of authorization. The researchers are requested to submit reports of their scientific research activity after its completion.

II. Method of Collection

Information may be submitted on paper or electronically, and in some cases by telephone.

III. Data

OMB Control Number: 0648–0309.

Form Number: None.

Type of Review: Regular submission (revision and extension of a current information collection).

Affected Public: Business or other for-profit organizations; individuals or households; not for profit organizations; state, local or tribal governments.

Estimated Number of Respondents: 129.

Estimated Time per Response: Scientific research plans, 37 hours; scientific research reports, 3 hours; exempted fishing permit requests, 56 hours; exempted fishing permit reports, 15 hours; exempted educational requests, 4 hours; exempted educational reports, 2 hours.

Estimated Total Annual Burden Hours: 6,073.

Estimated Total Annual Cost to Public: $387.

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 3, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–2936 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Feedback Survey for Annual Tsunami Warning Communications Tests

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before 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 Jeff Lorens, (801) 524–4000 or *Jeffrey.Lorens@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of this information collection.

This information collection supports the Tsunami Warning and Education Act, Public Law 109–424. To assess the effectiveness of NOAA/National Weather Service's (NWS) Tsunami Warning System, this survey is needed to gather specific feedback information following testing of the associated NWS communications systems. The tests are planned annually, in March/April and again in September. Post-test feedback information will be requested from emergency managers, the media, law enforcement officials, local government agencies/officials, and the general public. The responses will be solicited for a limited period immediately following completion of the tests, not to exceed seven days. This will be a Web-based survey and will allow for efficient collection of information regarding the effectiveness of the Tsunami Warning System.

II. Method of Collection

A Web-based survey will be used for electronic submission.

III. Data

OMB Control Number: 0648–0539.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals or households, Federal Government, and State, local or tribal governments.

Estimated Number of Respondents: 300.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 25.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

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 6, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–2963 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–KE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; List of Gear by Fisheries and Fishery Management Council

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before 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 Paula N. Evans (301) 427–8557 or *Paula.Evans@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

Under the provisions of the Magnuson-Stevens Fishery and Conservation and Management Act (Magnuson-Stevens Act) [16 U.S.C. 1801 *et seq.*], as amended by the Sustainable Fisheries Act [Pub. L. 104–297], the Secretary of Commerce (Secretary) is required to publish a list of all fisheries under authority of each Regional

Fishery management Council (Council) and all such fishing gear used in such fisheries (see section 305(a) of the Magnuson-Stevens Act). The list has been published and appears in 50 CFR 600.725(v). Any person wishing to use gear not on the list, or engage in a fishery not on the list, must provide the appropriate Council or the Secretary, in the case of Atlantic highly migratory species, with 90 days of advance notice. If the Secretary takes no action to prohibit such a fishery or use of such a gear, the person may proceed.

II. Method of Collection

The respondent provides written notice. No form is used.

III. Data

OMB Control Number: 0648–0346.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 6.

Estimated Time per Response: 90 minutes.

Estimated Total Annual Burden Hours: 15 hours.

Estimated Total Annual Cost to Public: $30 in recordkeeping/reporting costs.

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 3, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–2943 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA979

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of change to public meeting dates and times.

SUMMARY: The Western Pacific Fishery Management Council (Council) announces changes in the dates that the Merizo community and Guam Regional Ecosystem Advisory Committee (REAC) meetings will be held.

DATES: The Merizo Community Meeting will be held on February 29, 2012, between 6 p.m. and 9 p.m. and the Guam REAC on March 1, 2012, between 9 a.m. and 4 p.m. The Merizo Community Meeting will be held at the Merizo Community Center, Merizo, Guam and the Guam REAC will be held at the Guam Hilton Hotel, Tumon Bay, Guam. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: Council office, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813; telephone: (808) 522–8220.

Merizo Community Center, Merizo, Guam 96915; telephone: (671) 828–2941.

Guam Hilton Hotel, 202 Hilton Road, Tumon Bay, Guam 96913; telephone: (671) 646–1835.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: The original notice published on February 6, 2012 (77 FR 5775). The new dates and agenda items are listed below.

Schedule and Agenda for Merizo Community Meeting

6 p.m.–9 p.m., Wednesday, February 29, 2012

1. Introduction
2. Community Based Monitoring
3. Community Fisheries Development
4. Fishery Issues
5. Other Issues

Schedule and Agenda for Guam REAC Meeting

9 a.m.–4 p.m., Thursday, March 1, 2012

1. Welcome and Introductions
2. Status of 2011 REAC Recommendations
3. Report on Agency Activities
4. Community Marine Management Forum
A. Military Activities
i. Military Closures Impacting Southern Fishing Grounds
ii. Report on Recommendations to US Department of Defense on Military Activities
iii. Improving Fishery Data Collection from Military Areas
iv. Discussion on Options to Mitigate Impacts to Fishing Community Military Activities
B. Update on the Marianas Trench Marine National Monument
i. Report on Monument Monument Scoping Sessions and Management Plan
C. Federal Annual Fisheries Catch Limits
D. Compact Impact Issues
E. Proposed Guam Fisheries Management Act
5. Ocean Monitoring and Data Collection
A. Report on Bio-Sampling Program
B. Habitat Blue Print for Guam
C. Pacific Island Ocean Observe ring System
D. Guam Coral Reef Ecosystem Research Program
E. Report on Data Workshop
F. Discussion and Recommendations
6. Communities and Traditional Fishing Rights
A. First Stewards Climate Change Symposium
B. Guam Village Management
C. Discussion and Recommendations
6. Upcoming Meetings/Workshops
A. Synopsis of Upcoming 153rd Council Meeting Actions
B. Teachers Workshop
C. Western and Central Pacific Fisheries Commission
7. Other Business
8. Public Comment
9. Discussion and Recommendations

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: February 6, 2012.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–3017 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

U.S. Coral Reef Task Force Public Meeting and Public Comment

AGENCY: National Ocean Service, NOAA, Department of Commerce.

ACTION: Notice of public meeting, Notice of public comment.

SUMMARY: Notice is hereby given of a public meeting of the U.S. Coral Reef Task Force. The meeting will be held in Washington, DC This meeting, the 27th

bi-annual meeting of the U.S. Coral Reef Task Force, provides a forum for coordinated planning and action among federal agencies, state and territorial governments, and nongovernmental partners. Please register in advance by visiting the Web site listed below. This meeting has time allotted for public comment. All public comment must be submitted in written format. A written summary of the meeting will be posted on the Web site within two months of its occurrence.

DATES: The meeting will be held Thursday, February 23, 2012. Registration is requested for all participants. Advance public comments can be submitted to the email, fax, or mailing address listed below from Wednesday, February 1–Wednesday, February 15.

Location: The meeting will be held at the U.S. Department of the Interior, 1849 C Street NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Beth Dieveney, NOAA U.S. Coral Reef Task Force Steering Committee Point of Contact, NOAA Coral Reef Conservation Program, 1305 East-West Highway, Silver Spring, Maryland, 20910 (Phone: (301) 713–3155 ext. 129, Fax: (301) 713–4389, email: *beth.dieveney@noaa.gov,* Liza Johnson, U.S. Coral Reef Task Force Steering Committee Point of Contact, U.S. Department of the Interior, 1849 C Street NW., Washington, DC 20240 (Phone: (202) 208–1378, email: *Liza_m_Johnson@ios.doi.gov*), or visit the U.S. Coral Reef Task Force Web site at *www.coralreef.gov.*)

SUPPLEMENTARY INFORMATION: Established by Presidential Executive Order 13089 in 1998, the U.S. Coral Reef Task Force mission is to lead, coordinate, and strengthen U.S. government actions to better preserve and protect coral reef ecosystems. Co-chaired by the Departments of Commerce and Interior, Task Force members include leaders of 12 Federal agencies, seven U.S. states and territories, and three freely associated states. For more information about the meeting, registering, and submitting public comment go to *www.coralreef.gov.*

Dated: January 27, 2012.

Donna Wieting,

Director, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic Atmospheric Administration.

[FR Doc. 2012–2957 Filed 2–8–12; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Prepare a Supplemental Environmental Impact Statement for a Live-Fire Training Range Complex on Guam To Support the Guam Military Relocation

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, as implemented by the Council on Environmental Quality Regulations (40 CFR parts 1500–1508), the Department of the Navy (DoN) announces its intent to prepare a Supplemental Environmental Impact Statement (SEIS) to evaluate the potential environmental consequences that may result from construction and operation of a live-fire training range complex and associated infrastructure on Guam to support the Guam Military Relocation. The SEIS supplements the Final EIS for the ''Guam and Commonwealth of the Northern Mariana Islands (CNMI) Military Relocation; Relocating Marines from Okinawa, Visiting Aircraft Carrier Berthing, and Army Air and Missile Defense Task Force'' dated July 2010.

Pursuant to 40 CFR 1502.9(c), a SEIS is being prepared for the limited purpose of supplementing the 2010 Final EIS regarding the establishment of a live-fire training range complex on Guam.

The proposed action that will be analyzed in the SEIS is to construct and operate a live-fire training range complex that allows for simultaneous use of all firing ranges to support training and operations on Guam for the relocated Marines. The DoN has preliminarily identified five alternatives for the range complex: two are adjacent to Route 15 in northeastern Guam, and three are located at or immediately adjacent to the Naval Magazine (NAVMAG), also known as the Naval Munitions Site. The SEIS will also consider the No Action Alternative.

The purpose and need for the proposed action is to ensure that the relocated Marines are organized, trained, and equipped as mandated in section 5063 of Title 10 of the United States Code, and to satisfy individual live-fire training requirements as described in the Guam and CNMI Military Relocation Final EIS and associated Record of Decision (ROD).

The live-fire training range complex will consist of a Known Distance (KD) rifle range, KD pistol range, Modified Record of Fire Range, nonstandard small arms range, Multipurpose Machine Gun range, and a hand grenade range. The proposed action also includes associated roadways and supporting infrastructure.

The DoN encourages government agencies, private-sector organizations, and the general public to participate in the NEPA process for the training range complex. Because the Federal Aviation Administration (FAA) will have to approve airspace associated with the training range complex at any of the five preliminary alternatives being considered, the DoN will invite the FAA to participate as a cooperating agency in the preparation of the SEIS.

The DoN invites comments on the proposed scope and content of the SEIS from all interested parties. Comments on the scope of the SEIS may be provided by mail and through the SEIS Web site at: *http://bit.ly/Guam_LFTRC_SEIS.* In addition, the DoN will conduct public open-house scoping meetings on Guam to obtain comments on the scope of the SEIS and to identify specific environmental concerns or topics for consideration in the SEIS. Meetings will be held at the following locations and times:

Saturday, March 17, 2012, from 1 p.m. to 5 p.m., University of Guam Field House, Mangilao, Guam;

Monday, March 19, 2012, from 5 p.m. to 9 p.m., Southern High School, Santa Rita, Guam;

Tuesday, March 20, 2012, from 5 p.m. to 9 p.m., Yigo Gymnasium, Yigo, Guam.

Interested agencies, individuals, and groups unable to attend the open-house scoping meetings are encouraged to submit comments by April 6, 2012. Mailed comments should be postmarked no later than April 6, 2012, Chamorro Standard Time (ChST) to ensure they are considered. Mail comments to: Joint Guam Program Office Forward, P.O. 153246, Santa Rita, GU 96915.

FOR FURTHER INFORMATION CONTACT: Ms. Catherine Norton, Public Affairs Officer, NAVFAC Marianas; phone (671) 349–4053; email: *Catherine.norton@fe.navy.mil.*

SUPPLEMENTARY INFORMATION: The DoN's proposed action is to construct and operate a live-fire training range complex and associated infrastructure in support of the Guam Military Relocation.

A ROD for the Guam and CNMI Military Relocation Final EIS was signed on September 20, 2010, and published in the **Federal Register** on September 30, 2010 (Volume 75, Number 189, Page 60438). This ROD deferred a decision on the specific site

for a live-fire training range complex due to the significant number of public comments during the EIS process regarding the DoN's preferred alternative located on areas southeast of Andersen South referred to in the Guam and CNMI Military Relocation Final EIS as the Route 15 area. Two primary concerns were raised over this location: (1) The use of non-DoD property, and (2) the impact on the community's ability to access the cultural sites of Pagat Village and Pagat Cave. In response to comments and concerns raised by the Government of Guam, Guam Legislature, and other interested parties about locating Surface Danger Zones for the ranges over Pagat Village and Pagat Cave, in January 2011, the Under Secretary of the Navy committed that the DoN would conduct training activities in such a manner that would not impact access to Pagat Village and Cave via the existing trail. The DoN further committed to 24/7 access to Pagat Village and Cave during National Historic Preservation Act consultation with the Guam State Historic Preservation Office and other consulting parties as documented in a Programmatic Agreement signed in March 2011.

Since that time, the DoN has been evaluating options to satisfy this commitment while also meeting the training requirements of the relocating Marines. This analysis resulted in the application of a probabilistic methodology which takes into account site-specific conditions and reduced the boundaries of the training range complex while providing the same margin of safety. The DoN then reviewed previously discarded sites to determine if any of those sites might be a reasonable alternative with application of the probabilistic methodology (*i.e.,* the site-specific methodology). As a result of this review, the DoN has preliminarily identified five alternatives for the range complex: Two are adjacent to Route 15 in northeastern Guam, and three are located at or immediately adjacent to the NAVMAG, also known as the Naval Munitions Site. The SEIS will also consider the No Action Alternative.

Under the No Action Alternative, Marine Corps units would not be provided live-fire training ranges. The No Action Alternative is not a reasonable alternative as it would not satisfy the need for training requirements for the relocated Marines as mandated in section 5063 of Title 10 of the United States Code, or satisfy individual live-fire training requirements as described in the Guam and CNMI Military Relocation Final EIS and ROD. NEPA requires the lead agency to consider the alternative of no action as a baseline for comparison of environmental impacts regardless of whether or not it would meet the purpose and need of the proposed action. The SEIS will evaluate environmental effects associated with: Geology and soils; water resources, which may include water, floodplains, wetlands, wild and scenic rivers; terrestrial biology; threatened and endangered species and their designated critical habitat (if applicable); air quality; noise; airspace; cultural resources; socioeconomics; environmental justice (minority and low income populations and children); land use and coastal zone management federal consistency; transportation; hazardous materials/hazardous waste/installation restoration; public health and safety; and other environmental concerns as identified through scoping. The analysis will include an evaluation of direct and indirect impacts, and will account for cumulative impacts from other relevant activities in the area of Guam. Additionally, the DoN will undertake any consultations required by all applicable laws or regulations.

No decision will be made to implement any alternative until the SEIS process is completed and a ROD is signed by the Assistant Secretary of the Navy (Energy, Installations and Environment) or designee.

By publishing this Notice, the DoN is initiating a scoping process to identify community concerns and issues that should be addressed in the SEIS. Federal, Territory, and local agencies, and interested parties and persons are encouraged to provide comments on the proposed action that clearly describe specific issues or topics of environmental concern that the commenter believes the DoN should consider. In addition to this Notice, an information report is available for review on the project Web site (see link below). This information report provides additional background information on the environmental planning efforts which have occurred since the Final EIS ROD was signed in September 2010. Additional information will be made available on the project Web site as it becomes available.

Comments may be submitted in writing at one of the public scoping meetings, through the project Web site at: *http://bit.ly/Guam_LFTRC_SEIS* or may be mailed to: Joint Guam Program Office Forward, P.O. 153246, Santa Rita, GU 96915.

To ensure consideration, all written comments on the scope of the SEIS must be submitted or postmarked by April 6, 2012 ChST.

Dated: February 3, 2012.

J.M. Beal,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2012–2949 Filed 2–8–12; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the U.S. Naval Academy Board of Visitors

AGENCY: Department of the Navy, DoD.

ACTION: Notice of Partially Closed Meeting.

SUMMARY: The U.S. Naval Academy Board of Visitors will meet to make such inquiry, as the Board shall deem necessary, into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the Naval Academy. The executive session of this meeting from 11 a.m. to 12 p.m. on March 5, 2012, will include discussions of disciplinary matters, law enforcement investigations into allegations of criminal activity, and personnel issues at the Naval Academy, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. For this reason, the executive session of this meeting will be closed to the public.

DATES: The open session of the meeting will be held on March 5, 2012, from 8:30 a.m. to 11 a.m. The closed session of this meeting will be the executive session held from 11 a.m. to 12 p.m.

ADDRESSES: The meeting will be held in the Bo Coppege Room at the Naval Academy in Annapolis, Maryland. The meeting will be handicap accessible.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Travis Haire, USN, Executive Secretary to the Board of Visitors, Office of the Superintendent, U.S. Naval Academy, Annapolis, MD 21402–5000, (410) 293–1503.

SUPPLEMENTARY INFORMATION: This notice of meeting is provided per the Federal Advisory Committee Act, as amended (5 U.S.C. App.). The executive session of the meeting from 11 a.m. to 12 p.m. on March 5, 2012, will consist of discussions of law enforcement investigations into allegations of criminal activity, new and pending administrative/minor disciplinary infractions and nonjudicial punishments involving the Midshipmen

attending the Naval Academy to include but not limited to individual honor/conduct violations within the Brigade, and personnel issues. The discussion of such information cannot be adequately segregated from other topics, which precludes opening the executive session of this meeting to the public. Accordingly, the Secretary of the Navy has determined in writing that the meeting shall be partially closed to the public because the discussions during the executive session from 11 a.m. to 12 p.m. will be concerned with matters coming under sections 552b(c)(5), (6), and (7) of title 5, United States Code.

Dated: February 3, 2012.

J.M. Beal,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2012–2950 Filed 2–8–12; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before April 9, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 3, 2012.

Darrin A. King, Director,

Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office for Civil Rights

Type of Review: Extension.

Title of Collection: Assurance of Compliance—Civil Rights Certificate.

OMB Control Number: 1870–0503.

Agency Form Number(s):

Frequency of Responses: Other: One Time.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs (primary); Businesses or other for-profit; Not-for-profit institutions.

Total Estimated Number of Annual Responses: 50.

Total Estimated Number of Annual Burden Hours: 17.

Abstract: The Office for Civil Rights (OCR) has enforcement responsibilities under several civil rights laws, including Title VI, Title IX, Section 504, the Age Discrimination Act, and the Boy Scouts of America Equal Access Act. To meet these responsibilities, OCR collects assurances of compliance from applicants for Federal financial assistance from, and applicants for funds made available through, the Department of Education, as required by regulations. These entities include, for example, State educational agencies, local education agencies, and postsecondary educations. If a recipient violates one or more of these civil rights laws, OCR and the Department of Justice can use the signed assurances of compliance in an enforcement proceeding.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04801. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to (202) 401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2012–2956 Filed 2–8–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Board for Education Sciences; Meeting

AGENCY: Institute of Education Sciences, U.S. Department of Education.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the National Board for Education Sciences. The notice also describes the functions of the Committee. Notice of this meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend the meeting.

DATES: February 24, 2012.

Time: 8:30 a.m. to 5 p.m.

ADDRESSES: 80 F Street NW., Room 100, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Monica Herk, Executive Director, National Board for Education Sciences, 555 New Jersey Ave. NW., Room 602 K, Washington, DC 20208; phone: (202) 208–3491; fax: (202) 219–1466; email: *Monica.Herk@ed.gov.*

SUPPLEMENTARY INFORMATION: The National Board for Education Sciences is authorized by Section 116 of the Education Sciences Reform Act of 2002 (ESRA), 20 U.S.C. 9516. The Board advises the Director of the Institute of

Education Sciences (IES) on, among other things, the establishment of activities to be supported by the Institute, on the funding for applications for grants, contracts, and cooperative agreements for research after the completion of peer review, and reviews and evaluates the work of the Institute.

On February 24, 2012, starting at 8:30 a.m., the Board will approve the agenda and hear remarks from the chair. John Easton, IES Director, and the Commissioners of the national centers will give an overview of recent developments at IES. From 9:30 to 10:45 a.m., Board members will discuss and give suggestions regarding a draft of the Board's 2012 Annual Report. A break will take place from 10:45 to 11 a.m.

From 11 a.m. to 12:30 p.m., the Board will consider the topic, ''The Importance of Disseminating Research Results: How can we better reach practitioners and policy-makers?'' Following opening remarks by Ruth Neild, Associate Commissioner of the National Center for Education Evaluation, and by Diane Massell with the University of Michigan's School of Education, Board members will engage in roundtable discussion of the issues raised.

The meeting will break for lunch from 12:30 to 1:30 p.m.

Following lunch the Board will resume from 1:30 to 2:30 p.m. to discuss the topic, ''Scaling up Promising Models: What can the field of education learn from other Federal agencies?'' Naomi Goldstein, Director of the Office of Policy Research and Evaluation in the Administration for Children and Families in the Department of Health and Human Services, and Paul Carttar, Director of the Social Innovation Fund within the Corporation for National and Community Service, will present their experience with scaling up evidence-based programs within the Federal Government. Their presentations will be followed by Board discussion.

From 2:30 to 3:30 p.m., Elizabeth Albro, Acting Commissioner of the National Center for Education Research, and Deborah Speece, Commissioner of the National Center for Special Education Research, will brief the Board on research grants in their centers. The Board will then discuss any implications of these presentations.

An afternoon break from 3:30 to 3:45 p.m. will precede a legislative update from 3:45 to 4:45 p.m. by a representative of the Office of Legislation and Congressional Affairs in the U.S. Department of Education who will brief the Board on legislative developments affecting IES.

At 4:45 p.m., there will be closing remarks and a consideration of next steps from the IES Director and NBES Chair, with adjournment scheduled for 5 p.m.

There will not be an opportunity for public comment. However, members of the public are encouraged to submit written comments related to NBES to Monica Herk (see contact information above). A final agenda will be available from Monica Herk (see contact information above) on February 10 and will be posted on the Board Web site *http://ies.ed.gov/director/board/agendas/index.asp.* Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistance listening devices, or materials in alternative format) should notify Monica Herk no later than February 10. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Records are kept of all Board proceedings and are available for public inspection at 555 New Jersey Ave. NW., Room 602 K, Washington, DC 20208, from the hours of 9 a.m. to 5 p.m., Eastern Standard Time Monday through Friday.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *www.ed.gov/news/fed-register/index.html.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–866–512–1800; or in the Washington, DC, area at (202) 512–0000.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *www.gpoaccess.gov/nara/index.html.*

John Q. Easton,

Director, Institute of Education Sciences.

[FR Doc. 2012–3039 Filed 2–8–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Portsmouth

AGENCY: Department of Energy (DOE).

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Portsmouth. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, March 1, 2012; 6 p.m.

ADDRESSES: Ohio State University, Endeavor Center, 1862 Shyville Road, Piketon, Ohio 45661.

FOR FURTHER INFORMATION CONTACT: Joel Bradburne, Deputy Designated Federal Officer, Department of Energy Portsmouth/Paducah Project Office, Post Office Box 700, Piketon, Ohio 45661, (740) 897–3822, *Joel.Bradburne@lex.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management and related activities.

Tentative Agenda

- Call to Order, Introductions, Review of Agenda.
- Approval of February Minutes.
- Deputy Designated Federal Officer's Comments.
- Federal Coordinator's Comments.
- Liaisons' Comments.
- Presentations:
  - The Ohio Valley Regional Development Center (OVRDC) Overview, John Hemmings, Executive Director of OVRDC.
  - Waste Acceptance Criteria, Dennis Carr, Fluor-B&W
  - Information Portfolio, Karen Price, Fluor-B&W.
  - Fluor-B&W Community Commitment Plan Update, Jerry Schneider, Fluor-B&W.
- Administrative Issues.
- Subcommittee Updates.
- Public Comments.
- Final Comments from the Board.
- Adjourn.

Public Participation: The meeting is open to the public. The EM SSAB, Portsmouth, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Joel Bradburne at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals

who wish to make oral statements pertaining to agenda items should contact Joel Bradburne at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Joel Bradburne at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.ports-ssab.energy.gov/*.

Issued at Washington, DC, on February 3, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–2964 Filed 2–8–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Biomass Research and Development Technical Advisory Committee

AGENCY: Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Biomass Research and Development Technical Advisory Committee. The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: March 1, 2012; 9 a.m.–2 p.m. March 2, 2012; 8:30 a.m.–1 p.m.

ADDRESSES: Omni Shoreham Hotel, 2500 Calvert Street NW. (at Connecticut Avenue), Washington, DC 20008.

FOR FURTHER INFORMATION CONTACT: Elliott Levine, Designated Federal Officer, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; (202) 586–1476; Email: *Elliott.Levine@ee.doe.gov* or Roy Tiley at (410) 997–7778 ext. 220; Email: *rtiley@bcs-hq.com.*

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and recommendations that promotes research and development leading to the production of biobased fuels and biobased products.

Tentative Agenda

- Update on USDA Biomass R&D Activities
- Update on DOE Biomass R&D Activities
- Presentation on the USDA Feedstocks Readiness Tool
- Panel discussion on Renewable Fuel Standards
- Presentation on the National Biofuels Action Plan

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to attend the meeting and/or to make oral statements regarding any of the items on the agenda should contact Elliott Levine or Roy Tiley at the email or telephone number listed above. Request to make oral comments must be received five days prior to the meeting; reasonable provision will be made to include the requested topic(s) on the agenda. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. The Co-chairs will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying at the following Web site: *http://biomassboard.gov/committee/meetings.html.*

Issued at Washington, DC on February 3, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–2972 Filed 2–8–12; 8:45 am]

BILLING CODE 6450–01–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: ER10–1537–001; *ER10–1553–001; ER10–1538–001; ER10–1539–001; ER10–1540–001; ER10–1531–001.*

Applicants: Entergy Nuclear Generation Company, Entergy Nuclear Power Marketing, LLC, Entergy Nuclear Vermont Yankee, LLC, Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC.

Description: *Supplemental Information of Entergy Nuclear Fitzpatrick, LLC, et al.*

Filed Date: 2/1/12.

Accession Number: 20120201–5255.

Comments Due: 5 p.m. ET 2/13/12.

Docket Numbers: ER12–543–001.

Applicants: Ethical Electric Benefit Co.

Description: Ethical Electric Benefit Co. Market Based Rate Filing—Clone to be effective 12/6/2011.

Filed Date: 2/2/12.

Accession Number: 20120202–5000.

Comments Due: 5 p.m. ET 2/23/12.

Docket Numbers: ER12–768–001.

Applicants: Cleco Evangeline LLC.

Description: Compliance Filing to be effective 1/1/2012.

Filed Date: 2/2/12.

Accession Number: 20120202–5001.

Comments Due: 5 p.m. ET 2/23/12.

Docket Numbers: ER12–862–000.

Applicants: Power Supply Services LLC.

Description: Supplement to Application for Market-Based Rate Authority and Approval of Waivers and Blanket Authorization.

Filed Date: 2/1/12.

Accession Number: 20120201–5249.

Comments Due: 5 p.m. ET 2/22/12.

Docket Numbers: ER12–975–000.

Applicants: Cleco Evangeline LLC.

Description: Change to Add Ancillary Services to be effective 1/10/2012.

Filed Date: 2/2/12.

Accession Number: 20120202–5002.

Comments Due: 5 p.m. ET 2/23/12.

Docket Numbers: ER12–977–000.

Applicants: Avista Corporation.

Description: Service Agreement No. T1110—Construction Agreement to be effective 2/3/2012 under ER12–977 Filing Type: 20.

Filed Date: 2/2/12.

Accession Number: 20120202–5069.

Comments Due: 5 p.m. ET 2/23/12.

Docket Numbers: ER12–978–000.

Applicants: Michigan Electric Transmission Company.

Description: Filing of Certificate of Concurrence to be effective 2/1/2012.

Filed Date: 2/2/12.

Accession Number: 20120202–5071.

Comments Due: 5 p.m. ET 2/23/12.

Docket Numbers: ER12–979–000.

Applicants: Rocky Ridge Wind Project, LLC.

Description: Rocky Ridge Wind Project MBR Filing to be effective 3/1/2012.

Filed Date: 2/2/12.

Accession Number: 20120202–5079.

Comments Due: 5 p.m. ET 2/23/12.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–4–000.

Applicants: Enel Green Power North America, Inc., Canastota Windpower,

LLC, Caney River Wind Project, LLC, EGP Stillwater Solar, LLC, Enel Stillwater, LLC, Smoky Hills Wind Farm, LLC, Smoky Hills Wind Project II, LLC.

Description: Quarterly Land Acquisition Report of Enel Green Power North America, Inc.

Filed Date: 2/2/12.

Accession Number: 20120202–5058.

Comments Due: 5 p.m. ET 2/23/12.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH12–7–000.

Applicants: IIF US Holding 1 GP, LLC.

Description: Notification of Material Change in Facts and Update of FERC 65–A of IIF US Holding 1 GP, LLC.

Filed Date: 2/2/12.

Accession Number: 20120202–5059.

Comments Due: 5 p.m. ET 2/23/12.

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.

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: February 2, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2945 Filed 2–8–12; 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: ER10–1144–001; ER11–2014–003; ER11–2013–003; ER11–2005–003.

Applicants: CR Clearing, LLC, Exelon Generation Company, LLC, Wind Capital Holdings, LLC, Cow Branch Wind Power, LLC.

Description: Updated Market Power Analysis of Exelon Generation Company, LLC, *et al.*

Filed Date: 1/20/12.

Accession Number: 20120120–5079.

Comments Due: 5 p.m. ET 2/10/12.

Docket Numbers: ER11–4625–001.

Applicants: Colton Power L.P.

Description: Colton Power L.P. Market-Based Rate Tariff to be effective 2/2/2012.

Filed Date: 2/1/12.

Accession Number: 20120201–5166.

Comments Due: 5 p.m. ET 2/22/12.

Docket Numbers: ER12–658–001.

Applicants: R.E. Ginna Nuclear Power Plant, LLC.

Description: Compliance Filing of MBR Tariff Under ER12–658 to be effective 1/1/2012.

Filed Date: 2/1/12.

Accession Number: 20120201–5178.

Comments Due: 5 p.m. ET 2/22/12.

Docket Numbers: ER12–970–000.

Applicants: PJM Interconnection, LLC.

Description: Notice of Cancellation of Service Agreement 2976 in Docket No. ER11–4222–000 to be effective 1/24/2012.

Filed Date: 2/1/12.

Accession Number: 20120201–5165.

Comments Due: 5 p.m. ET 2/22/12.

Docket Numbers: ER12–971–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: 02–01–12 Coordination Agreement to be effective 12/31/9998.

Filed Date: 2/1/12.

Accession Number: 20120201–5191.

Comments Due: 5 p.m. ET 2/22/12.

Docket Numbers: ER12–972–000.

Applicants: Wolverine Power Supply Cooperative, Inc.

Description: Amended and Restated IFA with METC and City of Zeeland Re Blendon Substation to be effective 2/2/2012.

Filed Date: 2/1/12.

Accession Number: 20120201–5193.

Comments Due: 5 p.m. ET 2/22/12.

Docket Numbers: ER12–973–000.

Applicants: Verus Energy Trading, LLC.

Description: Verus Energy Trading, LLC's Initial Market-Based Rate Tariff to be effective 2/2/2012.

Filed Date: 2/1/12.

Accession Number: 20120201–5195.

Comments Due: 5 p.m. ET 2/22/12.

Docket Numbers: ER12–974–000.

Applicants: PJM Interconnection, LLC.

Description: PJM SA No. 3207 ISA filed for Integration of Duke Energy Ohio, Inc. Into PJM to be effective 1/1/2012.

Filed Date: 2/1/12.

Accession Number: 20120201–5222.

Comments Due: 5 p.m. ET 2/22/12.

Docket Numbers: ER12–976–000.

Applicants: Florida Power Corporation.

Description: Notice of Cancellation of Rate Schedule No. 115 of Florida Power Corporation.

Filed Date: 2/1/12.

Accession Number: 20120201–5242.

Comments Due: 5 p.m. ET 2/22/12.

Take notice that the Commission received the following electric reliability filings.

Docket Numbers: RD12–2–000.

Applicants: North American Electric Reliability Corporation.

Description: Petition of the North American Electric Reliability Corporation for Approval of Proposed SERC Regional Reliability Standard PRC–006–SERC–01—Automatic Underfrequency Load Shedding Requirements.

Filed Date: 2/1/12.

Accession Number: 20120201–5186.

Comments Due: 5 p.m. ET 3/2/12.

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.

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: February 2, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–2946 Filed 2–8–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–39–000]

D'Lo Gas Storage, LLC; Notice of Intent To Prepare an Environmental Assessment for the PROPOSED D'LO Gas Storage Project, Request for Comments on Environmental Issues, and Notice of Onsite Environmental Review

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the D'Lo Gas Storage Project involving construction and operation of facilities by D'Lo Gas Storage, LLC (DGS) in Simpson and Rankin Counties, Mississippi. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Please note that the scoping period will close on March 5, 2012. Further details on how to submit written comments are provided in the Public Participation section of this notice.

The Office of Energy Projects staff will conduct an onsite environmental review of the project area to gather data for its environmental analysis of the proposed project. Viewing of this area is anticipated to be from public access points and DGS's right-of-way and property. All interested parties are invited to attend but must provide their own transportation. Those attending should meet at the following location and time:

FERC Onsite Environmental Review

D'Lo Gas Storage Project, February 16, 2012 at 10:00 am Central Time, Country Fisherman Parking Area, 3809 Simpson Highway 49, Mendenhall, Mississippi.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

DGS provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?''. This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*www.ferc.gov*).

Summary of the Proposed Project

DGS proposes to construct and operate a new natural gas storage facility in the D'Lo Salt Dome formation in Simpson County, Mississippi. The D'Lo Gas Storage Project would provide approximately 24 billion cubic feet of working natural gas storage and have interconnections with five existing natural gas transmission pipelines in Simpson and Rankin Counties, Mississippi.

The D'Lo Gas Storage Project would consist of the construction and operation of the following facilities:

- Three salt dome storage caverns;
- A Solution Mining Facility;
- A Compression Facility with four 8,000 horsepower and one 4,735 horsepower gas engine driven compressors;
- Four primary and three secondary source water wells;
- Four primary and one secondary brine disposal wells;
- 3.7 miles of 20-inch-diameter source water and brine disposal pipelines;
- 0.2 miles of 24-inch-diameter natural gas pipeline for the Cavern Well Corridor;
- 0.4 miles of 30-inch-diameter natural gas pipeline with an interconnect and meter station to Boardwalk Pipeline;
- 0.8 miles of 24-inch-diameter natural gas pipeline with an interconnect and meter station to Southern Natural Gas Company (SONAT);
- 3.2 miles of 30-inch-diameter natural gas pipeline with an interconnect and meter station to Kinder Morgan Midcontinent Express Pipeline;
- a 12-inch-diameter tap, an interconnect, and meter station to Southcross Pipeline;
- 1.0 mile of 12-inch-diameter natural gas pipeline with an interconnect and meter station to Gulf South Pipeline; and
- 0.4 miles of nonjurisdictional electric right-of-way for utility lines to the storage facility and an electrical substation.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

Construction of the proposed facilities would disturb about 172 acres of land for the aboveground facilities and the pipelines. Following construction, DGS would maintain about 123 acres for permanent operation of the project facilities; the remaining acreage would be restored and revert to former uses.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us[2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Socioeconomics;
- Endangered and threatened species; and

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

• Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary on the FERC Web site. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 5.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Mississippi State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before March 5, 2012.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP12–39–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., CP12–39). Be sure you have selected an appropriate date range. 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. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Site visits and any public meetings will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Finally, to request additional project information or to obtain updated information directly from the project sponsor, you may call DGS's representative at the toll free number 1–855–4DLOGAS, or access its Web site (*www.dlogasstorage.com*).

Dated: February 3, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3021 Filed 2–8–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9629–4]

Notification of a Public Meeting of the Science Advisory Board (SAB) Animal Feeding Operations Emission Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public meeting of the SAB Panel to conduct a peer review on the EPA documents, ''Draft—Development of Emissions Estimating Methodologies for Broiler Animal Feeding Operations'' and ''Draft—Development of Emissions Estimating Methodologies for Lagoons and Basins at Swine and Dairy Animal Feeding Operations'' (February 2012 draft).

DATES: The SAB Panel meeting will be held on Wednesday, March 14, 2012 from 8:30 a.m. to 5:30 p.m. (Eastern Time), Thursday, March 15, 2012 from 8:30 a.m. to 5:30 p.m. (Eastern Time), and Friday, March 16, 2012 from 8:30 a.m. to 1 p.m. (Eastern Time).

ADDRESSES: The public meeting will be held at the Marriott at Research Triangle Park hotel, 4700 Guardian Drive, Durham, North Carolina 27703, (919) 941–6200.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the public meeting may contact Mr. Edward Hanlon, Designated Federal Officer (DFO), via telephone at (202) 564–2134 or email at *hanlon.edward@epa.gov.* General information concerning the SAB can be found on the EPA Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization (ERDDAA) Act, codified at 42 U.S.C. 4365 to provide independent scientific and technical advice to the EPA Administrator on the technical basis for EPA actions. Pursuant to Federal Advisory Committee Act (FACA) and EPA policy, notice is hereby given that the SAB Animal Feeding Operations Emission Review Panel will hold a public meeting to peer review the EPA's documents, ''Draft—Development of Emissions-Estimating Methodologies for Broiler Animal Feeding Operations'' (February 2012 draft), and ''Draft—Development of Emissions-Estimating Methodologies for Lagoons and Basins at Swine and Dairy Animal Feeding Operations'' (February 2012 draft). EPA's Office of Air and Radiation developed the draft methodologies to address requirements of a voluntary air compliance consent agreement signed in 2005 between EPA and nearly 14,000 broiler, dairy, egg layer, and swine animal feeding operations. As previously announced in a **Federal Register** Notice (Volume 76, Number 70, Pages 54466–54467) published on September 1, 2011, EPA has requested the SAB to review EPA's emission estimating methodologies, and the SAB sought nominations of experts to serve on the SAB Panel. Information about the formation of the SAB Animal Feeding Operation Emission Review Panel can be found on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Animal%20Feeding%20Air%20Methods?OpenDocument.* The SAB Animal Feeding Operation Emission Review Panel will provide advice through the chartered SAB and will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Technical Contacts: Any technical questions concerning EPA's air emission estimating methodologies for animal feeding operations, please contact Mr. Larry Elmore of EPA's Office of Air Quality Planning and Standards by phone at (919) 541–5433, or via email at *elmore.larry@epa.gov.*

Availability of Meeting Materials: Prior to the meeting, the review documents, agenda and other materials will be accessible through the calendar link on the blue navigation bar at *http://www.epa.gov/sab/.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit relevant comments for a federal advisory committee to consider pertaining to EPA's charge to the panel or meeting materials. Input from the public to the SAB will have the most impact if it provides specific scientific or technical information or analysis for SAB panels to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should contact the Designated Federal Officer directly. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes. Interested parties should contact Mr. Edward Hanlon, DFO, in writing (preferably via email) at the contact information noted above by March 7, 2012, to be placed on the list of public speakers for the meeting. *Written Statements:* Written statements should be supplied to the DFO via email at the contact information noted above by March 7, 2012 for the meeting so that the information may be made available to the Panel members for their consideration. Written statements should be supplied in one of the following electronic formats: Adobe Acrobat PDF, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format. It is the SAB Staff Office general policy to post written comments on the Web page for the advisory meeting or teleconference. Submitters are requested to provide an unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Edward Hanlon at (202) 564–2134 or *hanlon.edward@epa.gov.* To request accommodation of a disability, please contact Mr. Hanlon preferably at least ten days prior to the meeting to give EPA as much time as possible to process your request.

Dated: February 2, 2012.

Thomas H. Brennan,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2012–2999 Filed 2–8–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9629–7]

Notification of Three Public Teleconferences of a Work Group of the Chartered Science Advisory Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces three public teleconferences of a work group of the Chartered Science Advisory Board to discuss the President's FY 2013 Budget Request for the EPA Office of Research and Development.

DATES: The teleconference dates and times are March 1, 2012, from 1 p.m. to 4 p.m. (Eastern Time); March 2, 2012 from 10 a.m. to 1 p.m. (Eastern Time); and March 8, 2012 from 10 a.m. to 1 p.m. (Eastern Time).

ADDRESSES: The public teleconferences will be held by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to obtain general information concerning this public meeting should contact Dr. Angela Nugent, Designated Federal Officer (DFO), EPA Science Advisory Board (1400R), 1200 Pennsylvania Ave. NW., Washington, DC 20460; via telephone/voice mail: (202) 564–2218; fax: (202) 565–2098; or email at *nugent.angela@epa.gov.* General information concerning the EPA Science Advisory Board can be found on the SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. Pursuant to FACA and EPA policy, notice is hereby given that a work group of the chartered SAB will hold three public teleconferences to discuss the President's requested Fiscal Year 2013 Budget to support EPA research needs. The SAB work group and the SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Background: The chartered SAB has conducted a review of the EPA research budget annually and provides written comments to the EPA Administrator and to Congress, as requested, on the adequacy of EPA's requested research budget. At the teleconference on March 1, 2012, a work group of the chartered SAB will receive briefings on the requested research budget for Fiscal Year 2012. At the teleconference on March 2, 2012, the work group will develop review comments. At the teleconference on March 8, 2012, the work group will discuss a draft report that will receive additional review by the full chartered SAB at a date to be announced in the **Federal Register**.

Availability of Meeting Materials: The agenda and other materials in support of the meeting will be placed on the SAB Web site at *http://www.epa.gov/sab* in advance.

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit comments pertaining to EPA's charge, meeting materials and/or the group conducting the activity. They should send their comments directly to the DFO for the relevant advisory committee. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to three minutes per speaker. Interested parties should contact Dr. Nugent, DFO, in writing (preferably via email) at the contact information noted above by February 24, 2012 to be placed on a list of public speakers for the meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by February 24, 2012 so that the information may be made available to the chartered SAB members for their consideration and placed on the SAB Web site for public information. Written statements should be supplied to the DFO in the following formats: one hard copy with original signature, and one electronic copy via email (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). Submitters are asked to provide versions of each document submitted with *and* without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Angela Nugent at (202) 564–2218, or *nugent.angela@epa.gov.* To request accommodation of a disability, please contact Dr. Nugent, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: January 31, 2012.

Thomas H. Brennan,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2012–3011 Filed 2–8–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9629–5]

Notification of a Public Meeting of the Clean Air Scientific Advisory Committee (CASAC); Ozone Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public teleconference of the CASAC Ozone Review Panel to discuss its draft review of EPA's *Integrated Science Assessment for Ozone and Related Photochemical Oxidants (Second External Review Draft—September 2011).*

DATES: The CASAC Ozone Review Panel teleconference will be held on Friday, March 9, 2012, from 9 a.m. to 1 p.m. (Eastern Time).

ADDRESSES: The public teleconference will take place by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the public teleconference may contact Mr. Aaron Yeow, Designated Federal Officer (DFO), via telephone at: (202) 564–2050 or email at *yeow.aaron@epa.gov.* General information concerning the CASAC can be found on the EPA Web site at *http://www.epa.gov/casac.*

SUPPLEMENTARY INFORMATION: The CASAC was established pursuant to the Clean Air Act (CAA) Amendments of 1977, codified at 42 U.S.C. 7409D(d)(2),

to provide advice, information, and recommendations to the Administrator on the scientific and technical aspects of issues related to the criteria for air quality standards, research related to air quality, sources of air pollution, and the strategies to attain and maintain air quality standards and to prevent significant deterioration of air quality. The CASAC is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. The CASAC Ozone Review Panel and the CASAC will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Section 109(d)(1) of the CAA requires that the Agency periodically review and revise, as appropriate, the air quality criteria and the NAAQS for the six ''criteria'' air pollutants, including ozone. EPA is currently reviewing the primary (health-based) and secondary (welfare-based) NAAQS for ozone. The CASAC Ozone Review Panel held a face-to-face meeting on January 9–10, 2012 (as noticed in 76 FR 76725–76726) to provide a peer review of EPA's *Ozone and Related Photochemical Oxidants (Second External Review Draft—September 2011).* Information about this review activity may be found on the CASAC Web site at *http://www.epa.gov/casac*. Pursuant to FACA and EPA policy, notice is hereby given that the CASAC Ozone Review Panel will hold a follow-up public teleconference to discuss its draft review of EPA's *Ozone and Related Photochemical Oxidants (Second External Review Draft—September 2011).*

Availability of Meeting Materials: Prior to the meeting, the review documents, agenda and other materials will be accessible through the calendar link on the blue navigation bar at *http://www.epa.gov/casac/*.

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit relevant comments for a federal advisory committee to consider pertaining to EPA's charge to the panel or meeting materials. Input from the public to the CASAC will have the most impact if it provides specific scientific or technical information or analysis for CASAC panels to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should contact the DFO directly.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to three minutes. Interested parties should contact Mr. Aaron Yeow, DFO, in writing (preferably via email) at the contact information noted above by March 2, 2012, to be placed on the list of public speakers for the teleconference.

Written Statements: Written statements should be supplied to the DFO via email at the contact information noted above by March 2, 2012 for the teleconference so that the information may be made available to the Panel members for their consideration. Written statements should be supplied in one of the following electronic formats: Adobe Acrobat PDF, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format. It is the SAB Staff Office general policy to post written comments on the Web page for the advisory meeting or teleconference. Submitters are requested to provide an unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the CASAC Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Aaron Yeow at (202) 564–2050 or *yeow.aaron@epa.gov*. To request accommodation of a disability, please contact Mr. Yeow preferably at least ten days prior to the teleconference to give EPA as much time as possible to process your request.

Dated: January 30, 2012.

Thomas H. Brennan,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2012–3009 Filed 2–8–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9629–6]

Request for Nominations of Experts for EPA Science Advisory Board Scientific and Technological Achievement Awards Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office is requesting nominations of experts to be considered for service on an SAB Committee to make recommendations on EPA's Scientific and Technological Achievement Awards (STAA) for 2012–2015.

DATES: Nominations should be submitted by March 1, 2012 per the instructions below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding this Notice and Request for Nominations may contact Mr. Edward Hanlon, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 564–2134; by fax at (202) 565–2098 or via email at *hanlon.edward@epa.gov*. General information concerning the EPA SAB can be found at the EPA SAB Web site at *http://www.epa.gov/sab*.

SUPPLEMENTARY INFORMATION: The SAB (42 U.S.C. 4365) is a chartered Federal Advisory Committee that provides independent scientific and technical peer review, advice, consultation, and recommendations to the EPA Administrator on the technical basis for EPA actions. As a Federal Advisory Committee, the SAB conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and related regulations. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. EPA's STAA was established in 1980 to recognize Agency scientists and engineers who published their work in the peer-reviewed literature. The STAA Program is an Agency-wide competition to promote and recognize scientific and technological achievements by EPA employees. The STAA program is administered and managed by EPA's Office of Research and Development (ORD). Each year the SAB has been asked to review EPA's STAA nominations and make recommendations to the Administrator for monetary awards. The SAB Staff Office is announcing the formation of a

new STAA Committee that will serve for the next three years.

Request for Nominations: The SAB Staff Office is soliciting nominations of nationally and internationally recognized scientists and engineers with a multidisciplinary background in the areas of: Ecological research; energy and the environment; environmental control systems and technology; environmental monitoring and measurement methods; environmental policy and decision-making studies; environmental risk management and restoration; environmental sustainability and innovation; environmental transport and fate; human health effects research and human health risk assessment; homeland security; industry and the environment; integrated environmental risk assessment and other environmental research.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate qualified individuals in the areas of expertise described above. Nominations should be submitted in electronic format (preferred over hard copy) following the instructions for ''Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed,'' *http://www.epa.gov/sabprovided* on the SAB Web site. If you wish to nominate yourself or another expert, please follow the instructions that can be accessed through the ''Nomination of Experts'' link on the blue navigational bar at the SAB Web site *http://www.epa.gov/sab*. To receive full consideration, nominations should include all of the information requested below.

EPA's SAB Staff Office requests contact information about the person making the nomination, contact information about the nominee, the disciplinary and specific areas of expertise of the nominee, the nominee's resume or curriculum vita, sources of recent grant and/or contract support, and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations. The bio-sketches and resume or curriculum vita of nominees identified by respondents to this **Federal Register** notice, and additional experts identified by the SAB Staff, will be made available to the public upon request.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Mr. Edward Hanlon, DFO, as indicated above in this notice. Nominations should be submitted in time to arrive no later than March 1, 2012. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

The EPA SAB Staff Office will acknowledge receipt of nominations. The names and bio-sketches of qualified nominees identified by respondents to this **Federal Register** notice, and additional experts identified by the SAB Staff, will be posted in a List of Candidates on the SAB Web site at *http://www.epa.gov/sab.* Public comments on this List of Candidates will be accepted for 21 days. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office a review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. In forming this expert panel, the SAB Staff Office will consider public comments on the List of Candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Selection criteria to be used for panel membership include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; (e) skills working in committees, subcommittees and advisory panels; and, (f) for the Panel as a whole, diversity of expertise and viewpoints.

The SAB Staff Office's evaluation of an absence of financial conflicts of interest will include a review of the ''Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency'' (EPA Form 3110–48). This confidential form allows government officials to determine whether there is a statutory conflict between a person's public responsibilities (which includes membership on an EPA federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by federal regulation. The form may be viewed and downloaded from the following URL address *http://www.epa.gov/sab/pdf/epaform3110-48.pdf.*

The approved policy under which the EPA SAB Office selects subcommittees and review panels is described in the following document: *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board* (EPA–SAB–EC–02–010), which is posted on the SAB Web site at *http://www.epa.gov/sab/pdf/ec02010.pdf.*

Dated: January 30, 2012.

Thomas Brennan,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2012–3005 Filed 2–8–12; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Notice

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission.

DATE AND TIME: Wednesday, February 15, 2012, 9:30 a.m. Eastern Time.

PLACE: Commission Meeting Room on the First Floor of the EEOC Office Building, 131 ''M'' Street, NE., Washington, DC 20507.

STATUS: The meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Votes, and
2. Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities

Note: In accordance with the Sunshine Act, the meeting will be open to public observation of the Commission's deliberations and voting. Seating is limited and it is suggested that visitors arrive 30 minutes before the meeting in order to be processed through security and escorted to the meeting room. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides information about Commission meetings on its Web site, *eeoc.gov.*, and provides a recorded announcement a week in advance on future Commission sessions.)

Please telephone (202) 663–7100 (voice) and (202) 663–4074 (TTY) at any time for information on these meetings. The EEOC provides sign language interpretation and Communication Access Realtime Translation (CART) services at Commission meetings for the hearing impaired. Requests for other reasonable accommodations may be made by using the voice and TTY numbers listed above.

CONTACT PERSON FOR MORE INFORMATION: Bernadette B. Wilson, Senior Program Analyst on (202) 663–4077.

Dated: February 7, 2012.

Bernadette B. Wilson,

Senior Program Analyst. Executive Secretariat.

This Notice Issued February 7, 2012.

[FR Doc. 2012–3175 Filed 2–7–12; 4:15 pm]

BILLING CODE 6570–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0142; Docket 2011–0079; Sequence 19]

Federal Acquisition Regulation; Submission for OMB Review; Past Performance Information

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning past performance information. A notice was published in the **Federal Register** at 76 FR 67153, on October 31, 2011. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before March 12, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000–0142, Past Performance Information, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 9000–0142, Past Performance Information,'' under the heading ''Enter Keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0142, Past Performance Information.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0142, Past Performance Information,'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0142, Past Performance Information.

Instructions: Please submit comments only and cite Information Collection 9000–0142, Past Performance Information, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, Acquisition Policy Division, at GSA (202) 501–1448 or email *Curtis.glover@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Past performance information regarding a contractor's actions under previously awarded contracts is relevant information for future source selection purposes.

B. Annual Reporting Burden

Respondents: 150,000.
Responses per Respondent: 4.
Annual Responses: 600,000.
Hours per Response: 2.
Total Burden Hours: 1,200,000.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0142, Past Performance Information, in all correspondence.

Dated: February 3, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–3050 Filed 2–8–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Secretary's Advisory Committee on Human Research Protections

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health.

ACTION: Notice.

SUMMARY: Pursuant to Section 10(a) of the Federal Advisory Committee Act, U.S.C. Appendix 2, notice is hereby given that the Secretary's Advisory Committee on Human Research Protections (SACHRP) will hold its twenty-seventh meeting. The meeting will be open to the public. Information about SACHRP and the meeting agenda will be posted on the SACHRP Web site at: *http://www.dhhs.gov/ohrp/sachrp/mtgings/index.html.*

DATES: The meeting will be held on Tuesday, February 28, 2012 from 8:30 a.m. until 5 p.m. and Wednesday, February 29, 2012 from 8:30 a.m. until 5:00 pm.

ADDRESSES: U.S. Department of Health & Human Services, 200 Independence Avenue SW., Hubert H. Humphrey Building, Room 705, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Jerry Menikoff, M.D., J.D., Director, Office for Human Research Protections (OHRP), or Julia Gorey, J.D., Executive Director, SACHRP; U.S. Department of Health and Human Services, 1101 Wootton Parkway, Suite 200, Rockville, Maryland 20852; 240–453–8141; fax: 240–453–6909; email address: *Julia.Gorey@hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the authority of 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended, SACHRP was established to provide expert advice and recommendations to the Secretary of Health and Human Services and the Assistant Secretary for Health on issues and topics pertaining to or associated with the protection of human research subjects.

The meeting will open February 28 with remarks from SACHRP Chair Dr. Barbara Bierer and OHRP Director Dr. Jerry Menikoff, followed by a summary report from the Presidential Commission for the Study of Bioethical Issues on that group's recent report *Moral Science: Protecting Participants in Human Subjects Research.* This will be followed by a summary of public comment from OHRP on the ANPRM *Human Subjects Research Protections:*

Enhancing Protections for Research Subjects and Reducing Burden, Delay and Ambiguity for Investigators. The afternoon will also include a presentation from the Subpart A Subcommittee (SAS) to inform SACHRP of recent work. SAS is charged with developing recommendations for consideration by SACHRP regarding the application of subpart A of 45 CFR part 46 in the current research environment; this subcommittee was established by SACHRP in October 2006.

On February 29, SACHRP will hear recommendations from the Subcommittee on Harmonization (SOH). SOH was established by SACHRP at its July 2009 meeting, and is charged with identifying and prioritizing areas in which regulations and/or guidelines for human subjects research adopted by various agencies or offices within HHS would benefit from harmonization, consistency, clarity, simplification and/or coordination. Following the SOH report, SACHRP will hear a discussion on the IRB use of component analysis, utilizing speakers from the FDA and academia.

Public Comment will be heard on both days.

Public attendance at the meeting is limited to space available. Individuals who plan to attend the meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact persons. Members of the public will have the opportunity to provide comments on both days of the meeting. Public comment will be limited to five minutes per speaker. Any members of the public who wish to have printed materials distributed to SACHRP members for this scheduled meeting should submit materials to the Executive Director, SACHRP, prior to the close of business February 23, 2012.

Dated: February 3, 2012.

Jerry Menikoff,

Director, Office for Human Research Protections, Executive Secretary, Secretary's Advisory Committee on Human Research Protections.

[FR Doc. 2012–2958 Filed 2–8–12; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[ATSDR–273]

Notice of Development of Set 25 Toxicological Profiles

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (DHHS).

ACTION: Notice.

SUMMARY: This notice announces the development of Set 25 Toxicological Profiles, which will consist of four updated profiles. ATSDR will make these profiles available to the public on or about October 17, 2012 and will solicit public comments at that time for a 90-day period. Electronic access to these documents will be available at the ATSDR Web site: *http://www.atsdr.cdc.gov/toxprofiles/index.asp.*

Set 25 Toxicological Profiles

The following toxicological profiles are now being developed:

	Name	CAS
1	Hexachlorobenzene (UPDATE)	118–74–1
2	Endosulfan (UPDATE)	115–29–7
	Endosulfan sulfate	1031–07–8
	Endosulfan-alpha	95–99–98
	Endosulfan-beta	33213–65–9
3	1,1-Dichloroethane (UPDATE)	75–34–3
4	Dinitrotoluenes (DNT) (UPDATE):	
	2,3-DNT	602–01–7
	2,4-DNT	121–14–2
	2,5-DNT	619–15–8
	2,6-DNT	606–20–2
	3,4-DNT	610–39–9
	3,5-DNT	618–85–9

SUPPLEMENTARY INFORMATION: The Superfund Amendments and Reauthorization Act of 1986 (SARA) (42 U.S.C. 9601 *et seq.*) amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) (42 U.S.C. 9601 *et seq.*) by establishing certain requirements for ATSDR and the U.S. Environmental Protection Agency (EPA) with regard to hazardous substances that are most commonly found at facilities on the CERCLA National Priorities List (NPL). Among these statutory requirements is a mandate for the Administrator of ATSDR to prepare toxicological profiles for each substance included on the Priority List of Hazardous Substances (*www.atsdr.cdc.gov/SPL*). This list names 275 hazardous substances that pose the most significant potential threat to human health as determined by ATSDR and EPA. The availability of the revised list of the 275 priority substances was announced in the **Federal Register** on November 3, 2011 (76 FR 68193). For prior versions of the list of substances, see **Federal Register** notices dated April 17, 1987 (52 FR 12866); October 20, 1988 (53 FR 41280); October 26, 1989 (54 FR 43619); October 17, 1990 (55 FR 42067); October 17, 1991 (56 FR 52166); October 28, 1992 (57 FR 48801); February 28, 1994 (59 FR 9486); April 29, 1996 (61 FR 18744; November 17, 1997 (62 FR 61332); October 21, 1999 (64 FR 56792); October 25, 2001 (66 FR 54014); November 7, 2003 (68 FR 63098); December 7, 2005 (70 FR 70284); and March 6, 2008 (73 FR 12178).

Notice of the availability of drafts of these four updated toxicological profiles for public review and comment will be published in the **Federal Register** on or about October 17, 2012, with notice of a 90-day public comment period for each profile, starting from the actual release date. Following the close of the comment period, chemical-specific comments will be addressed, and, where appropriate, changes will be incorporated into each profile.

FOR FURTHER INFORMATION CONTACT: Commander Jessilynn B. Taylor, Division of Toxicology and Environmental Medicine, Agency for Toxic Substances and Disease Registry, 1600 Clifton Road NE., Mail Stop F–62,

Atlanta, GA 30333, telephone 770–488–3313.

Dated: February 3, 2012.

Ken Rose,

Director, Office of Policy, Planning and Evaluation, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.

[FR Doc. 2012–2955 Filed 2–8–12; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–12–09BK]

Agency for Toxic Substances and Disease Registry; Agency Forms Undergoing Paperwork Reduction Act Review

The Agency for Toxic Substances and Disease Registry (ATSDR) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC/ATSDR Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Registration of Individuals Displaced by the Hurricanes Katrina and Rita (Pilot Project)—New—Agency for Toxic Substances and Disease Registry (ATSDR), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

On August 29, 2005, Hurricane Katrina made landfall on the coast of the Gulf of Mexico near New Orleans, Louisiana, and became one of the most deadly and destructive storms in U.S. history. Also occurring in 2005, Hurricane Rita was the fourth-most intense Atlantic hurricane ever recorded and the most intense tropical cyclone ever observed in the Gulf of Mexico. Following the initial phase of the response, the Federal Emergency Management Agency (FEMA) assumed the primary role for housing displaced persons over the intermediate term. To support those needing temporary housing, FEMA provided over 130,000 travel trailers, park homes, and mobile homes for persons displaced by the above mentioned storms. However, some persons living in trailers complained of an odor or of eye or respiratory tract irritation.

FEMA entered into an Interagency Agreement with the Centers for Disease Control and Prevention (CDC)/ATSDR on August 16, 2007 to conduct a comprehensive public health assessment, based on objective and credible research, of air quality conditions present in FEMA housing units to guide FEMA policy makers and inform the public as to the actual conditions in the field and any actions required to better promote a safe and healthful environment for the disaster victims FEMA housed in the units. FEMA's agreement with the CDC includes an initial formaldehyde exposure assessment as well as a subsequent long-term study of the health effects among resident children. Formaldehyde testing conducted and evaluated by the CDC pursuant to the initial exposure assessment has identified the need to evaluate the feasibility of establishing a national registry to identify and monitor the health of disaster victims who occupied FEMA-provided temporary housing units. The establishment of such a registry would complement the long-term health effects study set forth in the FEMA–CDC Interagency Agreement.

The proposed pilot registry will have two goals: Primary Goal: Test the feasibility and cost of contacting and enrolling members in a registry by collecting and verifying phone interview data. Secondary Goal: Test the difference in prevalence rates of health conditions compared to national surveys (*i.e.,* NHANES and NHIS).

The data collected in the pilot registry and the evaluation of the pilot registry will be used to determine the feasibility and estimate the costs of developing and populating a more complete registry of people affected by Hurricanes Katrina and Rita. In addition, comparisons of prevalence rates of health outcomes obtained through the pilot registry with estimates from national surveys will help determine the utility of conducting a full registry. For example, if all or most health outcomes do not appear to be in excess, the value of a full registry may be questionable.

A pre-registration datasets will be created before enrollment. This dataset will be populated with contact information of the occupants of temporary housing units provided by FEMA. FEMA provided the datasets for this pilot registry.

A computer-assisted telephone interview (CATI) system based on a paper questionnaire will be used during all interviews to collect data for this project. The first part will consist of screening questions to determine eligibility for enrollment. The second part will contain contact information of the registrant and other household members, demographics, and health status questions, focusing on respiratory outcomes and mental health.

The two minute screening questionnaire will be administered to a total of 8,000 respondents. Annualized over a two year period, 4,000 will be screened. The 25 minute main questionnaire will be administered to a total of 5,000 respondents. Annualized over a two year period, 2,500 occupants will complete the main questionnaire.

There are no costs to the respondents other than their time. The total estimated annual burden hours are 1,176.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Temporary and Non-Temporary housing unit occupants.	Screening questionnaire	4,000	1	2/60
Main questionnaire	2,500	1	25/60	

Kimberly Lane,

Reports Clearance Officer, Agency for Toxic Substances and Disease Registry.

[FR Doc. 2012–2971 Filed 2–8–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–12–12AG]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

HIV Prevention among Latino MSM: Evaluation of a locally developed intervention—New—National Center for HIV/AIDS, Viral Hepatitis, STD, TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Latinos are the largest and fastest growing ethnic minority group in the U.S. and have the second highest rate of HIV/AIDS diagnoses of all racial/ethnic groups in the country. From the beginning of the epidemic through 2007, Latinos accounted for 17% of all AIDS cases reported to the CDC. Among Latino males, male-to-male sexual contact is the single most important source of HIV infection, accounting for 46% of HIV infections in U.S.-born Latino men from 2001 to 2005, and for more than one-half of HIV infections among South American, Cuban, and Mexican-born Latino men in the U.S. (CDC, 2007a; 2007b). In 2006, male-to-male sex accounted for 72% of new HIV infections among Latino males. Relative to other men who have sex with men (MSM), the rate of HIV infection among Latino MSM is twice the rate recorded among whites (43.1 vs. 19.6 per 100,000).

Despite the high levels of infection risk that affect Latino MSM, no efficacious interventions to prevent infection by HIV and other sexually transmitted diseases (STDs) are available for this vulnerable population. CDC's Prevention Research Synthesis group, whose role is to identify HIV prevention interventions that have met rigorous criteria for demonstrating evidence of efficacy, has not identified any behavioral interventions for Latino MSM that meet current efficacy criteria, and no such interventions are listed in CDC's 2011 update of its Compendium of Evidence-Based HIV Behavioral Interventions (*http://www.cdc.gov/hiv/topics/research/prs/compendium-evidence-based-interventions.htm*). There is an urgent need for efficacious, culturally congruent HIV/STD prevention interventions for Latino MSM.

The purpose of this project is to test the efficacy of an HIV prevention intervention for reducing sexual risk among Latino men who have sex with men in North Carolina. The HOLA en Grupos intervention is a Spanish-language, small-group, 4-session intervention that is designed to increase consistent and correct condom use and HIV testing among Latino MSM and to affect other behavioral and psychosocial factors that can increase their vulnerability of HIV/STD infection. This study will use a randomized controlled trial design to assess the efficacy of the HOLA en Grupos intervention compared to a general health comparison intervention.

CDC is requesting approval for a 3-year clearance for data collection. The data collection system involves screening of potential study participants for eligibility, collection of participants' contact information, and measures of intervention and comparison participants' socio-demographic characteristics, health seeking actions, HIV/STD and substance use-related risk behaviors, and psychosocial factors at baseline before intervention delivery and 6 months after intervention delivery. An estimated 350 men will be screened for eligibility in order to enroll the 300 men required for the study. The baseline and the 6-month follow-up assessments will be similar. However, the 6-month assessment will ask study participants fewer questions because there is no need to ask all questions during both assessments. Collection of eligibility information from potential participants will require about 10 minutes; collection of baseline assessment information will require about 1 hour and 45 minutes; and collection of the 6-month follow-up assessment information will require about 1 hour.

The total estimated annual burden hours are 883. There is no cost to participants other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number responses per respondent	Average burden per respondent (in hours)
Prospective Study Participant	Participant Screening Form	350	1	10/60
Enrolled Study Participant	Baseline Assessment	300	1	1.75
Enrolled Study Participant	6-month follow-up assessment	300	1	1

Kimberly S. Lane,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2012–2969 Filed 2–8–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–0920–11CE]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995. To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

The National Health and Nutrition Examination Survey (NHANES) 1999–2010 Birth Certificate Linkage Study—Pregnant Women—New—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability; environmental, social and other health hazards; and determinants of health of the population of the United States.

Division of Health and Nutrition Examination Surveys (DHANES) proposes to re-contact women who were pregnant at the time of their participation in NHANES in 1999–2010 and ask permission to link their data to the child's birth certificate data, for the birth that resulted after the survey. This study is funded in collaboration with CDC's National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health (DRH). Participation is completely voluntary and confidential.

NHANES was conducted periodically between 1970 and 1994, and continuously since 1999 by the NCHS. A supplemental sample of pregnant women was selected in NHANES from 1999–2006. This resulted in a total of 1,350 pregnant women. Although this supplemental sample was discontinued after 2006, there are an estimated 150 pregnant women in the NHANES sample for the years 2007–10. This results in a total estimate of 1,500 women for this project.

The NHANES only collected information about the pregnant women at the time of interview. Having information on their children's birth certificates and birth outcomes could provide insight into issues related to maternal and child health. No other survey has the physical examination and nutritional data that NHANES collects on pregnant women.

Consents for these projects will be sent to the appropriate U.S. states, local areas, or territories, where the birth certificate retrievals will then be conducted. Electronic retrieval per records is estimated at five minutes.

NHANES data users include the U.S. Congress; the World Health Organization; numerous Federal agencies such as the National Institutes of Health, the Environmental Protection Agency, and the United States Department of Agriculture; private groups such as the American Heart Association; schools of public health; private businesses; individual practitioners; and administrators. This submission requests approval for two years. There is no cost to respondents other than their time. The total estimated annual burden is 312 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
1. Women who were pregnant during NHANES 1999–2010.	Health Questionnaire/Consent Form	750	1	20/60
3. State/local vital statistics staff (one per U.S. State or Territory).	Locate and transmit birth certificates	57	13	5/60

Kimberly S. Lane,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2012–2965 Filed 2–8–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–12–11JZ]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Underreporting of Occupational Injuries and Illnesses by Workers—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In 2008, the Congressional Committee on Education and Labor released the report, ''Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses,'' indicating ''that work-related injuries and illnesses in the United States are chronically and even grossly underreported.'' Based in part on the report's results, Congress allocated funds for NIOSH to conduct a follow-up study using NIOSH's occupational supplement to the National Electronic Injury Surveillance System (NEISS–Work) to estimate underreporting among individuals who seek care at an emergency department (ED) for an occupational illness, injury, or exposure.

Objectives for this project are to (1) assess the reporting behavior of workers that are injured, ill, or exposed to a harmful substance at work; (2) characterize the chronic aspects of work-related injuries or illnesses; and (3) estimate the prevalence of work-related chronic injuries and illnesses among United States workers treated in EDs. Particular attention will be paid to self-employed workers, workers with work-related illnesses, and workers with chronic health problems.

Data collection for the telephone interview survey will be done via a questionnaire containing questions about the respondent's injury, illness, or exposure that sent them to the ED; the characteristics of the job they were working when they were injured, became ill, or were exposed; their experiences reporting their injury, illness, or exposure to the ED and their employer (if applicable); the presence of an underlying chronic condition that was associated with their ED visit; and the nature of any other work-related chronic conditions they have experienced. The questionnaire was designed to take 30 minutes to complete and includes a brief series of questions to screen out individuals who were not seen in the ED for a work-related injury, illness, or exposure; who are younger than age 20 or older than age 64; who do not speak English or Spanish; or who were working as volunteers or day laborers when the injury, illness, or exposure occurred or was made worse.

Approximately 1,500 to 3,000 interviews will be completed over the two year period. The only cost to the respondent will be the cost of their time spent on the phone completing the telephone interview survey. The total estimated burden hours are 750.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
U.S. workers presenting to an emergency department	1,500	1	30/60

Kimberly S. Lane,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2012–2961 Filed 2–8–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Advisory Committee for Reproductive Health Drugs; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Advisory Committee for Reproductive Health Drugs.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on April 5, 2012, from 8 a.m. to 4:30 p.m.

Location: FDA White Oak Campus, Building 31, the Great Room, White Oak Conference Center (rm. 1503), 10903 New Hampshire Ave., Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking and transportation may be accessed at *http://www.fda.gov/Advisory Committees/default.htm;* under the heading ''Resources for You'', click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Kalyani Bhatt, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., WO31–2417, Silver Spring, MD 20993–0002, 301–796–9001, Fax: 301–847–8533, email: *ACRHD@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss the benefits and risks of mirabegron (YM178), under new drug application (NDA) 202611, submitted by Astellas Pharma Global Development Inc., for the proposed indication of treatment of overactive bladder (OAB) with symptoms of urge urinary incontinence, urgency, and urinary frequency. Mirabegron is a beta-3-adrenoceptor (AR) agonist and is a new molecular entity. The benefit/risk discussion will focus on the adequacy of the demonstration of efficacy and safety in the treatment of OAB.

FDA intends to make background material available to the public no later than two business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written

submissions may be made to the contact person on or before March 22, 2012. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before March 14, 2012. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by March 15, 2012.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kalyani Bhatt at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: February 3, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–2927 Filed 2–8–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Eligibility Criteria for the Centers of Excellence Program in Health Professions Education for Under-Represented Minority Individuals

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Final Notice.

SUMMARY: The Centers of Excellence (COE) program in health professions education for under-represented minority (URM) individuals is authorized by section 736 of the Public Health Service Act (PHS Act), 42 U.S.C. 293 (2011). The purpose of this final notice is to inform interested individuals of the criteria that will be used to determine the eligibility of designated health professions schools to apply for COE funding in fiscal year (FY) 2012 and subsequent fiscal years. The Supplementary Information in this Notice provides a brief synopsis of the public comments that the Health Resources and Services Administration (HRSA) received on the updates to the proposed eligibility criteria in response to the November 7, 2011 **Federal Register** Notice, specifically addressing: 1) the proposed graduation threshold eligibility criteria, 2) the COE eligibility criteria in general, and 3) the purpose of the COE program as authorized by the PHS Act.

DATES: *Effective Date:* February 9, 2012.

FOR FURTHER INFORMATION CONTACT: Dr. Joan Weiss, Director, Division of Public Health and Interdisciplinary Education, Bureau of Health Professions, Health Resources and Services Administration. Dr. Weiss may be reached in one of three following methods: 1) via written request to: Dr. Joan Weiss, Designated Federal Official, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 9–36, 5600 Fishers Lane Rockville, Maryland 20852; 2) via telephone at (301) 443–6950; or 3) via email at *jweiss@hrsa.gov*.

SUPPLEMENTARY INFORMATION:

Background

For more than 20 years, the COE program has supported programs of excellence in health professions education for under-represented minority (URM) individuals in designated health professions schools. The authorized categories of designated health professions schools are: (1) Designated Historically Black Colleges and Universities (HBCUs), (2) Hispanic, (3) Native American, and (4) ''other'' health professions schools that meet the program requirements. COEs provide academic enhancement programs to URM individuals; develop a large and competitive applicant pool to pursue health professions careers; and improve the capacity of schools to recruit, train, and retain URM faculty. The COE program facilitates faculty and student research on health issues particularly affecting URM groups. In addition, the program carries out activities to improve information resources, clinical education, curricula and cultural competence of schools' graduates relating to minority health issues. COEs also train students to provide health services to URM individuals at community-based health facilities and provide financial assistance, as available and appropriate. To be eligible for funding, the PHS Act requires designated schools to meet each of four general conditions. The schools must: (1) Have a significant number of URM individuals enrolled in the school, including individuals accepted for enrollment in the school; (2) have been effective in assisting URM students of the school to complete the program of education and receive the degree involved; (3) have been effective in recruiting URM individuals to enroll in and graduate from the school, including providing scholarships and other financial assistance to such individuals and encouraging URM students from all levels of the educational pipeline to pursue health professions careers; and (4) have made significant recruitment efforts to increase the number of URM individuals serving in faculty or administrative positions at the school (See PHS Act, Section 736(c)(1)(B)(i)—(iv)).

1. Proposed Graduation Threshold Eligibility Criteria

The **Federal Register** Notice (FRN), published November 7, 2011, updated the eligibility criteria and requires eligible health professions schools to demonstrate effectiveness in assisting URM students to successfully complete the program of education and receive the appropriate degree. The eligibility criteria requires applicants to meet or exceed a specified minimum number of URM students graduating with appropriate degrees. Graduation rates are calculated and provided by health professions schools applying for COE funding. To account for varying class sizes across the landscape of health professions schools, the threshold percentage for Hispanic, Native American, and ''Other'' COEs within the designated health professions will be determined by the total number of URM students graduating from the health professions school with degrees divided by the total number of students graduating with degrees in a given health professions school. The percentage representing the cut-off point for the top quartile (75th percentile) will serve as the minimum percentage that Hispanic, Native American, and ''Other'' COEs must meet.

One commenter requested removing the graduation rate as an eligibility requirement, and instead using it as one factor to evaluate a school's qualifications for a COE grant due to the number of medical schools that have recently opened and are undergoing accreditation and do not yet have a graduating class to meet the graduation threshold. However, section 736(c)(1)(B)(ii) of the PHS Act requires health professions schools to demonstrate that they have ''been effective in assisting under-represented minority students of the school to complete the program of education and receive the degree involved.'' Newly opened health professions schools that are undergoing accreditation may be unable to meet this statutory requirement.

Another commenter expressed concern that the graduation threshold gives preference to institutions in the top quartile nationally for graduating URM students and may encourage institutions that have data below the threshold to inappropriately expand the number. The previous COE funding opportunity announcement (FY 2009) provided that, ''[t]he reviewers will determine if the health professions school has been effective in assisting URM students of the school to complete the program of education and receive the degree involved. Reviewers will verify that the applicant school meets the required URM graduation rate of at least 85% over 4 or 5 years. If the applicant is a Native American COE, reviewers will verify that the applicant school has a URM graduation rate of at least 75%.'' The criterion implements a statutory provision requiring effectiveness in assisting URM students to complete their degree programs, and we believe that the current formulation serves to standardize the minimum threshold by setting it at 75 percent. If the result is an increase in the graduation rate, that would be consistent with the goals of the program.

One commenter noted that the word ''its'' that was in the criterion, ''requires designated health professions schools to be effective in assisting its URM students to successfully complete the program of education and to receive the appropriate professional degree'' disconnects the intent of the criterion from the calculation. To avoid miscommunication on the intent of graduation threshold criteria and calculation, the word ''its'' is not used in this context in this Final Notice and will not be used when this criteria is reiterated in the COE funding opportunity announcement.

2. COE Eligibility Criteria in General

The general conditions of a designated health professions school to be eligible for COE funding, as authorized by the PHS Act, Title VII, Section 736, include meeting the four criteria mentioned previously in the Background section. A public comment recommended deleting part or all of the first, third, and fourth eligibility criteria. Because the statute clearly states these four conditions are required for eligible applicants to receive COE funding, none can be deleted, partially or in full.

3. Authorized Purpose and Intent of COE Program

Another commenter raised concern about the underlying statute, rather than the proposed criteria; these concerns are beyond the scope of this notice. The COE program, first authorized by Public Law 100–97 (''Excellence in Minority Health Education and Care Act'') in 1987, funds minority health professions schools to recruit, retain, and graduate URMs to increase the supply and quality of URMs in the health professions workforce. As demonstrated by national data sources, there continues to be a low number of URMs applying to U.S. medical schools (*https://www.aamc.org/download/161338/data/table15.pdf*) and a low number in the physician workforce (AAMC, *Diversity in the Physician Workforce, Facts and Figures 2010;* Figure 14, p. 30). Due to the challenges in recruiting and graduating a critical mass of URM students to increase diversity in the health professions workforce, the eligibility criteria for eligible health professions schools for COE funding remains as defined in the authorizing statute.

The catalog of Federal Domestic Assistance Number for the COE program is 93.157. This program is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100). Further, these programs are not subject to the Public Health Systems Reporting Requirements.

The Centers of Excellence Program application is approved under OMB No. 0915–0060.

Dated: February 2, 2012.

Mary K. Wakefield,

Administrator, Health Resources and Services Administration.

For the reasons stated above, the Heath Resources and Services Administration (HSRA) is adopting the Proposed Notice, published at 76 FR 0215 on Monday, November 7, 2011, as a Final Notice with the change to clarify Criterion Two.

SUPPLEMENTARY INFORMATION: *Purpose:* The COE program supports programs of excellence in health professions education for URM individuals in designated health professions schools. The categories of designated health professions schools subject to this notice are: (1) Hispanic, (2) Native American, and (3) ''Other'' health professions schools that meet the program requirements. Centers of Excellence provide academic enhancement programs to URM individuals; develop a large and competitive applicant pool to pursue health professions careers; and improve the capacity of schools to recruit, train, and retain URM faculty. The COE program facilitates faculty and student research on health issues particularly affecting URM groups. In addition, the program carries out activities to improve information resources, clinical education, curricula, and cultural competence of schools' graduates relating to minority health issues. COEs also train students to provide health services to URM individuals at community-based health facilities and provide financial assistance, as available and appropriate.

Eligibility Criteria: To be eligible for funding, the Public Health Service Act requires designated schools to meet each of four criteria. The schools must: (1) Have a significant number of URM students enrolled, including individuals accepted for enrollment; (2) have been effective in assisting URM students to complete their educational program and receive the degree involved; (3) have been effective in recruiting URM students to enroll in and graduate from the school, including providing scholarships and other financial assistance and encouraging URM students at all levels of the educational pipeline to pursue health professions careers; and (4) have made significant recruitment efforts to increase the number of URM individuals serving in faculty or administrative positions at the school.

The COE program aims to support institutions with a commitment to URMs, including having demonstrated effectiveness in recruiting, teaching, training, and retaining current and future URM health professionals, both as practitioners and as faculty. This announcement details the proposed approach that the Secretary will use to assess whether schools and other eligible entities meet the eligible criteria defined in statute. Beginning in FY 2012, the following approach would be

used to assess whether applicants meet eligibility criteria.

A. *Criterion one:* The school must have a significant number of URM students enrolled in the designated health professions education program. The Secretary will determine the significant number for Hispanic and Native American COEs based on a percentage of the current number of URM students enrolled in these schools. This determination is unnecessary, however, for HBCUs because they meet the significant number condition by virtue of their definition. With respect to the eligible ''Other'' COE health professions schools, the Act requires these schools to have a current enrollment of URMs above the national average.

B. *Criterion two:* The second criterion requires designated health professions schools to be effective in assisting URM students to successfully complete the program of education and to receive the appropriate professional degree. Graduation rates are calculated, determined, and provided by health professions schools applying for COE funding. To account for varying class sizes across the health professions schools, the graduation rate eligibility thresholds for Hispanic, Native American, and ''Other'' COEs in the designated health professions will be determined using the following procedure:

1. Health professions schools and programs will be ranked according to the percentage of URMs (*e.g.,* Hispanic, Native American, or ''Other'') successfully graduating from such health professions schools or programs with degrees each year, as calculated by the total number of URM students graduating from the health professions school with degrees divided by the total number of students graduating with degrees in a given health professions school.

2. The top quartile (75th percentile) will serve as the threshold and eligibility percentage for Hispanic, Native American, and ''Other'' COE applicants.

3. The Integrated Postsecondary Education Data System Completions survey will provide the raw data for threshold analysis. The Integrated Postsecondary Education Data System (IPEDS) is a system of interrelated completed surveys conducted annually by the U.S. Department of Education's National Center for Education Statistics (NCES). IPEDS collects data on postsecondary education in the United States, including the number of students who complete a postsecondary education program by type of program and level of award (certificate or degree). The IPEDS is available at *http://nces.ed.gov/ipeds/datacenter/DataFiles.aspx.* Separate thresholds will be calculated and established for each of the following four categories: allopathic and osteopathic medicine; pharmacy; dentistry; and behavioral or mental health.

Individual schools will be responsible for calculating their percentage of URM graduates with degrees. Each school's graduation rate percentage will be compared to the thresholds established through the methodology described above. If a school meets or exceeds the threshold, it will meet the graduation eligibility criterion for the COE program. To calculate their URM graduation percentage, health professions schools would:

1. Sum the appropriate URM (Hispanic, Native American, or ''Other'') population that completed and successfully graduated from the health professions school with degrees across the most recent three years (A).

2. Sum the total student population that completed and successfully graduated from the health professions school with degrees across the most recent three years (B).

3. Divide A by B to arrive at the average designated URM percentage of successful graduates from the health professions schools with degrees across the past three years.

To be eligible for the COE program, Hispanic, Native American and ''Other'' applicants must meet or exceed the proposed graduation thresholds. The proposed graduation threshold in each of the eligible fields of study is the 75th percentile of URM graduation rates as reported to the IPEDS. The 75th percentile was determined based on an analysis of the IPEDS completion survey of 2009 data within the appropriate field of study, as defined by the Classification of Instructional Program (CIP) code system. The CIP is the accepted federal government statistical standard on instructional program classifications. The ''Total Programs'' per discipline represents the number of programs reporting a completions rate for the given CIP code in the U.S. within the IPEDS system.

Proposed Graduation Rate Eligibility Thresholds

The analysis would be as follows:

ALLOPATHIC AND OSTEOPATHIC MEDICINE PROGRAMS (Doctors of Medicine, Doctors of Osteopathy):

TOTAL PROGRAMS REPORTED IN IPEDS = 142.

Hispanic graduation rate eligibility threshold = 6.3 percent.

Native American graduation rate eligibility threshold = 1.0 percent.

''Other'' COE graduation rate eligibility threshold = 14.1 percent.

DENTISTRY (Doctors of Dental Surgery, Doctors of Dental Medicine):

TOTAL PROGRAMS REPORTED IN IPEDS = 59.

Hispanic graduation rate eligibility threshold = 7.1 percent.

Native American graduation rate eligibility threshold = 1.4 percent.

''Other'' COE graduation rate eligibility threshold = 13.5 percent.

PHARMACY (Doctor of Pharmacy):

TOTAL PROGRAMS REPORTED IN IPEDS = 94.

Hispanic graduation rate eligibility threshold = 3.5 percent.

Native American graduation rate eligibility threshold = 0.5 percent. *

Other COE graduation rate eligibility threshold = 10.0 percent.

BEHAVIORAL OR MENTAL HEALTH:

TOTAL PROGRAMS REPORTED IN IPEDS = 1928.

Hispanic graduation rate eligibility threshold = 7.7 percent.

Native American graduation rate eligibility threshold = 0.66 percent. *

Other COE graduation rate eligibility threshold = 26.1percent.

* Due to the limited number of Native Americans graduating with a Doctor of Pharmacy or a graduate degree in Behavioral or Mental Health from the school of discipline, the proposed graduation rate eligibility threshold for these two disciplines is based on the mean percentage and not on the 75th percentile of Native Americans graduating with the required degree.

C. *Criterion three:* The third criterion requires designated health professions schools to have effectively recruited URMs, including providing scholarships and other financial assistance for individuals enrolled in the school, and encouraging URM students from all levels of the education pipeline to pursue health professions careers. Such schools are responsible for establishing criteria for financial assistance, selecting recipients within the Centers of Excellence program, and making reasonable determinations of need for the level of financial assistance for the recipients. Each school will independently develop the criteria to receive financial assistance, submit this information in their application, where it collectively will be objectively reviewed by the peer review panel. The availability of financial assistance, as formulated by the health professions school, is designed to assist in increasing the level of URM health professionals who successfully

complete the program as well as increase their intent to practice in underserved areas.

D. *Criterion four:* The fourth criterion requires designated health professions schools to have made a significant recruitment effort to increase the number of URM individuals serving in faculty or administrative positions at the school. A major COE program focus is to improve the capacity of the school to train, recruit, and retain URM faculty and administrative personnel. A health professions school should demonstrate over a 5-year period a ''significant effort'' to recruit and retain URM faculty and administrative positions based on the number of URM faculty and new URM hires.

[FR Doc. 2012–2933 Filed 2–8–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request: Information Program on Clinical Trials; Maintaining a Registry and Results Databank

Summary: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (PRA) to provide opportunity for public comment on proposed data collection projects, the National Library of Medicine (NLM), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection

Title: Information Program on Clinical Trials: Maintaining a Registry and Results Databank.

Type of Information Collection Request: Revision of OMB No. 0925–0586, expiration date April 30, 2012.

Form Number: NA.

Need and Use of Information Collection: The National Institutes of Health operates ClinicalTrials.gov, which was established as a clinical trial registry under section 113 of the Food and Drug Administration Modernization Act of 1997 (Pub. L. 105–115) and was expanded to include a results data bank by Title VIII of the Food and Drug Administration Amendments Act of 2007 (FDAAA). ClinicalTrials.gov collects registration and results information for clinical trials and other types of clinical studies (e.g., observational studies and patient registries) with the objectives of enhancing patient enrollment and providing a mechanism for tracking subsequent progress of clinical studies, to the benefit of public health. It is widely used by patients, physicians, and medical researchers; in particular those involved in clinical research. While many clinical studies are registered voluntarily, FDAAA requires the registration of certain applicable clinical trials of drugs and devices and the submission of results information for completed applicable clinical trials of drugs and devices that are approved, licensed, or cleared by the Food and Drug Administration. Beginning in 2009, results information was required to include information about serious and frequent adverse events. As the existing PRA clearance for this information collection nears expiration, we are making a limited number of revisions to include additional data elements that may be voluntarily submitted to describe and aid in the interpretation of any submitted adverse event information and to facilitate the registration of patient registries.

Frequency of Response: For clinical trials that are subject to FDAAA, responsible parties must submit the required registration information not later than 21 days after enrolling the first subject. Results information is to be submitted not later than 12 months after the completion date (as defined in the law), but can be delayed under certain circumstances. Updates to most submitted information are required at least once a year, if there are changes to report, but changes in recruitment status and completion of a trial must be reported not later than 30 days after such events. Other clinical studies register once, at their inception, and are requested to update information annually, as necessary.

Description of Respondents: Respondents include sponsors or principal investigators of clinical studies. Those subject to FDAAA are referred to as ''responsible parties,'' which are defined as sponsors of the clinical trial (as defined in 21 CFR 50.3) or designated principal investigators who meet requirements specified in the law.

Estimate of Burden: The burden associated with this information collection consists of the burden associated with registration of clinical studies and the burden associated with the submission of results information (including adverse events). These information collections will occur at different times, but submitted information is integrated into a single record for each clinical trial. To estimate the annual reporting burden for registration, we examined the number of clinical studies registered annually with ClinicalTrials.gov and found an average of 17,000 registrations per year since the enactment of FDAAA. From this total, we estimate that approximately 5,000 studies would be applicable clinical trials of drugs (including biological products) and 500 would be applicable trials of devices subject to FDAAA. The remaining 11,500 studies would be registered voluntarily. We estimate the time to complete an initial registration to be 7 hours (including time to extract, reformat and submit information which has already been produced for other purposes). This estimate is consistent with that used on the previous PRA clearance and incorporates 4 hours for data extraction and 3 hours for reformatting. Based on previous experience, we estimate that each registration record will be updated an average of eight times and that each update takes approximately 2 hours. Applying these figures to the estimated number of trials to be registered per year produces an annual burden estimate of 391,000 hours. Of this total, 126,500 hours are associated with the mandatory registration of trials subject to FDAAA, and 264,500 hours are associated with voluntary registrations.

The burden of results submission consists of the time and effort needed to summarize information from a clinical trial, format it, and enter it into the databank. We estimate that of the 5,500 applicable clinical trials that are registered each year, approximately 1,845 will be required to submit results each year (1,500 trials of drugs and biological products, and 345 trials of devices). We estimate that each results record will submitted once and updated twice to reflect changes in the data analysis, additional results of subsequent pre-specified outcome measures, or additional adverse event information. Based on information available from various organizations about results submission times, comments made at a public meeting held in April 2009, responses to estimates in previous OMB clearance documents (73 FR 58972, Oct. 8, 2008), and feedback from respondents who have submitted results to ClinicalTrials.gov, we have increased our estimate of the average response time to 25 hours from the 10 hour estimate included in the previous OMB clearance request. We estimate that updates take 8 hours, an increase over the 5 hour estimate included in the previous OMB clearance request for adverse event information. In addition,

we estimate that 3,655 trials per year will submit certifications to ClinicalTrials.gov indicating that they qualify for delayed results submission, and another 200 trials will request extensions to the submission deadline for good cause, as permitted by FDAAA. We expect that it would take no more than 30 minutes for a responsible party to determine that a certification is required and to submit the necessary information through ClinicalTrials.gov. For extension requests, we estimate that the time to prepare a request and submit it to ClinicalTrials.gov would be no more than 2 hours. Using these figures, we estimate the annualized hourly burden for submitting results information, certifications, and extension requests to be 77,872.5 hours. There are no capital costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: David Sharlip, National Library of Medicine, Building 38A, Room B2N12, 8600 Rockville Pike, Bethesda, MD 20894, or call non-toll free number 301–402–9680 or Email your request to *sharlipd@mail.nih.gov.*

DATES: *Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

Dated: February 2, 2012.

David H. Sharlip,

OMB Project Clearance Liaison, National Library of Medicine, National Institutes of Health.

[FR Doc. 2012–3048 Filed 2–8–12; 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 Biomedical Research and Research Training Review Subcommittee A.

Date: March 8, 2012.

Time: 8 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: Carole H. Latker, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, 301–594–2848, *latkerc@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 2, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3035 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Technologies for Lipoprotein Subfraction Analyses.

Date: March 2, 2012.

Time: 10 a.m. to 1 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Charles Joyce, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924, 301–435–0288, *cjoyce@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: February 2, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3044 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group Dissemination and Implementation Research in Health Study Section.
Date: February 27, 2012.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.
Contact Person: Jacinta Bronte-Tinkew, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3164, MSC 7770, Bethesda, MD 20892, 301 806–0009, *brontetinkewjm@csr.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group Societal and Ethical Issues in Research Study Section.
Date: February 28, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.
Contact Person: Karin F Helmers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7770, Bethesda, MD 20892, 301–254–9975, *helmersk@csr.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group Biomedical Computing and Health Informatics Study Section.
Date: February 28, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.
Contact Person: Melinda Jenkins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3156, MSC 7770, Bethesda, MD 20892, 301–437–7872, *jenkinsml2@mail.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group Community-Level Health Promotion Study Section.
Date: February 28–29, 2012.
Time: 8:30 a.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Kabuki, 1625 Post Street, San Francisco, CA 94115.
Contact Person: Jacinta Bronte-Tinkew, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3164, MSC 7770, Bethesda, MD 20892, 301 806–0009, *brontetinkewjm@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Translational Research in Pediatric and Obstetric Pharmacology.
Date: February 28, 2012.
Time: 11 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: John Bleasdale, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170, MSC 7892, Bethesda, MD 20892, 301–435–4514, *bleasdaleje@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Fellowships: Immunology.
Date: March 1–2, 2012.
Time: 8 a.m. to 11 a.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue NW., Washington, DC 20007.
Contact Person: Calbert A Laing, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4210, MSC 7812, Bethesda, MD 20892, 301–435–1221, *laingc@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Review of Immunology AREA Grant Applications
Date: March 2, 2012.
Time: 11 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue NW, Washington, DC 20007.
Contact Person: Calbert A Laing, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4210, MSC 7812, Bethesda, MD 20892, 301–435–1221, *laingc@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 2, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3043 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 Human Genome Research Institute Special Emphasis Panel; CIDR Contract Renewal Technical Review.
Date: February 27, 2012.
Time: 12 p.m. to 2 p.m.
Agenda: To review and evaluate contract proposals.
Place: NHGRI Twinbrook Library, 5635 Fishers Lane, Room 4076, Rockville, MD 20852, (Telephone Conference Call).
Contact Person: Rudy O. Pozzatti, Ph.D., Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, 5635 Fishers Lane, Suite 4076, MSC 9306, Rockville, MD 20852, (301) 402–0838, *pozzattr@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Human Genome Research Institute Special Emphasis Panel; ENCODE Production SEP (M1).
Date: March 5, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Renaissance Arlington Capital View, 2800 S Potomac Avenue, Studio 6, Arlington, VA 22202.
Contact Person: Keith McKenney, Ph.D., Scientific Review Officer, NHGRI, 5635 Fishers Lane, Suite 4076, Bethesda, MD 20814, 301–594–4280, *mckenneyk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: February 3, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3042 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious 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 Allergy and Infectious Diseases Special Emphasis Panel; Integrated Preclinical/Clinical AIDS Vaccine Development Program (IPCAVD).

Date: March 1–2, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Eleazar Cohen, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, Room 3129, Bethesda, MD 20892, 301–435–3564, *ec17w@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 3, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3041 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Anti-pathogen drug development and resistance.

Date: February 28, 2012.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Richard G Kostriken, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, 301–402–4454, *kostrikr@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Synthetic and Biological Chemistry A.

Date: March 1, 2012.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: William A. Greenberg, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4168, MSC 7806, Bethesda, MD 20892, 301 435–1726, *greenbergwa@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Pediatric drug formulations and delivery systems.

Date: March 1, 2012.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Robert C Elliott, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Oral, Dental and Craniofacial Sciences.

Date: March 7–8, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Yi-Hsin Liu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, 301–435–1781, *liuyh@csr.nih.gov*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Neurotechnology.

Date: March 7, 2012.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Eugene Carstea, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892, 301 408–9756, carsteae@csr.nih.gov

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Non-HIV Microbial Vaccine Development.

Date: March 8–9, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Scott Jakes, Ph.D., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4198, MSC 7812, Bethesda, MD 20892, 301–495–1506, *jakesse@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 2, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3049 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; 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 of the NIH Clinical Center.

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 Clinical Center, 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 of the NIH Clinical Center.

Date: March 6–7, 2012.

Time: 8:15 a.m. to 5 p.m.

Agenda: To review and evaluate to review the Imaging Sciences Program.

Place: National Institutes of Health, Building 10, 10 Center Drive, Room 4–2551, Bethesda, MD 20892.

Contact Person: David K Henderson, MD, Deputy Director for Clinical Care, Office of the Director, Clinical Center, National

Institutes of Health, Building 10, Room 6–1480, Bethesda, MD 20892, (301) 496–3515.

Dated: February 2, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3046 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; 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 Nursing Research Special Emphasis Panel Genomic Advances to Wound Repair.

Date: March 7, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Tamizchelvi Thyagarajan, Ph.D., Scientific Review Officer, National Institute of Nursing Research, National Institutes of Health, Bethesda, MD 20892, (301) 594–0343, *tamizchelvi.thyagarajan@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: February 2, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3033 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research, 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 Dental and Craniofacial Research Special Emphasis Panel; NIDCR Secondary Data Analysis R03.

Date: March 2, 2012.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6706 Democracy Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Jayalakshmi Raman, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, One Democracy Plaza, Room 670, Bethesda, MD 20892–4878, (301) 594–2904, *ramanj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: February 2, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3028 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: Mechanisms of Cilium-Based Signaling.

Date: February 27–28, 2012.

Time: 8 a.m to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Sergei Ruvinov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4158, MSC 7806, Bethesda, MD 20892, 301–435–1180, *ruvinser@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Metabolism, Nutrition and Reproduction.

Date: February 29–March 1, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Reed A Graves, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6166, MSC 7892, Bethesda, MD 20892, (301) 402–6297, *gravesr@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Synthetic and Biological Chemistry A Study Section.

Date: March 1, 2012.

Time: 8 a.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Latham Hotel, 3000 M Street NW., Washington, DC 20007.

Contact Person: Mike Radtke, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7806, Bethesda, MD 20892, 301–435–1728, *radtkem@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cancer Diagnostics and Treatments (CDT).

Date: March 5–6, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Zhang-Zhi Hu, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6186,

MSC 7804, Bethesda, MD 20892, (301) 594–2414, *huzhuang@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Orthopedics.

Date: March 5, 2012.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Baljit S Moonga, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7806, Bethesda, MD 20892, 301–435–1777, *moongabs@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–11–131: Tools for Zebrafish Research.

Date: March 6–7, 2012.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Burch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3213, MSC 7808, Bethesda, MD 20892, 301–408–9519, *burchjb@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–11–30: Zebrafish Screens.

Date: March 6–7, 2012.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Burch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3213, MSC 7808, Bethesda, MD 20892, 301–408–9519, *burchjb@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Neurobiology of Brain Disease and Aging.

Date: March 6–7, 2012.

Time: 10 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Boris P Sokolov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, 301–408–9115, *bsokolov@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 2, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–3030 Filed 2–8–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2012–0004]

President's National Security Telecommunications Advisory Committee

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: Committee Management; Notice of an Open Federal Advisory Committee Teleconference.

SUMMARY: The President's National Security Telecommunications Advisory Committee (NSTAC) will meet on Tuesday, February 28, 2012, via a conference call. The meeting will be open to the public.

DATES: The NSTAC will meet Tuesday, February 28, 2012, from 2 p.m. to 3:15 p.m. Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held via a conference call. For access to the conference bridge, contact Ms. Deirdre Gallop-Anderson by email at *deirdre.gallop-anderson@dhs.gov* by 5 p.m. on February 21, 2012.

To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the ''Supplementary Information'' section below. Documents associated with the issues to be discussed during the conference call are available at *www.ncs.gov/nstac* for review prior to the call. Written comments must be received by the NSTAC Designated Federal Officer no later than March 14, 2012, and must be identified by ''DHS–2012–0004'' and may be submitted by any *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting written comments.
- *Email: NSTAC@hq.dhs.gov*. Include the docket number in the subject line of the email message.
- *Fax:* (703) 235–4981.
- *Mail:* Deputy Manager, National Communications System, Office of Cybersecurity and Communications, National Protection and Programs Directorate, Department of Homeland Security, 245 Murray Lane, Mail Stop 0615, Arlington, VA 20598–0615.

Instructions: All written submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Written comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket, including all documents and comments received by the NSTAC, go to *http://www.regulations.gov*.

A public comment period will be held during the meeting on February 28, 2012, from 2:45 p.m. to 3:15 p.m. Speakers that wish to participate in the public comment period must register in advance no later than February 21, 2012 at 5 p.m. by emailing Deirdre Gallop-Anderson at *deirdre.gallop-anderson@dhs.gov*. Speakers are requested to limit their comments to 3 minutes and will speak in order of registration as time permits. Please note that the public comment period may end before the time indicated, following the last call for comments.

FOR FURTHER INFORMATION CONTACT: Allen F. Woodhouse, NSTAC Designated Federal Officer, Department of Homeland Security, telephone (703) 235–4900.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. (Pub. L. 92–463). The NSTAC advises the President on matters related to national security and emergency preparedness telecommunications policy.

During the conference call, the NSTAC members will receive a quarterly update on NSTAC Recommendations from Mr. Gregory Schaffer, Assistant Secretary for Cybersecurity and Communications, an update on the Cloud Computing Subcommittee from Mr. Mark McLaughlin, Chair of the Cloud Computing Subcommittee, and an update on the National Public Safety Broadband Network scoping effort from Mr. Scott Charney and Mr. Michael Laphen, Co-Chairs of the National Public Safety Broadband Network Subcommittee.

Dated: February 2, 2012.

Allen F. Woodhouse,

Designated Federal Officer for the NSTAC.

[FR Doc. 2012–2934 Filed 2–8–12; 8:45 am]

BILLING CODE 9110–09–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4042–DR; Docket ID FEMA–2012–0002]

Virginia; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Virginia (FEMA–4042–DR), dated November 4, 2011, and related determinations.

DATES: *Effective Date:* February 1, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Virginia is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of November 4, 2011.

Albemarle and King George Counties for Individual Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–3056 Filed 2–8–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4029–DR; Docket ID FEMA–2012–0002]

Texas; Amendment No. 13 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Texas (FEMA–4029–DR), dated September 9, 2011, and related determinations.

DATES: *Effective Date:* February 1, 2012.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Texas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 9, 2011.

Bosque County for Public Assistance, including direct federal assistance. Caldwell, Fayette, and Grimes Counties for emergency protective measures (Category B), including direct federal assistance, under the Public Assistance program (already designated for Individual Assistance).

Bowie, Camp, Crockett, Foard, Franklin, Grayson, Hardin, Hunt, Jefferson, Kendall, La Salle, Lee, Limestone, Matagorda, McCulloch, Newton, Orange, Pecos, Polk, Red River, Reeves, Roberts, San Augustine, Shelby, Titus, and Tyler Counties for emergency protective measures (Category B), including direct federal assistance, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–3053 Filed 2–8–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Bonded Warehouse Proprietor's Submission

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.

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 Bonded Warehouse Proprietor's Submission (CBP Form 300). 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: Bonded Warehouse Proprietor's Submission.

OMB Number: 1651–0033.

Form Number: CBP Form 300.

Abstract: CBP Form 300, *The Bonded Warehouse Proprietor's Submission,* is filed annually by each warehouse proprietor. The information on CBP Form 300 is used by CBP to evaluate warehouse activity for the year. This form must be filed within 45 days of the end of his business year, pursuant to the provisions of the Tariff Act of 1930, as amended, 19 U.S.C. 66, 1311, 1555, 1556, 1557, 1623 and 19 CFR 19.12(5). The information collected on this form helps CBP determine all bonded merchandise that was entered, released, and manipulated in the warehouse. CBP Form 300 is accessible at *http://forms.cbp.gov/pdf/CBP_Form_.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 300.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 1,800.

Estimated Number of Annual Respondents per Respondent: 1.

Estimated Number of Total Annual Responses: 1,800.

Estimated Time per Response: 25 hours.

Estimated Total Annual Burden Hours: 45,000.

Dated: February 3, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–2926 Filed 2–8–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Country of Origin Marking Requirements for Containers or Holders

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.

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 Country of Origin Marking Requirements for Containers or Holders. 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: Country of Origin Marking Requirements for Containers or Holders.

OMB Number: 1651–0057.

Form Number: None.

Abstract: Section 304 of the Tariff Act of 1930, as amended, 19 U.S.C. 1304, requires each imported article of foreign origin, or its container, to be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article or container permits, with the English name of the country of origin. The marking informs the ultimate purchaser in the United States of the name country in which the article was manufactured or produced. The marking requirements for containers are provided for by 19 CFR 134.22(b).

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 250.

Estimated Number of Responses per Respondent: 40.

Estimated Time per Response: 15 seconds.

Estimated Total Annual Burden Hours: 41.

Dated: February 3, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–2924 Filed 2–8–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2012–N028; FXES11130200000F5–112–FF02ENEH00]

Emergency Exemption; Issuance of Emergency Permit To Salvage Houston Toads Affected by a Wildfire in Bastrop County, TX

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of endangered species emergency permit.

SUMMARY: Between September 4 and October 10, 2011, more than 34,000

acres burned in Bastrop County, Texas, much of which was habitat for the endangered Houston toad. The Houston toad usually emerges and becomes active at the end of January or in early February. Without authorized personnel to salvage individuals, the ongoing Federal Emergency Management Agency (FEMA) clean-up may be delayed or Houston toads may be needlessly harmed or killed. We, the U.S. Fish and Wildlife Service have authorized researchers employed by FEMA, under an Endangered Species Act (ESA) permit, to survey for, collect, and relocate Houston toads that may be affected by the FEMA clean-up.

ADDRESSES: Documents and other information concerning the permit are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act. Documents will be available for public inspection, by appointment only, during normal business hours at the U.S. Fish and Wildlife Service, 500 Gold Ave. SW., Room 6034, Albuquerque, NM 87103.

FOR FURTHER INFORMATION CONTACT: Susan Jacobsen, Chief, Endangered Species Division, P.O. Box 1306, Albuquerque, NM 87103; (505) 248–6920.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) clean-up in Bastrop County, Texas, after the September 4 through October 10, 2011, fire may be delayed or the endangered Houston toad (*Bufo houstonensis*) may be needlessly harmed or killed without authorized personnel to salvage individuals. Because the Houston toad usually emerges and becomes active at the end of January or in early February, we, the U.S. Fish and Wildlife Service have authorized Jacob T. Jackson and James H. Bell (TE–64710A), under an Endangered Species Act (ESA) permit, to immediately aid Houston toads that may be affected by the FEMA clean-up. Efforts to salvage adults, juveniles, tadpoles, or egg masses are currently taking place and will continue on an ongoing basis until the FEMA clean-up is completed.

Salvage of Houston toads may include the following activities: collect as adults, juveniles, tadpoles, or eggs from areas or under conditions that will likely result in their dessication or destruction; transport to the Welsh property in Bastrop County, Texas, and release into exclosures or the headstarting facility until they can be returned to the wild; or transported to the Houston toad captive breeding or captive assurance colony at the Houston Zoo.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: February 2, 2012.

Joy E. Nicholopoulos,

Acting Regional Director, Southwest Region, Fish and Wildlife Service.

[FR Doc. 2012–2954 Filed 2–8–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2012–N035; 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 12, 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: Thomas Moore, Kerrville, TX; PRT–690098

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: Kyle Wildlife Limited Partnership, Bandera, TX; PRT–731315

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add 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: Kyle Wildlife Limited Partnership, Bandera, TX; PRT–828861

The applicant requests amendment of their permit authorizing interstate and foreign commerce, export and cull to include scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Hatada Enterprises, Inc., Valley Mills, TX; PRT–60391A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), Addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Cedar Hill Birds, Acampo, CA; PRT–63868A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the blue-throated parakeet (*Pyrrhura cruentata*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Bar H Bar Land & Cattle Company, Houston, TX; PRT–63871A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Bar H Bar Land & Cattle Company, Houston, TX; PRT–63872A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: NH&S Holdings, LLC, Valley Mills, TX; PRT–64164A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: NH&S Holdings, LLC, Valley Mills, TX; PRT–64164A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Indianhead Ranch, Inc., Del Rio, TX; PRT–64482A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the 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: Indianhead Ranch, Inc., Del Rio, TX; PRT–64481A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) and Addax (*Addax nasomaculatus*) from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Recordbuck Ranch, Utopia, TX; PRT–64161A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for 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: Recordbuck Ranch, Utopia, TX; PRT–64161A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), Addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*), from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: H&L Sales, Hunt, TX; PRT–667872

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add addax (*Addax nasomaculatus)* to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: H&L Sales, Hunt, TX; PRT–704025

The applicant requests amendment of their permit authorizing interstate and foreign commerce, export and cull to include addax (*Addax nasomaculatus*) from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Leslie Barnhart, Westhoff, TX; PRT–128054

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*) and addax (*Addax nasomaculatus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Leslie Barnhart, Westhoff, TX; PRT–128056

The applicant requests renewal and amendment of their permit authorizing interstate and foreign commerce, export and cull to include barasingha (*Rucervus duvaucelii*) and addax (*Addax nasomaculatus*) from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: John Ball Zoological Garden, Grand Rapids, MI; PRT–680321

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:
- Callitricidae
- Felidae (*does not* include jaguar, margay, or ocelot)
- Canidae
- Lemuridae

Applicant: Phoenix Zoo, Phoenix, AZ; PRT–678366

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
- Callitricidae
- Canidae
- Cebidae
- Cercopithecidae
- Cervidae
- Equidae
- Felidae (*does not* include jaguar, margay, or ocelot)
- Hominidae
- Hylobatidae
- Lemuridae
- Macropodidae
- Tapiridae
- Cathartidae
- Columbidae
- Ploceidae
- Psittacidae (*does not* include thick-billed parrots)
- Rallidae
- Rheidae
- Strigidae
- Struthionidae
- Sturnidae (*does not* include *Aplonis pelzelni*)
- Tinamidae
- Alligatoridae
- Crocodylidae (*does not* include American crocodile)
- Pelomedusidae
- Testudinidae

Species
- Asian elephant (*Elephas maximus*)

Applicant: Zoo Boise, Boise, ID; PRT–781629

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add maned wolf (*Chrysocyon brachyurus*) and parma wallaby (*Macropus parma*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Bamberger Ranch Preserve, Johnson City, TX; PRT–64742A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Diamond J Game Ranch, Eden, TX; PRT–64775A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the barasingha (*Rucervus duvaucelii*) and scimitar-horned oryx (*Oryx dammah*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Diamond J Game Ranch, Eden, TX; PRT–64776A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*) and scimitar-horned oryx (*Oryx dammah*), from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Kent Creek Ranch, Inc., Leakey, TX; PRT–64653A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the addax (*Addax nasomaculatus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Kent Creek Ranch, Inc., Leakey, TX; PRT–64652A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess Addax (*Addax nasomaculatus*), from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Palfam Ranch Management LLC, Giddings, TX; PRT–64737A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), and Addax (*Addax nasomaculatus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Palfam Ranch Management LLC, Giddings, TX; PRT–64737A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), and Addax (*Addax nasomaculatus*), from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Mathias Family Investments LLC, Hext, TX; PRT–64743A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the addax (*Addax nasomaculatus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Mathias Family Investments LLC, Hext, TX; PRT–64744A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess Addax (*Addax nasomaculatus*), from

the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Larry Friesenhahn, Mico, TX; PRT–64724A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Larry Friesenhahn, Mico, TX; PRT–64723A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Double Springs Partnership, Ltd., Walnut Springs, TX; PRT–64654A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Double Springs Partnership, Ltd., Walnut Springs, TX; PRT–64656A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Jetton Ranch, Junction, TX; PRT–64740A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the scimitar-horned oryx (*Oryx dammah*), and Addax (*Addax nasomaculatus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Jetton Ranch, Junction, TX; PRT–64741A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*) and Addax (*Addax nasomaculatus*) from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Ricardo Longoria, Natalia, TX; PRT–192404

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add 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: Ricardo Longoria, Natalia, TX; PRT–192403

The applicant requests amendment of their permit authorizing interstate and foreign commerce, export and cull to include addax (*Addax nasomaculatus*), and dama gazelle (*Nanger dama*) from the captive herds maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: National Museum of Natural History, Washington, DC; PRT–125284

The applicant requests a permit to export and re-import nonliving museum specimens of endangered and threatened species previously accessioned into the applicant's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Robin Thigpen, Jacksonville, FL; PRT–65030A

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2012–3045 Filed 2–8–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK920000–L14100000–BJ0000]

Notice of Filing of Plats of Survey; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey.

SUMMARY: Notice of Filing of Plats of Survey; Alaska.

Survey Descriptions: The plat(s) and field notes, representing the retracement and dependent resurvey of portions of U.S. Survey No. 4615, Alaska, located within the Barrow Townsite, situated within Tps. 22 and 23 N., R. 18 W., Umiat Meridian, Alaska.

DATES: The plat of survey described above is scheduled to be officially filed in the Alaska State Office, Bureau of Land Management, Anchorage, Alaska, March 12, 2012.

ADDRESSES: Bureau of Land Management, Alaska State Office; 222 W. 7th Ave., Stop 13; Anchorage, AK 99513–7599.

FOR FURTHER INFORMATION CONTACT: Michael H. Schoder, Chief Cadastral Surveyor, Division of Cadastral Survey, BLM-Alaska State Office; 222 W. 7th Ave., Stop 13; Anchorage, AK 99513–7599; Tel: 907–271–5481; fax: 907–271–4549; email: *mschoder@blm.gov*.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The survey plat(s) and field notes will be available for inspection in the Public Information Center, Alaska State Office, Bureau of Land Management, 222 West 7th Avenue, Anchorage, Alaska, 99513–7599; telephone (907) 271–5960. Copies may be obtained from this office for a minimum recovery fee.

If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed.

A person or party who wishes to protest against this survey must file a written response with the Alaska State Director, Bureau of Land Management, stating that they wish to protest.

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.

A statement of reasons for a protest may be filed with the notice of protest to the State Director; the statement of reasons must be filed with the State Director within thirty days after the protest is filed.

Authority: 43 U.S.C. 3; 53.

Dated: February 2, 2012.

Michael H. Schoder,

Chief Cadastral Surveyor, Alaska.

[FR Doc. 2012–2952 Filed 2–8–12; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRSS–0211–9466; 2340–N003–NYS]

Proposed Information Collection; Comment Request: Creating Stewardship Through Biodiversity Discovery in National Parks

AGENCY: National Park Service (NPS), Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. This collection will survey participants of Biodiversity Discovery efforts. To comply with the Paperwork Reduction Act of 1995 and as a part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other federal agencies to comment on this IC. The PRA (44 U.S.C. 3501, et seq.) provides that we may not conduct or sponsor and a person is not required to respond to a collection unless it displays a currently valid OMB control number and current expiration date.

DATES: Please submit your comment on or before April 9, 2012.

ADDRESSES: Please send your comments to the IC to Phadrea Ponds, Information Collections Coordinator, National Park Service, 1201 Oakridge Drive, Fort Collins, CO 80525 (mail); or *phadrea_ponds@nps.gov* (email). Please reference Information Collection 1024–NEW, BIODISCOVERY in the subject line.

FOR FURTHER INFORMATION CONTACT: Gerard Kyle by mail at Texas A&M University, 2261 TAMU, College Station, TX 77843 or *gerard@tamu.edu* (email). Or contact: Kirsten Leong at *Kirsten_Leong@nps.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Abstract

Biodiversity Discovery refers to a variety of efforts to discover living organisms through public involvement. Examples include Bioblitzes and All Taxa Biodiversity Inventories (ATBIs). A Bioblitz is a field study where NPS and other scientists lead members of the public in an intensive 24-hour (or 48-hour) biological inventory to identify and record all species of living organisms in a given area. The term ''Bioblitz'' was coined by NPS naturalist Susan Rudy while assisting with the first Bioblitz at Kenilworth Aquatic Gardens in Washington DC in 1996. Approximately 1,000 species were identified at that event. The first All Taxa Biodiversity Inventory began in Great Smoky Mountains National Park in 1998 and is still ongoing. The effort has engaged hundreds of participants and resulted in the discovery of thousands of species, including many that are new records for the park. In addition to collecting taxonomic data, there appears to be important secondary benefits gained by visitors who have taken part in Biodiversity Discovery activities. A 2009 study found that such participants felt an increased sense of stewardship, a connection to the host park, and a better understanding about the species of concern after their Biodiversity Discovery experience. The information collected will provide NPS managers and planners with a greater understanding of public attitudes, preferences, and behaviors related to stewardship and resource conservation in their National Parks.

II. Data

OMB Control Number: None. This is a new collection.

Title: Creating Stewardship through Biodiversity Discovery in National Parks.

Type of Request: New.

Affected Public: General public.

Respondent's Obligation: Voluntary.

Frequency of Collection: Annually.

Estimated Annual Number of Respondents: 300.

Estimated Total Annual Burden Hours: 150 hours. We expect to receive 300 annual responses. We estimate an average of 30 minutes per response.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: None.

Comments: We invite comments concerning this IC on: (1) Whether or not the proposed collection of information is necessary for the agency to perform its duties, including whether or not the information will have practical utility; (2) the accuracy of our estimate of the burden for this collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your 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 OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: February 3, 2012.

Madonna L Baucum,

Acting Information Collection Clearance Officer, National Park Service.

[FR Doc. 2012–2932 Filed 2–8–12; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–12–003]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: February 10, 2012 at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701–TA–486 and 731–TA–1195–1196 (Preliminary) (Utility Scale Wind Towers from China and Vietnam). The Commission is currently scheduled to transmit its determinations to the Secretary of

Commerce on or before February 13, 2012; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before February 21, 2012.

5. Vote in Inv. Nos. 701–TA–487 and 731–TA–1197–1198 (Preliminary) (Steel Wire Garment Hangers from Taiwan and Vietnam). The Commission is currently scheduled to transmit its determinations to the Secretary of Commerce on or before February 13, 2012; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before February 21, 2012.

6. Vote in Inv. Nos. 701–TA–488 and 731–TA–1199–1200 (Preliminary) (Certain Large Residential Washers from Korea and Mexico). The Commission is currently scheduled to transmit its determinations to the Secretary of Commerce on or before February 13, 2012; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before February 21, 2012.

7. Outstanding action jackets: None

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: February 1, 2012.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–3104 Filed 2–7–12; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–756]

Certain Reduced Ignition Proclivity Cigarette Paper Wrappers and Products Containing Same; Request for Statements on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the presiding administrative law judge (ALJ) has issued a Final Initial Determination and Recommended Determination on Remedy and Bonding (ID/RD) in the above-captioned investigation. The Commission is soliciting comments on public interest issues raised by the recommended relief, specifically a limited exclusion order directed to infringing products of any respondent that the Commission finds in violation of section 337, and a cease and desist order to any respondent found to be in violation of section 337 and to have a commercially significant infringing inventory.

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 ALJ's ID/RD will be accessible 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: Section 337 of the Tariff Act of 1930 provides that if the Commission finds a violation it shall exclude the articles concerned from the United States:

> Unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1). A similar provision applies to cease and desist orders. 19 U.S.C. 1337(f)(1).

The Commission is interested in further development of the record on the public interest in these investigations. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the administrative law judge's Recommended Determination on Remedy and Bonding issued in this investigation on February 1, 2012 (confidential version). Comments should address whether issuance of a limited exclusion order and cease and desist orders 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 recommended orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the recommended 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 recommended exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) Explain how any limited exclusion order and cease and desist order would impact consumers in the United States.

Written submissions must be filed no later than by close of business on March 2, 2012.

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 investigation number (''Inv. No. 337–TA–756'') 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 210.50 of the

Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50).

Issued: February 3, 2012.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–2942 Filed 2–8–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on January 30, 2012, a proposed Consent Decree in *United States of America* v. *Columbus Manufacturing, Inc.* Case No. 4:12–cv–00471–DMR, was lodged with the United States District Court for the Northern District of California.

In this action, the United States sought civil penalties and injunctive relief against Columbus Manufacturing Inc. (''CMI'') for violations of Section 112(r)(1) and 112(r)(7) of the Clean Air Act, 42 U.S.C. 7412(r)(1) and 7412(r)(7) (''CAA''), Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act, § 42 U.S.C. 9603 (''CERCLA''), and/or Sections 304 and 312 of the Emergency Preparedness and Community Right-To-Know Act, 42 U.S.C. 11004 and 11022 (''EPCRA''), with respect to CMI's two meat processing facilities located in South San Francisco and Hayward, California.

The United States has agreed to resolve these claims under the proposed Consent Decree wherein CMI has agreed to pay $685,446 in civil penalties, and perform injunctive relief valued at over $6 million.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *Columbus Manufacturing, Inc.* Case No. 4:12–cv–00471–DMR,

The Consent Decree may be examined at U.S. EPA Region IX at 75 Hawthorne Street, San Francisco, California 94105. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or emailing a request to ''Consent Decree Copy'' (*EESCDCopy.ENRD@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–5241. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $9.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Henry Friedman,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–3019 Filed 2–8–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJP) Docket No. 1598]

Second Hearing of the Attorney General's National Task Force on Children Exposed to Violence

AGENCY: Office of Justice Programs (OJP), Justice.

ACTION: Notice of hearing.

SUMMARY: This is an announcement of the second hearing of the Attorney General's National Task Force on Children Exposed to Violence (the ''Task Force''). The Task Force is chartered to provide OJP, a component of the Department of Justice, with valuable advice in the areas of children exposed to violence for the purpose of addressing the epidemic levels of exposure to violence faced by our nation's children. Based on the testimony at four public hearings; comprehensive research; and extensive input from experts, advocates, and impacted families and communities nationwide, the Task Force will issue a final report to the Attorney General presenting its findings and comprehensive policy recommendations in the fall of 2012.

DATES: The hearing will take place on Tuesday, January 31, from 8:30 a.m. to 5:30 p.m., MST; and Wednesday, February 1, 2012, from 8:30 a.m. to 2 p.m., MST.

ADDRESSES: The portion of the hearing occurring on Tuesday, January 31, 2012, will take place at One Civic Center Plaza, Albuquerque, New Mexico (87102). The portion of the hearing occurring on Wednesday, February 1, 2012, will take place at the United States Attorney's Office for the District of New Mexico, 201 3rd St. NW., Albuquerque, New Mexico (87102).

FOR FURTHER INFORMATION CONTACT: Will Bronson, Designated Federal Officer (DFO) and Deputy Associate Administrator, Child Protection Division, Office of Juvenile Justice & Delinquency Prevention, Office of Justice Programs, 810 7th Street NW., Washington, DC 20531. Phone: (202) 305–2427 [**Note:** this is not a toll-free number]; email: *willie.bronson@usdoj.gov*.

SUPPLEMENTARY INFORMATION: This hearing is being convened to brief the Task Force members about the issue of children's exposure to violence. The final agenda is subject to adjustment, but it is anticipated that on January 31, there will be a morning and afternoon session, with a break for lunch. The morning session will likely include welcoming remarks and introductions, and panel presentations from invited guests on the impact of children's exposure to violence. The afternoon session will likely include presentations from experts invited to brief the Task Force on describing children's exposure to violence in rural and American Indian/Alaska Native communities and several existing programs that attempt to address this epidemic. On February 1, there will be a morning session that will include a review of material presented during the previous day, presentation from the subcommittee that participated in a community listening session, and a discussion on the structure of the final report.

This meeting is open to the public. Members of the public who wish to attend this meeting must provide photo identification upon entering the facility. Those wishing to provide public testimony during the hearings should register with Will Bronson at *defendingchildhoodtaskforce@nccdcrc.org* at least seven (7) days in advance of the meeting. Registrations will be accepted on a space available basis. Testimony will not be allowed without prior registration. An hour for public testimony is scheduled from 4 p.m. to 5 p.m. MST. Public testimony must be provided in person and will be limited to three (3) minutes per witness. Please bring photo identification and allow extra time prior to the meeting. Persons interested in providing written testimony to the Task Force should submit their written comments to the DFO at least seven (7) days prior to the hearing at the address listed.

Anyone requiring special accommodations should notify Mr. Bronson at least seven (7) days in advance of the meeting.

Will Bronson

Deputy Associate Administrator, Child Protection Division and National Task Force on Children Exposed to Violence, Designated Federal Official, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice.

[FR Doc. 2012–3007 Filed 2–8–12; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Existing Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning its proposal to extend OMB approval of the information collection: Statement of Recovery (SOR) Forms (CA–1108 and CA–1122). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before April 9, 2012.

ADDRESSES: Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0701, fax (202) 693–1447, Email *Alvarez.Vincent@dol.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION:

I. Background: Under section 8131 a Federal employee can sustain a work-related injury, for which he or she is eligible for compensation under the Federal Employees' Compensation Act (FECA), under circumstance that create a legal liability in some third party to pay damages for the same injury. When this occurs, section 8131 of the FECA (5 U.S.C. 8131) authorizes the Secretary of Labor to either require the employee to assign his or her right of action to the United States or to prosecute the action. When the employee receives a payment for his or her damages, whether from a final court judgment on or a settlement of the action, section 8132 of the FECA (5 U.S.C. 8132) provides that the employee ''shall refund to the United States that amount of compensation paid by the United States * * *.'' To enforce the United States' statutory right to this refund, the Office of Workers' Compensation Programs (OWCP) has promulgated regulations that require both the reporting of these types of payments (20 CFR 10.710) and the submission of the type of detailed information necessary to calculate the amount of the required refund (20 CFR 10.707(e)). The information collected by Form CA–1122 is requested from the claimant if he or she received a payment for damages without hiring an attorney. Form CA–1108 requests this information from the attorney if one was hired to bring suit against the third party. If SOL is contacted directly, SOL would provide the attorney the CA–1108. Furthermore, by memorandum of agreement between OWCP with the United States Postal Service (USPS), USPS may administer the third party aspects of certain cases. The USPS must follow the guidelines established by OWCP for processing any funds recovered from the third party, including the use of the OMB-approved SOR. This information collection is currently approved for use through June 30, 2012.

II. Review Focus: The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions: The Department of Labor seeks the approval for the extension of this currently approved information collection in order to exercise its responsibility to enforce the United States' right to this refund. These forms will be used to obtain information about amounts received as the result of a final judgment in litigation, or a settlement of the litigation, brought against a third party who is liable for damages due to compensable work-related injury.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Statement of Recovery Forms.

OMB Number: 1240–0001.

Agency Number: CA–1108 and CA–1122.

Affected Public: Business or other for-profit, Individuals or households.

Form	Time to complete (minutes)	Frequency of response	Number of respondents	Number of responses	Hours burden
CA–1108 Business Respondent	30	1	2,549	2,549	1,275
CA–1122 Individual Respondent	15	1	283	283	71
Totals	NA	NA	2,832	2,832	1,346

Total Respondents: 2,832.

Total Annual Responses: 2,832.

Average Time per Response: 15–30 minutes.

Estimated Total Burden Hours: 1,346.

Frequency: As needed.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $1,359.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 6, 2012.

Vincent Alvarez,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2012–2998 Filed 2–8–12; 8:45 am]

BILLING CODE 4510–CH–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Existing Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Rehabilitation Maintenance Certificate (OWCP–17). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before April 9, 2012.

ADDRESSES: Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0701, fax (202) 693–1447, Email *Ferguson.Yoon@dol.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION

I. Background: The Office of Workers' Compensation Programs (OWCP) administers the Federal Employees' Compensation Act (FECA). This act provides vocational rehabilitation services to eligible workers with disabilities. Section 8111(b) of the FECA provides that that person(s) undergoing such vocational rehabilitation shall receive maintenance allowances as additional compensation. Form OWCP–17 is used to collect information necessary to decide the amount of any maintenance allowance to be paid. This information collection is currently approved for use through June 30, 2012.

II. Review Focus: The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions: The Department of Labor seeks the approval for the extension of this currently approved information collection in order to carry out its responsibility to assure payment of compensation benefits to injured workers at the proper rate.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Rehabilitation Maintenance Certificate.

OMB Number: 1240–0012.

Agency Number: OWCP–17.

Affected Public: Individuals or households.

Total Respondents: 478.

Total Annual Responses: 6,678.

Average Time per Response: 10 minutes.

Estimated Total Burden Hours: 1,115.

Frequency: On occasion.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $3,205.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 6, 2012.

Vincent Alvarez,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2012–2997 Filed 2–8–12; 8:45 am]

BILLING CODE 4510–CR–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 12–010]

NASA Advisory Council; Science Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–462, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Science Committee of the NASA Advisory Council (NAC). This Committee reports to the NAC. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Tuesday, March 6, 2012, 8:30 a.m. to 4 p.m., and Wednesday, March 7, 2012, 8:30 a.m. to 2 p.m., Local Time.

ADDRESSES: NASA Headquarters, 300 E Street SW., Room 3H46 and 7H45, respectively, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–1377, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. This meeting is also available telephonically and by WebEx. Any interested person may call the USA toll free conference call number 888–997–8509, pass code Science Committee, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com/,* the meeting number on March 6 is 991 156 095, and the password is Science@Mar6; the meeting number on March 7 is 998 310 358, and the password is Science@Mar7. The agenda for the meeting includes the following topics:

—Fiscal Year 2013 Budget Request.

—Program and Subcommittee Updates.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID to Security before access to NASA Headquarters. Foreign nationals attending this meeting will be required to provide a copy of their passport and visa in addition to providing the following information no less than 10 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee; and home address to Marian Norris via email at *mnorris@nasa.gov* or by fax at (202) 358–1377. U.S. citizens and green card holders are requested to submit their name and affiliation 3 working days prior to the meeting to Marian Norris.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2012–3020 Filed 2–8–12; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (12–011)]

NASA Advisory Council; Information Technology Infrastructure Committee; Meeting.

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Information Technology Infrastructure Committee of the NASA Advisory Council.

DATES: Wednesday, March 7, 2012, 8:30 a.m.–12 p.m., local time. Meet-Me-Number: 1–866 818–0788, Participant—9453583.

ADDRESSES: NASA Headquarters, 300 E. Street SW., Washington, DC 20546, Room MIC 3B.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Harper, Executive Secretary for the Information Technology Infrastructure Committee, National Aeronautics and Space Administration, Headquarters, Washington, DC 20546, (202) 358–1807.

SUPPLEMENTARY INFORMATION: The topics of discussion for the meeting are the following:

- Proposed NAC Recommendations from the Information Technology Infrastructure Committee
- Future mission data needs

The meeting will be open to the public up to the seating capacity of the room. It is imperative that these meetings be held on this date to accommodate the scheduling priorities of the key participants. Attendees will be required to comply with NASA security procedures, including the presentation of a valid picture ID to Security before access to NASA Headquarters. Foreign Nationals attending this meeting will be required to provide a copy of their passport and visa in addition to providing the following information no later than February 24, 2012, prior to the meeting: full name; gender; date/place of birth; citizenship; visa information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee; and home address to Ms. Karen Harper via email at *Karen.l.harper@nasa.gov* or by telephone at (202) 358–1807. U.S. citizens and green card holders are requested to submit their name and affiliation 3 working days prior to the meeting. U.S. citizens and green card holders are requested to submit their name and affiliation 3 working days prior to the meeting to Karen Harper. Persons with disabilities who require assistance should indicate this.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2012–3025 Filed 2–8–12; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 12–012]

NASA Advisory Council; Human Exploration and Operations Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Human Exploration and Operations Committee of the NASA Advisory Council.

DATES: Tuesday, March 6, 2012, 8:30 a.m.–3:30 p.m. and Wednesday, March 7, 2012; 8:30 a.m.–2:30 p.m., local time.

ADDRESSES: National Aeronautics and Space Administration, 300 E Street SW., Glennan Conference Room 1Q39, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Dr. Bette Siegel, Human Exploration and Operations Mission Directorate, National Aeronautics and Space Administration Headquarters, 300 E Street SW., Washington, DC 20546, 202–358–2245; *bette.siegel@nasa.gov.*

SUPPLEMENTARY INFORMATION: The agenda topics for the meeting will include:

- Status of the Human Exploration and Operations Mission Directorate
- Capability Driven Roadmap
- Exploration Planning, Partnerships, and Prioritization Summary
- Status of Space Launch System, Multi-Purpose Crew Vehicle, Ground System Development and Operations
- Exploration Technology Development
- International Space Station and Robotics
- Status of Commercial Crew/Cargo

The meeting will be open to the public up to the seating capacity of the room. This meeting is also available telephonically and by WebEx. You must use a touchtone phone to participate in this meeting. Any interested person may dial access number, 866–692–4538 or 517–466–2084 and then enter the numeric participant passcode: 1799949 followed by the # sign. To join via WebEx the link is *https://nasa.webex.com/,* meeting number 991 630 498, and password NA$A0306*07. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Attendees will be required to comply with NASA security procedures, including the presentation of a valid picture ID to Security before access to NASA Headquarters. Foreign nationals attending this meeting will be required to provide a copy of their passport and visa in addition to providing the following information no less than 15 working days (by February 13, 2012) prior to the meeting: Full name; gender; date/place of birth; citizenship; visa information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution,

address, country, telephone); title/position of attendee; and home address to Dr. Bette Siegel via email at *bette.siegel@nasa.gov* or by telephone at (202) 358–2245. U.S. citizens and green card holders are requested to submit their name and affiliation 3 working days prior to the meeting to Dr. Bette Siegel.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2012–3026 Filed 2–8–12; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of permit applications received under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by March 12, 2012. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Polly A. Penhale at the above address or (703) 292–7420.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. *Applicant:* Robert A. Blanchette, University of Minnesota, 1991 Upper Buford Circle, St. Paul, MN 55108.

Permit Application: 2012–013.

Activity for Which Permit Is Requested: Take and Import into the U.S.A. The applicant plans to collect and transport fungi (mushrooms and other fruiting structures) for DNA extraction and taxonomic identification for investigations to better understand recycling organisms in the polar ecosystem. The applicant will also collect and transport soil samples to isolate soil microorganisms.

Location: Palmer Station vicinity, Anders Island, Antarctic Peninsula.

Dates: February 2, 2012 to December 31, 2014.

2. *Applicant:* H. William Detrich, III, Department of Biology, 134 Mugar Hall, Northeastern University, Boston, MA 02115.

Permit Application: 2012–014.

Activity for Which Permit Is Requested: Enter Antarctic Specially Protected Areas and Introduce Non-indigenous species into Antarctica. The applicant plans to enter ASPA 152-Western Bransfield Strait and ASPA 153-Eastern Dallmann Bay to capture Antarctic fish by trawling and trapping. The live fishes will be transported to the aquarium facilities at Palmer Station for experimentation. The applicant will use Escherichia coli strain BL21DE3 for the production of ^{35}S-labeled proteins to be used in protein folding assays in the continued analysis of a cold-functioning chaperonin protein folding system from testis tissue of the Antarctic fish.

Location: ASPA 152-Western Bransfield Strait and ASPA 153-Eastern Dallmann Bay, and Palmer Station, Anders Island, Antarctic Peninsula.

Dates: March 21, 2012 to June 21, 2012.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2012–2947 Filed 2–8–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Environmental Research and Education; 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: Advisory Committee for Environmental Research and Education (9487).

Dates: March 14, 2012, 8:30 a.m.–5 p.m.; March 15, 2012, 8:30 a.m.–2 p.m.

Place: Stafford I, Room 1235, National Science Foundation, 4201Wilson Blvd. Arlington, Virginia 22230.

Type of Meeting: Open.

Contact Person: Beth Zelenski, National Science Foundation, Suite 705, 4201 Wilson Blvd., Arlington, Virginia 22230. Phone 703–292–8500.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To provide advice, recommendations, and oversight concerning support for environmental research and education.

Agenda:

Wednesday, March 14, 2012

- Update on NSF environmental research and education activities
- Update on national and international collaborations
- Meeting with the NSF Director

Thursday, March 15, 2012

- Update on NSF's Science, Engineering and Education for Sustainability portfolio (SEES)

Dated: February 6, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–2977 Filed 2–8–12; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; 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: Site visit review of the Materials Research Science and Engineering Center (MRSEC) at the University of Colorado by the Division of Materials Research (DMR) #1203.

Dates & Times: March 12, 2012; 7:15 a.m.–8:30 p.m., March 13, 2012; 7:15 a.m.–3 p.m.

Place: University of Colorado, Boulder, CO.

Type of Meeting: Part open.

Contact Person: Dr. Mary Galvin-Donoghue, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard Arlington, VA 22230, Telephone (703) 292–8562.

Purpose of Meeting: To provide advice and recommendations concerning further support of the MRSEC at the University of Colorado.

Agenda: Monday, March 12, 2012

7:15 a.m.–4:30 p.m.	Open—Review of the MRSEC
4:30 p.m.–6:20 p.m.	Closed—Executive Session
6:20 p.m.–8:30 p.m.	Open—Dinner

Tuesday, March 13, 2012

7:15 a.m.–3:30 p.m. Closed—Executive Session, Draft and Review Report

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the MRSEC. These matters are exempt under 5 U.S.C. 552 b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: February 6, 2012.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2012–2978 Filed 2–8–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0280]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The Nuclear Regulatory Commission (NRC) invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* NRC Form 7, ''Application for NRC Export or Import License, Amendment, Renewal or Consent Request(s).''

2. *Current OMB approval number:* 3150–0027.

3. *How often the collection is required:* On occasion; for each separate export, import, amendment, renewal, or consent request.

4. *Who is required or asked to report:* Any person in the U.S. who wishes to export or import (a) nuclear material and equipment subject to the requirements of a specific license; (b) amend a license; (c) renew a license; and (d) obtain consent to export Category 1 quantities of materials listed in Appendix P to 10 CFR part 110.

5. *The number of annual respondents:* 120.

6. *The number of hours needed annually to complete the requirement or request:* 288.

7. *Abstract:* Persons in the U.S. wishing to export or import nuclear material or equipment, who are required to obtain a specific license, amendment, license renewal or obtain consent to export Category 1 quantities of byproduct material listed in Appendix P to 10 CFR part 110. The NRC Form 7 application will be reviewed by the NRC and by the Executive Branch, and if applicable statutory, regulatory, and policy considerations are satisfied, the NRC will issue an export, import, amendment or renewal license.

Submit, by April 9, 2012, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied for a fee publicly available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket ID NRC–2011–0280.

You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket ID NRC–2011–0280. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by email to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this *2nd* day of *February*, 2012.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2012–3022 Filed 2–8–12; 8:45 am]

BILLING CODE 7590–01–P

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review, Request for Comments

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) is forwarding an Information Collection Request (ICR) to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB). Our ICR describes the information we seek to collect from the public. Review and approval by OIRA ensures that we impose appropriate paperwork burdens.

The RRB invites comments on the proposed collection of information to determine (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 the information that is the subject of collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology. Comments to the RRB or OIRA must contain the OMB control number of the ICR. For proper consideration of your comments, it is best if the RRB and OIRA receive them within 30 days of the publication date.

Under section 2(e)(3) of the Railroad Retirement Act (RRA), an annuity is not payable for any month in which a beneficiary works for a railroad. In addition, an annuity is reduced for any month in which the beneficiary works for an employer other than a railroad employer and earns more than a prescribed amount. Under the 1988 amendments to the RRA, the Tier II portion of the regular annuity and any supplemental annuity must be reduced by one dollar for each two dollars of Last Pre-Retirement Non-Railroad Employment (LPE) earnings for each month of such service. However, the reduction cannot exceed fifty percent of the Tier II and supplemental annuity amount for the month to which such

deductions apply. The LPE generally refers to an annuitant's last employment with a non-railroad person, company, or institution prior to retirement, which was performed either at the same time as railroad employment, or after an annuitant stopped railroad employment. The collection obtains earnings information needed by the RRB to determine if possible reductions in annuities are in order due to LPE.

The RRB utilizes Form G–19L, *Annual Earnings Questionnaire for Annuitants in Last Pre-Retirement Non-Railroad Employment,* to obtain LPE earnings information from annuitants. One response is requested of each respondent. Completion is required to retain a benefit.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (76 FR 71087 on November 16, 2011) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Annual Earnings Questionnaire for Annuitants in Last Pre-Retirement Non-Railroad Employment.

OMB Control Number: 3220–0179.

Form(s) submitted: G–19L.

Type of request: Extension without change of a currently approved collection.

Affected public: Individuals or Households.

Abstract: Under Section 2(e)(3) of the Railroad Retirement Act, an annuity is not payable or is reduced for any month in which the beneficiary works for a railroad or earns more than the prescribed amounts. The collection obtains earnings information needed by the Railroad Retirement Board to determine possible reductions in annuities because of earnings.

Changes proposed: The RRB proposes no changes to Form G–19L.

The burden estimate for the ICR is as follows:

Estimated Completion Time for Form G–19L: 15 minutes.

Estimated annual number of respondents: 300.

Total annual responses: 300.

Total annual reporting hours: 75.

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Charles Mierzwa at (312) 751–3363 or *Charles.Mierzwa@RRB.GOV*.

Comments regarding the information collection should be addressed to Charles Mierzwa, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611–2092 or *Charles.Mierzwa@RRB.GOV* and to the OMB Desk Officer for the RRB, Fax: (202) 395–6974, Email address: *OIRA_Submission@omb.eop.gov*.

Charles Mierzwa,

Chief of Information Resources Management.

[FR Doc. 2012–2967 Filed 2–8–12; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66315; File No. SR–Phlx–2012–12]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Exchange Disseminated Quotations

February 3, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on January 25, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 1082, Firm Quotations, by modifying Exchange Rules 1017, Openings in Options, and 1082, Firm Quotations, to describe the manner in which the PHLX XL® automated options trading system [3] will disseminate quotations when (i) there is an ''Opening Imbalance'' (as described below) in a particular series, and (ii) there is a ''Quote Exhaust'' quote condition (as described below) present in a particular series.

In addition, the current rules describing the Exchange's disseminated quotations during an Opening Imbalance and a Quote Exhaust condition are subject to a pilot scheduled to expire February 29, 2012. The Exchange proposes to discontinue the pilot and to adopt the proposed new rules on a permanent basis.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to establish a quote condition in which one side of an option quotation (bid or offer) disseminated by the Exchange will be designated as non-firm during an ''Opening Imbalance'' or a ''Quote Exhaust'' while the opposite side of the market from the ''non-firm'' bid or offer remains firm for the Exchange's disseminated price and size. The proposed rule would not be effective on a pilot basis. The Exchange is proposing that this rule change would be effective on a permanent basis.[4]

Background

In June, 2009, the Exchange added several significant enhancements to its automated options trading platform (now known as PHLX XL), and adopted rules to reflect those enhancements.[5] As part of the system enhancements, the Exchange proposed to disseminate a ''non-firm'' quote condition on a bid or offer whose size is exhausted in certain situations. The non-exhausted side of the Exchange's disseminated quotation

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] This proposal refers to ''PHLX XL'' as the Exchange's automated options trading system. In May 2009 the Exchange enhanced the system and adopted corresponding rules referring to the system as ''Phlx XL II.'' *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32). The Exchange intends to submit a separate technical proposed rule change that would change all references to the system from ''Phlx XL II'' to ''PHLX XL'' for branding purposes.

[4] The Exchange has previously indicated its intention to implement the non-firm bid or offer functionality. *See, e.g.,* Securities Exchange Act Release No. 65670 (November 2, 2011), 76 FR 69308 (November 8, 2011) (SR–Phlx–2011–144).

[5] *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

would remain firm at its disseminated price up to its disseminated size. At the time, however, the Options Price Reporting Authority (''OPRA'') only disseminated option quotations for which both sides of the quotation were marked ''non-firm.'' OPRA did not have the ability to disseminate a ''non-firm'' condition for one side of a quotation while the other side of the quotation remained firm.

Accordingly, the Exchange proposed, on a pilot basis, to disseminate quotations in such a circumstance with a (i) a bid price of $0.00, with a size of one contract if the remaining size is a seller, or (ii) an offer price of $200,000, with a size of one contract if the remaining size is a buyer.

The Exchange subsequently modified the manner in which the PHLX XL system disseminated quotes when one side of the quote was exhausted but the opposite side still had marketable size at the disseminated price, as described in detail below.[6]

On October 7, 2010, the U.S. options exchanges, as participants in the OPRA Plan, voted to make technological changes that would enable OPRA to support a one-sided non-firm quote condition. These technological changes presented the opportunity for OPRA and the participants to design, test, and deploy modifications to their systems, and to disseminate this quote condition to quotation vendors, that will support the one-sided non-firm quote condition.

On November 9, 2010, OPRA submitted to the Commission, for immediate effectiveness, an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (the ''OPRA Plan'').[7] The amendment made identical changes to Section 4.04 of OPRA's Data Recipient Interface Specification and Section 4.15 of its Participant Interface Specification (both Specifications are collectively referred to herein as the ''OPRA Spec''), which govern the format in which options market information is input to and disseminated from the OPRA Processor, in order to add message type codes specifying that either the bid side or the offer side, but not both sides, of a quotation is not firm.[8] OPRA also made a conforming change to Appendix D of the OPRA Spec describing Best Bid and Offer (BBO) calculations.

Pursuant to the amendment to the OPRA Plan (and the conforming amendments cited above), the Exchange now proposes to adopt, on a permanent basis, rules describing the PHLX XL system's disseminated quotations during an Opening Imbalance and during a Quote Exhaust condition.

Opening Imbalance

An Opening Imbalance occurs when all opening marketable size cannot be completely executed at or within an established Opening Quote Range (''OQR'') for the affected series.[9] Currently, Exchange Rule 1017(l)(vi)(C)(7) states that any unexecuted contracts from the opening imbalance not traded or routed are displayed in the Exchange quote at the opening price for a period not to exceed ten seconds. After such period, contracts that remain unexecuted are cancelled back to the entering participant, unless the member that submitted the original order has instructed the Exchange in writing to re-enter the remaining size, in which case the remaining size will be automatically submitted as a new order. During this display time period, the PHLX XL system disseminates a bid price of $0.00, with a size of one contract [sic] if the imbalance is a sell imbalance, or an offer price of $0.00, with a size of zero contracts if the imbalance is a buy imbalance.

The Exchange proposes to amend Rule 1017(l)(vi)(C)(7) to reflect the new manner in which the Exchange will disseminate quotations during the Opening Imbalance display period. Specifically, during this display time period, the PHLX XL system will disseminate, on the opposite side of the market from remaining unexecuted contracts: (i) A non-firm bid for the price and size of the next available bid(s) on the Exchange if the imbalance is a sell imbalance, or (ii) a non-firm offer for the price and size of the next available offer(s) on the Exchange if the imbalance is a buy imbalance.[10] The purpose of this provision is to indicate that the Exchange has exhausted all marketable interest, at or within the OQR, on one side of the market during the opening process yet has remaining unexecuted contracts on the opposite side of the market that are firm at the disseminated price and size.

Quote Exhaust

Quote Exhaust occurs when the market at a particular price level on the Exchange includes a quote, and such market is exhausted by an inbound contra-side quote or order (''initiating quote or order''), and following such exhaustion, contracts remain to be executed from the initiating quote or order.[11]

Rather than immediately executing at the next available price, the PHLX XL system employs a timer (a ''Quote Exhaust Timer''), not to exceed one second, in order to allow market participants to refresh their quotes. During the Quote Exhaust Timer, PHLX XL currently disseminates the ''Reference Price'' (the most recent execution price) for the remaining size, provided that such price does not lock an away market, in which case, the Exchange currently disseminates a bid and offer that is one Minimum Price Variation (''MPV'') from the away market price. During the Quote Exhaust Timer, the Exchange disseminates, on the opposite side of the market from the remaining contracts: (i) A bid price of $0.00, with a size of zero contracts if the remaining size is a seller, or (ii) an offer price of $0.00, with a size of zero contracts if the remaining size is a buyer.

The Exchange proposes to amend Rules 1082(a)(ii)(B)(3)(b), 1082(a)(ii)(B)(3)(g)(iv)(A)(3), 1082(a)(ii)(B)(3)(g)(iv)(A)(4), 1082(a)(ii)(B)(3)(g)(iv)(B)(2), and 1082(a)(ii)(B)(3)(g)(iv)(C) to reflect the new manner in which the Exchange will disseminate quotations during a Quote Exhaust condition. Specifically, during Quote Exhaust, the PHLX XL system will disseminate, on the opposite side of the market from remaining unexecuted contracts: (i) A non-firm bid for the price and size of the next available bid(s) on the Exchange if the remaining size is a seller, or (ii) a non-firm offer for the price and size of the next available offer(s) on the Exchange if the remaining size is a buyer.[12] The purpose of this provision is to indicate that the Exchange has exhausted all marketable quotations on one side of the market yet

[6] *See* Securities Exchange Act Release No. 63024 (September 30, 2010), 75 FR 61799 (October 6, 2010) (SR–Phlx–2010–134).

[7] *See* Securities Exchange Act Release No. 63400 (November 30, 2010), 75 FR 76058 (December 7, 2010) (SR–OPRA–2010–04).

[8] Specifically, a quote with a notation of ''X'' would indicate that the disseminated offer is not firm (and the disseminated bid is firm); a quote with a notation of ''Y'' would indicate that the disseminated bid is not firm (and the disseminated offer is firm).

[9] Where there is an imbalance at the price at which the maximum number of contracts can trade that is also at or within the lowest quote bid and highest quote offer, the PHLX XL system will calculate an OQR for a particular series, outside of which the PHLX XL system will not execute. *See* Exchange Rule 1017(l)(iii) and (iv).

[10] If there are multiple bids or offers at the Exchange's next available price, the PHLX XL system will disseminate a bid or offer for the aggregate size on the Exchange at such price. *See supra* note 8.

[11] *See* Exchange Rule 1082(a)(ii)(B)(3).

[12] Just as with an Opening Imbalance, if there are multiple bids or offers at the Exchange's next available price, the PHLX XL system will disseminate a bid or offer for the aggregate size on the Exchange at such price. *See supra* note 8.

has remaining unexecuted contracts on the opposite side of the market that are firm at the disseminated price and size.

Current Rule 1082(a)(ii)(B)(3)(g)(vi) describes what the PHLX XL system does if, after trading at the PHLX and/or routing, there are unexecuted contracts from the initiating order that are still marketable. In this situation, remaining contracts are posted for a period of time not to exceed 10 seconds and then cancelled after such period of time has elapsed, unless the member that submitted the original order has instructed the Exchange in writing to re-enter the remaining size, in which case the remaining size will be automatically submitted as a new order. Currently, during the up to 10 second time period, the Exchange disseminates, on the opposite side of the market from remaining unexecuted contracts: (i) A bid price of $0.00, with a size of zero contracts if the remaining size is a seller, or (ii) an offer price of $0.00, with a size of zero contracts if the remaining size is a buyer.

The Exchange proposes to amend Rule 1082(a)(ii)(B)(3)(g)(vi) to reflect the new manner in which the Exchange will disseminate quotations during the up to 10 second time period. Specifically, during the up to 10 second time period, the PHLX XL system will disseminate, on the opposite side of the market from remaining unexecuted contracts: (i) A non-firm bid for the price and size of the next available bid(s) on the Exchange if the remaining size is a seller, or (ii) a non-firm offer for the price and size of the next available offer(s) on the Exchange if the remaining size is a buyer. The purpose of this provision is to indicate that the Exchange has exhausted all marketable quotations on one side of the market, yet has remaining unexecuted contracts on the opposite side of the market that are firm at the disseminated price and size.

Discontinuation of Current Pilot

The current rules describing the Exchange's disseminated quotations during an Opening Imbalance and a Quote Exhaust condition are subject to a pilot scheduled to expire February 29, 2012. The Exchange proposes to discontinue the pilot and to adopt the proposed new rules on a permanent basis.

Implementation

The Exchange intends to implement the proposed changes to Rules 1017 and 1082 on March 1, 2012.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [13] in general, and furthers the objectives of Section 6(b)(5) of the Act [14] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange further believes that the proposal is consistent with the SEC Quote Rule's provisions regarding non-firm quotations.[15] Specifically, Rule 602(a)(3)(i) provides that if, at any time a national securities exchange is open for trading, the exchange determines, pursuant to rules approved by the Commission, that the level of trading activities or the existence of unusual market conditions is such that the exchange is incapable of collecting, processing, and making available to vendors the data for a subject security required to be made available in a manner that accurately reflects the current state of the market on such exchange, such exchange shall immediately notify all specified persons of that determination and, upon such notification, the exchange is relieved of its obligations under paragraphs (a)(1) and (2) of Rule 602 relating to collecting and disseminating quotations, subject to certain other provisions of Rule 602(a)(3).

By disseminating a non-firm bid (offer), together with a firm offer (bid) in certain situations delineated above, the Exchange believes that it is adequately communicating that it is non-firm on the affected side of the market in compliance with the Quote Rule.

The proposed rule change promotes just and equitable principles of trade by informing investors that one side of the Exchange's disseminated quotation is exhausted and therefore non-firm, thus providing transparency to investors. This also removes impediments to and perfects the mechanism of a free and open market and a national market system by providing information to market participants who may be in the process of determining where to send their orders for execution. The proposed rule change protects investors and the public interest because it provides accurate information to the investing public concerning the Exchange's disseminated market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) [17] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2012–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] *See* 17 CFR 242.602(a)(3)(i) and (ii).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change 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.

100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2012–12. 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–Phlx–2012–12, and should be submitted on or before March 1, 2012

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66322; File No. SR–NASDAQ–2012–020]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify NASDAQ's Transaction Execution Fee and Credit Schedule in Rules 7014 and 7018

February 3, 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 27, 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 Substance of the Proposed Rule Change

NASDAQ is proposing to modify NASDAQ's transaction execution fee and credit schedule in Rules 7014 and 7018. NASDAQ will implement the proposed change on February 1, 2012. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/*, at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is amending its fee and credit schedule for transaction executions in Rules 7014 and 7018. First, NASDAQ is amending the rebate associated with its recently introduced ''Pre-Market Investor Program'' (the ''PMI Program''). The goal of the PMI Program is to encourage the development of a deeper, more liquid trading book during pre-market hours, while also recognizing the correlation observed by NASDAQ between levels of liquidity provided during pre-market hours and levels provided during regular trading hours. Under the program, a member is required to designate one or more market participant identifiers (''MPIDs'') for use under the program. The member will then qualify for an extra rebate with respect to all displayed liquidity provided through a designated MPID that executes at a price of $1 or more during the month if the following conditions are met:

(1) The MPID's ''PMI Execution Ratio'' for the month is less than 10. The PMI Execution Ratio is defined as the ratio of (A) the total number of liquidity-providing orders entered by a member through a PMI-designated MPID during the specified time period to (B) the number of liquidity-providing orders entered by such member through such PMI-designated MPID and executed (in full or partially) in the Nasdaq Market Center during such time period; provided that: (i) No order shall be counted as executed more than once; and (ii) no Pegged Orders, odd-lot orders, or MIOC or SIOC[3] orders shall be included in the tabulation. Thus, the requirement stipulates that a high proportion of potentially liquidity-providing orders entered through the MPID actually execute and provide liquidity. This requirement is designed to focus the availability of the program on members representing retail and institutional customers.

(2) The member provides an average daily volume of 2 million or more shares of liquidity during the month using orders that are executed prior to NASDAQ's Opening Cross. NASDAQ has observed that members that provide higher volumes of liquidity-providing orders during the pre-market hours generally do so throughout the rest of the trading day. Accordingly, the PMI pays a credit with respect to all liquidity-providing orders, but only in the event that comparatively large volumes of such orders execute in pre-market hours.

(3) The ratio between shares of liquidity provided through the MPID and total shares accessed, provided, or routed through the MPID during the month is at least 0.80. This requirement reflects the PMI's goal of encouraging members that provide high levels of liquidity in pre-market hours to also do so during the rest of the trading day.

Under the proposed change, NASDAQ is raising the extra rebate under the program from $0.0001 per share executed to $0.0002 per share executed. As is currently the case, the rebate is paid with respect to all displayed liquidity provided through a designated MPID that executes at a price of $1 or more during the month. NASDAQ is making the change to encourage more market participants to join the program.

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[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] ''Market Hours Immediate-or-Cancel'' or ''System Hours Immediate-or-Cancel'' orders.

Second, NASDAQ is amending Rule 7018(a)(3)[4] to introduce volume tiers with respect to its fees for the execution of orders that access liquidity in securities listed on exchanges other than NASDAQ and the New York Stock Exchange (''Tape B Securities''). Currently, NASDAQ charges $0.0030 per share executed for execution of all orders that access liquidity in Tape B Securities, with the exception of orders that are designated to use the SAVE or SOLV routing strategies but that execute at NASDAQ (either before or after routing), which are charged $0.0027 per share executed. Under the proposed change, if a member enters an order through a Nasdaq Market Center market participant identifier (''MPID'') through which the member (i) accesses shares of liquidity in Tape B Securities that represent more than 0.5% of Consolidated Volume[5] in Tape B Securities during the month, and (ii) provides shares of liquidity in Tape B Securities that represent more than 0.25% of Consolidated Volume in Tape B Securities during the month, the charge will be $0.0028 per share executed with respect to such an order. Similarly, if a member enters an order through a NASDAQ Market Center MPID through which the member (i) accesses shares of liquidity in Tape B Securities that represent more than 1.5% of Consolidated Volume in Tape B Securities during the month, and (ii) provides shares of liquidity in Tape B Securities that represent more than 0.5% of Consolidated Volume in Tape B Securities during the month, the charge will be $0.0027 per share executed with respect to such an order.[6] The change is designed to encourage greater use of NASDAQ's facilities for the purpose of trading Tape B Securities. In this regard, NASDAQ notes that NYSEArca currently charges a fee to access liquidity in Tape B Securities of $0.0028 per share executed, but a fee to access liquidity in other securities of $0.0030 per share executed.[7] Accordingly, the change will enhance NASDAQ's ability to compete for orders in Tape B Securities. NASDAQ further notes that, as is the case with other portions of its fee schedule, the change is designed to ensure that NASDAQ's fee schedule does not provide excessive encouragement to members to aggregate the activity of several member firms under a single MPID for the sole purpose of receiving more favorable pricing. Accordingly, the proposed volume tiers are available only to the extent that a member achieves them through a single MPID. NASDAQ believes that this requirement promotes market quality by providing more favorable pricing to members that engage in unified management of high volumes of quotes/orders through a single MPID, while discouraging sponsored relationships that are established solely for pricing benefits.[8]

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general, and with Sections 6(b)(4) and (5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. All similarly situated members are subject to the same fee structure, and access to NASDAQ is offered on fair and non-discriminatory terms.

The proposed new tiers for members that use NASDAQ to trade significant amounts of Tape B Securities are reasonable because they will result in a fee reduction for members that qualify for the tiers, but will not increase the costs borne by other members or limit the availability of other, pre-existing pricing incentives. Moreover, the proposed change is consistent with an equitable allocation of fees because it charges lower fees for executing Tape B Securities to members that make significant contributions to NASDAQ market quality and price discovery by accessing and providing high volumes of liquidity in Tape B Securities. NASDAQ believes that the change is not unfairly discriminatory because the price reduction offered to qualifying members is linked to the volume of trading in the securities to which the discount applies. NASDAQ further believes that the program may encourage members to become more active in trading Tape B Securities through NASDAQ, thereby benefitting other market participants that may be able to trade larger volumes of stocks without affecting the price of those stocks. Finally, NASDAQ believes that it is reasonable, equitable, and not unfairly discriminatory to stipulate that members qualifying for the pricing tiers must achieve the requisite volume thresholds through a single MPID, thereby enhancing market quality through unified management of the member's quotes/orders and discouraging aggregation arrangements that exist solely for pricing reasons. NASDAQ believes that firms that engage in more unified management of their quotes and orders are most likely to promote price discovery and market stability.[11]

As described in the filing that instituted it,[12] the PMI program is not unfairly discriminatory because it is intended to promote submission of liquidity-providing orders to NASDAQ, which benefits all NASDAQ members and all investors. Likewise, the PMI is consistent with the Act's requirement for the equitable allocation of reasonable dues, fees, and other charges. Members who choose to significantly increase the volume of PMI-eligible liquidity-providing orders that they submit to NASDAQ would be benefitting all investors, and therefore providing credits to them, as contemplated in the PMI program, is equitable. Moreover, NASDAQ believes that the level of the credit to be offered under the proposed change—$0.0002 per share, in addition to credits ranging from $0.0020 to $0.00295 per share under NASDAQ's regular transaction execution fee and rebate schedule for execution of displayed quotes/orders—is reasonable, in that it provides a reduction of fees to members qualifying for the program.

Finally, NASDAQ notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, NASDAQ must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. NASDAQ

[4] Rule 7018(a) applies to executions of transactions at a price of $1 or more. Fees for transactions at a price below $1 remain unchanged.

[5] For purposes of Rule 7018, Rule 7018(a)(1) defines ''Consolidated Volume'' as the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities.

[6] The change would not alter pricing with respect to SAVE and SOLV orders. Thus, a member qualifying for the $0.0028 tier with respect to orders entered through a qualifying MPID would nevertheless pay $0.0027 per share executed with respect to all SAVE and SOLV orders.

[7] *See http://usequities.nyx.com/markets/nyse-arca-equities/trading-fees.*

[8] *See* Securities Exchange Act Release No. 64003 (March 2, 2011), 76 FR 12784 (March 8, 2011) (SR–NASDAQ–2011–028) (proposed rule change that first established single-MPID pricing requirements on NASDAQ).

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *See also* Securities Exchange Act Release No. 64003 (March 8, 2011), 76 FR 12784 (March 8, 2011) (SR–NASDAQ–2011–028).

[12] Securities Exchange Act Release No. 65717 (November 9, 2011), 76 FR 70784 (November 15, 2011) (SR–NASDAQ–2011–150).

believes that the proposed rule change reflects this competitive environment because it will reduce fees paid by active market participants, without removing any of the market's existing pricing incentives.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution is extremely competitive, members may readily opt to disfavor NASDAQ's execution services if they believe that alternatives offer them better value. The proposed changes will enhance competition by reducing certain of NASDAQ's fees. Notably, the proposed pricing tiers for Tape B Securities will enhance NASDAQ's ability to compete with NYSEArca, which currently offers reduced fees to access liquidity in Tape B Securities.[13] Similarly, the change to the PMI Program will enhance competition with the EDGX Exchange, which encourages participation in its pre-market and post-market trading sessions by means of favorable pricing offered to members that are active during pre-market and/or post-market hours.[14]

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[15] and subparagraph (f)(2) of Rule 19b–4 thereunder.[16] 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–2012–020 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–2012–020. 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–NASDAQ–2012–020 and should be submitted on or before March 1, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3000 Filed 2–8–12; 8:45 am]

BILLING CODE 8011–01–P

[13] *http://usequities.nyx.com/markets/nyse-arca-equities/trading-fees.*

[14] *http://www.directedge.com/Membership/FeeSchedule/EDGXFeeSchedule.aspx.*

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 240.19b–4(f)(2).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66320; File No. SR–NASDAQ–2012–013]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Relating to the Adoption of Listing Standards for Certain Securities

February 3, 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 20, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt rules applicable to the qualification, listing, trading, and delisting of certain securities on NASDAQ (''Listing Rules''). Specifically, NASDAQ proposes to adopt Listing Rules applicable to the following securities: Equity Index-Linked Securities, Commodity-Linked Securities,[3] Fixed Income Index-Linked Securities, Futures-Linked Securities, Multifactor Index-Linked Securities; Index-Linked Exchangeable Notes; Equity Gold Shares; Trust Certificates; Commodity-Based Trust Shares; Currency Trust Shares; Commodity Index Trust Shares; Commodity Futures Trust Shares; Partnership Units; Trust Units; Managed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NASDAQ Rules 5710(g) and (h) currently include initial listing standards applicable to Equity Index-Linked Securities and Commodity-Linked Securities. NASDAQ proposes to re-number the existing rule text in Rules 5710(g) and (h), and to adopt continuing listing standards applicable to Equity Index-Linked Securities and Commodity-Linked Securities, in proposed Rules 5710(k)(i) and (ii).

Trust Securities; and Currency Warrants.

The proposal would adopt listing standards based on the relevant listing standards of the NYSE Arca, Inc. (''NYSEArca'') Equities Rules, as set forth below. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to adopt listing standards for each of the products specified above. The Section 5000 series of the NASDAQ rules govern the qualification, listing and delisting of securities on the NASDAQ Stock Market. Section 5000 also sets forth, among other things, definitions,[4] NASDAQ's regulatory authority to list and maintain securities,[5] general procedures and prerequisites for initial and continued listing on the NASDAQ Stock Market,[6] and, most significantly to the instant proposed rule change, ''Other Securities,''[7] which govern, without limitation, listing and qualification rules applicable to Exchange Traded Funds, Portfolio Depository Receipts and Index Fund Shares. The proposed amendments to Rule 5710, Securities Linked to the Performance of Indexes and Commodities (Including Currencies), would add continuing listing standards for Equity Index-Linked Securities and Commodity-Linked Securities, and initial and continuing listing standards for fixed income index-linked securities (''Fixed Income Index-Linked Securities''), futures-linked securities (''Futures-Linked Securities'') and multifactor index-linked securities (''Multifactor Index-Linked Securities'' and, together with Equity Index-Linked Securities, Commodity-Linked Securities, Fixed Income Index-Linked Securities and Futures-Linked Securities, ''Linked Securities'') to the rule.

Proposed new Rule 5711, Trading of Certain Derivative Securities, would include listing standards for Index-Linked Exchangeable Notes, Equity Gold Shares, Trust Certificates, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, Managed Trust Securities, and Currency Warrants.

The instant proposed rule change is intended to define the specific products (see above) that NASDAQ intends to list and trade, and the listing and qualification requirements for each such product.

Introductory Paragraphs to Rule 5710

The proposed amendments to Rule 5710 would state that NASDAQ will consider for listing and trading the Linked Securities set forth in the introductory paragraphs of the rule. These paragraphs describe the basis for the payment at maturity of the various securities, which is the performance of ''Reference Assets,'' as defined below.

Specifically:

- Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying equity index or indexes (''Equity Reference Asset'').
- The payment at maturity with respect to Commodity-Linked Securities is based on one or more physical Commodities or Commodity futures, options or other Commodity derivatives, Commodity-Related Securities, or a basket or index of any of the foregoing (''Commodity Reference Asset''). The terms ''Commodity'' and ''Commodity-Related Security'' are defined in Rule 4630.
- The payment at maturity with respect to Fixed Income Index-Linked Securities is based on the performance of one or more indexes or portfolios of notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of the Treasury securities (''Treasury Securities''), government-sponsored entity securities (''GSE Securities''), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof or a basket or index of any of the foregoing (''Fixed Income Reference Asset'').
- The payment at maturity with respect to Futures-Linked Securities is based on the performance of an index of (a) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; or (b) interest rate futures or options or derivatives on the foregoing in this subparagraph (b); or (c) CBOE Volatility Index (VIX) Futures (''Futures Reference Asset'').
- The payment at maturity with respect to Multifactor Index-Linked Securities is based on the performance of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Fixed Income Reference Assets or Futures Reference Assets (''Multifactor Reference Asset,'' and together with Equity Reference Assets, Commodity Reference Assets, Fixed Income Reference Assets and Futures Reference Assets, ''Reference Assets''). A Multifactor Reference Asset may include as a component a notional investment in cash or a cash equivalent based on a widely accepted overnight loan interest rate, LIBOR, Prime Rate, or an implied interest rate based on observed market spot and foreign currency forward rates.

Linked Securities may or may not provide for the repayment of the original principal investment amount. NASDAQ may submit a rule filing pursuant to Section 19(b)(2) of the Act to permit the listing and trading of Linked Securities that do not otherwise meet the standards set forth in Rule 5710.

Technical Changes to Rule 5710

NASDAQ is not proposing any amendments to Rules 5710(a)–(f), and such provisions would apply to all Linked Securities.[8] Additionally,

[4] *See* Section 5005 of the NASDAQ Rules.

[5] *See* Section 5100 of the NASDAQ Rules.

[6] *See* Section 5200 of the NASDAQ Rules.

[7] *See* Section 5700 of the NASDAQ Rules.

[8] Current Rules 5710(a)–(f) state:

(a) Both the issue and the issuer of such security meet the criteria for other securities set forth in Rule 5730(a), except that if the security is traded in $1,000 denominations or is redeemable at the option of holders thereof on at least a weekly basis, then no minimum number of holders and no minimum public distribution of trading units shall be required.

(b) The issue has a term of not less than one (1) year and not greater than thirty (30) years.

(c) The issue must be the non-convertible debt of the Company.

(d) The payment at maturity may or may not provide for a multiple of the direct or inverse performance of an underlying index, indexes or Reference Asset; however, in no event will a loss (negative payment) at maturity be accelerated by a multiple that exceeds twice the performance of an underlying index, indexes or Reference Asset.

NASDAQ proposes to re-number the current text of Rule 5710 by deleting current Rules 5710(g) and (h) and moving the text of these two sections into proposed Rules 5710 (k)(i) and (ii).[9] In addition, NASDAQ is proposing to re-number the remaining existing sections of Rule 5710, and to amend references and defined terms in such sections such that they would apply to all Linked Securities.

Linked Securities

Proposed Rule 5710(k) would adopt listing standards for the various Linked Securities.

Equity Index-Linked Securities

Initial Listing Criteria

Proposed Rule 5710(k)(i)(A) would set forth the initial listing criteria for Equity Index-Linked Securities found in current Rule 5710(g), which would be deleted and replaced in proposed Rule 5710(k)(i)(A). Specifically:

In the case of an Equity Index-Linked Security, each underlying index is required to have at least ten (10) component securities. In addition, the index or indexes to which the security is linked shall either: (1) Have been reviewed and approved for the trading of options or other derivatives by the Commission under Section 19(b)(2) of the Act and rules thereunder, and the conditions set forth in the Commission's approval order, including comprehensive surveillance sharing agreements for non-U.S. stocks, continue to be satisfied, or (2) the index or indexes meet the following criteria:

- Each component security has a minimum market value of at least $75 million, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the market value can be at least $50 million;
- Each component security shall have trading volume in each of the last six months of not less than 1,000,000 shares, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the trading volume shall be at least 500,000 shares in each of the last six months;
- Indexes based upon the equal-dollar or modified equal-dollar weighting method will be rebalanced at least semiannually;
- In the case of a capitalization-weighted or modified capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of component securities in the index, each have an average monthly trading volume of at least 2,000,000 shares over the previous six months;
- No underlying component security will represent more than 25% of the weight of the index, and the five highest weighted component securities in the index do not in the aggregate account for more than 50% of the weight of the index (60% for an index consisting of fewer than 25 component securities);
- 90% of the index's numerical value and at least 80% of the total number of component securities will meet the then current criteria for standardized option trading on a national securities exchange or a national securities association, provided, however, that an index will not be subject to this requirement if (a) no underlying component security represents more than 10% of the dollar weight of the index and (b) the index has a minimum of 20 components; and
- All component securities shall be either (A) securities (other than securities of a foreign issuer and American Depository Receipts (''ADRs'')) that are (i) issued by a 1934 Act reporting company or by an investment company registered under the Investment Company Act of 1940 that, in each case, has securities listed on a national securities exchange and (ii) an ''NMS stock'' (as defined in Rule 600 of Regulation NMS under the Act), or (B) securities of a foreign issuer or ADRs, provided that securities of a foreign issuer (including when they underlie ADRs) whose primary trading market outside the United States is not a member of the Intermarket Surveillance Group (''ISG'') or a party to a comprehensive surveillance sharing agreement with NASDAQ will not in the aggregate represent more than 20% of the dollar weight of the index.

Continued Listing Criteria

Rule 5710(k)(i)(B) would adopt continued listing criteria for Equity Index-Linked Securities. Specifically, NASDAQ will commence delisting or removal proceedings (unless the Commission has approved the continued trading of the subject Equity Index-Linked Security), if any of the standards set forth above are not continuously maintained, except that:

- The criteria that no single component represent more than 25% of the dollar weight of the index and the five highest dollar weighted components in the index cannot represent more than 50% (or 60% for indexes with less than 25 components) of the dollar weight of the index, need only be satisfied at the time the index is rebalanced; and
- Component stocks that in the aggregate account for at least 90% of the weight of the index each shall have a minimum global monthly trading volume of 500,000 shares, or minimum global notional volume traded per month of $12,500,000, averaged over the last six months.

In connection with an Equity Index-Linked Security that is based on an index that has been reviewed and approved for the trading of options or other derivatives by the Commission under Section 19(b)(2) of the Act and rules thereunder and the conditions set forth in the Commission's approval order, NASDAQ will commence delisting or removal proceedings (unless the Commission has approved the continued trading of the subject Equity Index-Linked Security) if an underlying index or indexes fails to satisfy the maintenance standards or conditions for such index or indexes as set forth by the Commission in its order under Section 19(b)(2) of the Act approving the index or indexes for the trading of options or other derivatives.

Additionally, NASDAQ will commence delisting or removal proceedings (unless the Commission has approved the continued trading of the subject Equity Index-Linked Security), under any of the following circumstances:

- If the aggregate market value or the principal amount of the Equity Index-Linked Securities publicly held is less than $400,000;
- If the value of the index or composite value of the indexes is no longer calculated or widely disseminated on at least a 15-second basis with respect to indexes containing only securities listed on a national securities exchange, or on at least a 60-second basis with respect to indexes containing foreign country securities, provided, however, that, if the official index value does not change during some or all of the period when trading

(e) The Company will be expected to have a minimum tangible net worth in excess of $250,000,000 and to exceed by at least 20% the earnings requirements set forth in Rule 5405(b)(1)(A). In the alternative, the Company will be expected: (i) To have a minimum tangible net worth of $150,000,000 and to exceed by at least 20% the earnings requirement set forth in Rule 5405(b)(1)(A), and (ii) not to have issued securities where the original issue price of all the Company's other index-linked note offerings (combined with index-linked note offerings of the Company's affiliates) listed on a national securities exchange exceeds 25% of the Company's net worth.

(f) The Company is in compliance with Rule 10A–3 under the Act.

[9] *See supra* note 3.

is occurring on NASDAQ (for example, for indexes of foreign country securities, because of time zone differences or holidays in the countries where such indexes' component stocks trade) then the last calculated official index value must remain available throughout NASDAQ trading hours; or

• If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

Equity-Linked Indexes will be rebalanced at least annually.

The proposed rule change relating to Equity-Linked Securities is based on NYSEArca Equities Rule 5.2(j)(6)(B)(I).

Commodity-Linked Securities

Proposed Rule 5710(k)(ii) would adopt the initial listing criteria (found in current Rule 5710(h), which would be deleted and replaced in proposed Rule 5710(k)(ii)(A)) and continued listing criteria for Commodity-Linked Securities.

Initial Listing Criteria

The Reference Asset must meet one of the following criteria:

• The Reference Asset to which the security is linked shall have been reviewed and approved for the trading of Commodity-Related Securities or options or other derivatives by the Commission under Section 19(b)(2) of the Act and rules thereunder and the conditions set forth in the Commission's approval order, including with respect to comprehensive surveillance sharing agreements, continue to be satisfied; or

• The pricing information for each component of a Reference Asset other than a Currency must be derived from a market which is an ISG member or affiliate or with which NASDAQ has a comprehensive surveillance sharing agreement. Notwithstanding the previous sentence, pricing information for gold and silver may be derived from the London Bullion Market Association. The pricing information for each component of a Reference Asset that is a Currency must be either: (1) The generally accepted spot price for the currency exchange rate in question; or (2) derived from a market of which (a) is an ISG member or affiliate or with which NASDAQ has a comprehensive surveillance sharing agreement and (b) is the pricing source for a currency component of a Reference Asset that has previously been approved by the Commission. A Reference Asset may include components representing not more than 10% of the dollar weight of such Reference Asset for which the pricing information is derived from markets that do not meet the requirements of subparagraph (2) of the proposed rule; provided, however, that no single component subject to this exception exceeds 7% of the dollar weight of the Reference Asset. The term ''Currency,'' as used in the proposed rule, means one or more currencies, or currency options, futures, or other currency derivatives, Commodity-Related Securities if their underlying Commodities are currencies or currency derivatives, or a basket or index of any of the foregoing.

Continued Listing Standards

Proposed Rule 5710(k)(ii)(B) would establish continued listing criteria for Commodity-Linked Securities. Specifically, NASDAQ will commence delisting or removal proceedings if any of the initial listing criteria described above are not continuously maintained. Additionally, NASDAQ will also commence delisting or removal proceedings under any of the following circumstances:

• If the aggregate market value or the principal amount of the Commodity-Linked Securities publicly held is less than $400,000;

• If the value of the Commodity Reference Asset is no longer calculated or available and a new Commodity Reference Asset is substituted, unless the new Commodity Reference Asset meets the requirements of the proposed rule; or

• If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

The proposed rule change relating to Commodity-Linked Securities is based on NYSEArca Equities Rule 5.2(j)(6)(B)(II).

Fixed Income Index-Linked Securities

Proposed Rule 5710(k)(iii) would set forth the listing criteria for Fixed Income Index-Linked Securities.

Initial Listing Standards

Proposed Rule 5710(k)(iii)(A) states that either the Fixed Income Reference Asset to which the security is linked shall have been reviewed and approved for the trading of options, Index Fund Shares, or other derivatives by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied or the issue must meet the following initial listing criteria:

• Components of the Fixed Income Reference Asset that in the aggregate account for at least 75% of the weight of the Fixed Income Reference Asset must each have a minimum original principal amount outstanding of $100 million or more;

• A component of the Fixed Income Reference Asset may be a convertible security, however, once the convertible security component converts to the underlying equity security, the component is removed from the Fixed Income Reference Asset;

• No component of the Fixed Income Reference Asset (excluding Treasury Securities and GSE Securities) will represent more than 30% of the dollar weight of the Fixed Income Reference Asset, and the five highest dollar weighted components in the Fixed Income Reference Asset will not in the aggregate account for more than 65% of the dollar weight of the Fixed Income Reference Asset;

• An underlying Fixed Income Reference Asset (excluding one consisting entirely of exempted securities) must include a minimum of 13 non-affiliated issuers; and

• Component securities that in the aggregate account for at least 90% of the dollar weight of the Fixed Income Reference Asset must be from one of the following: (a) Issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Act; or (b) issuers that have a worldwide market value of outstanding common equity held by non-affiliates of $700 million or more; or (c) issuers that have outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least $1 billion; or (d) exempted securities as defined in Section 3(a)(12) of the Act, or (e) issuers that are a government of a foreign country or a political subdivision of a foreign country.

In addition, the value of the Fixed Income Reference Asset must be widely disseminated to the public by one or more major market vendors at least once per business day.

Continued Listing Standards

Proposed Rule 5710(k)(iii)(C) would provide that NASDAQ will commence delisting or removal proceedings if any of the initial listing criteria described above are not continuously maintained, and that NASDAQ will also commence delisting or removal proceedings:

• If the aggregate market value or the principal amount of the Fixed Income Index-Linked Securities publicly held is less than $400,000;

• If the value of the Fixed Income Reference Asset is no longer calculated or available and a new Fixed Income Reference Asset is substituted, unless the new Fixed Income Reference Asset

meets the requirements of proposed Rule 5710(k); or

• If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings inadvisable.

The proposed rule change relating to Fixed-Income Linked Securities is based on NYSEArca Equities Rule 5.2(j)(6)(B)(IV).

Futures-Linked Securities

Proposed Rule 5710(k)(iv) would establish listing standards for Futures-Linked Securities.

Initial Listing Standards

Proposed Rule 5710(k)(iv)(A) states that the issue must meet either of the following the initial listing standards:

• The Futures Reference Asset to which the security is linked shall have been reviewed and approved for the trading of Futures-Linked Securities or options or other derivatives by the Commission under Section 19(b)(2) of the Act and rules thereunder and the conditions set forth in the Commission's approval order, including with respect to comprehensive surveillance sharing agreements, continue to be satisfied, or

• The pricing information for components of a Futures Reference Asset must be derived from a market which is an ISG member or affiliate or with which NASDAQ has a comprehensive surveillance sharing agreement. A Futures Reference Asset may include components representing not more than 10% of the dollar weight of such Futures Reference Asset for which the pricing information is derived from markets that do not meet the requirements of proposed Rule 5710(k)(iv)(A)(2); provided, however, that no single component subject to this exception exceeds 7% of the dollar weight of the Futures Reference Asset.

In addition, the issue must meet both of the following initial listing criteria:

• The value of the Futures Reference Asset must be calculated and widely disseminated by one or more major market data vendors on at least a 15-second basis during the Regular Market Session, as defined in Rule 4120; and

• In the case of Futures-Linked Securities that are periodically redeemable, the value of a share of each series (''Intraday Indicative Value'') of the subject Futures-Linked Securities must be calculated and widely disseminated by NASDAQ or one or more major market data vendors on at least a 15-second basis during the Regular Market Session (as defined in Rule 4120).

Continued Listing Standards

Proposed Rule 5710(k)(iv)(C) states that NASDAQ will commence delisting or removal proceedings if any of the initial listing criteria described above are not continuously maintained, and that NASDAQ will also commence delisting or removal proceedings under any of the following circumstances:

• If the aggregate market value or the principal amount of the Futures-Linked Securities publicly held is less than $400,000;

• If the value of the Futures Reference Asset is no longer calculated or available and a new Futures Reference Asset is substituted, unless the new Futures Reference Asset meets the requirements of proposed Rule 5710(k); or

• If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

The proposed rule change relating to Futures-Linked Securities is based on NYSEArca Equities Rule 5.2(j)(6)(B)(V).

Multifactor Index-Linked Securities

Proposed Rule 5710(k)(v) would govern the listing standards for Multifactor Index-Linked Securities.

Initial Listing Standards

Proposed Rule 5710(k)(v)(A) states that the issue must meet one of the following initial listing standards:

• Each component of the Multifactor Reference Asset to which the security is linked shall have been reviewed and approved for the trading of either options, Index Fund Shares, or other derivatives under Section 19(b)(2) of the Act and rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied; or

• Each Reference Asset included in the Multifactor Reference Asset must meet the applicable initial and continued listing criteria set forth in the relevant subsection of proposed Rule 5710(k).

In addition to one of the initial listing standards set forth above, proposed Rule 5710(k)(v)(B) would state that the issue must meet both of the following initial listing criteria:

• The value of the Multifactor Reference Asset must be calculated and widely disseminated to the public on at least a 15-second basis during the time the Multifactor Index-Linked Security trades on NASDAQ; and

• In the case of Multifactor Index-Linked Securities that are periodically redeemable, the indicative value of the Multifactor Index-Linked Securities must be calculated and widely disseminated by one or more major market data vendors on at least a 15-second basis during the time the Multifactor Index-Linked Securities trade on NASDAQ.

Continued Listing Criteria

Proposed Rule 5710(k)(v)(C) states that NASDAQ will commence delisting or removal proceedings:

• If any of the initial listing criteria described above are not continuously maintained;

• If the aggregate market value or the principal amount of the Multifactor Index-Linked Securities publicly held is less than $400,000;

• If the value of the Multifactor Reference Asset is no longer calculated or available and a new Multifactor Reference Asset is substituted, unless the new Multifactor Reference Asset meets the requirements of proposed Rule 5710(k); or

• If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

The proposed rule change relating to Multifactor Index-Linked Securities is based on NYSEArca Equities Rule 5.2(j)(6)(B)(VI).

Regulatory Requirements for Registered Market Makers in Linked Securities

Commentary .01 to proposed Rule 5710(k) would establish certain regulatory requirements for registered Market Makers in Linked Securities. Specifically, the registered Market Maker in Linked Securities must file with NASDAQ, in a manner prescribed by NASDAQ, and keep current a list identifying all accounts for trading in the Reference Asset components, the commodities, currencies or futures underlying the Reference Asset components, or any derivative instruments based on the Reference Asset or based on any Reference Asset component or any physical commodity, currency or futures underlying a Reference Asset component, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker in Linked Securities would be permitted to trade in the Reference Asset components, the commodities, currencies or futures underlying the Reference Asset components, or any derivative instruments based on the Reference Asset or based on any Reference Asset component or any physical commodity, or futures currency underlying a Reference Asset component, in an account in which a registered Market Maker, directly or

indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to NASDAQ as required by the proposed Rule.

In addition to the existing obligations under NASDAQ rules regarding the production of books and records,[10] the registered Market Maker in Linked Securities would be required to make available to NASDAQ such books, records or other information pertaining to transactions by such entity or any limited partner, officer or approved person thereof, registered or nonregistered employee affiliated with such entity for its or their own accounts in the Reference Asset components, the commodities, currencies or futures underlying the Reference Asset components, or any derivative instruments based on the Reference Asset or based on any Reference Asset component or any physical commodity, currency or futures underlying a Reference Asset component, as may be requested by NASDAQ.

The proposed rule change relating to regulatory requirements for registered Market Makers in Linked Securities is based on NYSEArca Equities Rule 5.2(j)(6), Commentary .01.

Proposed Rule 5711—Trading of Certain Derivative Securities

NASDAQ proposes to adopt new Rule 5711, Trading of Certain Derivative Securities, which would set forth listing standards for the securities described below.

Index-Linked Exchangeable Notes

Proposed Rule 5711(a) would adopt listing standards for Index-Linked Exchangeable Notes.

Description

Index-Linked Exchangeable Notes are exchangeable debt securities that are exchangeable at the option of the holder (subject to the requirement that the holder in most circumstances exchange a specified minimum amount of notes), on call by the issuer, or at maturity for a cash amount (''Cash Value Amount'') based on the reported market prices of the underlying stocks of an underlying index. Each Index-Linked Exchangeable Note is intended to provide investors with an instrument that closely tracks the underlying index. Notwithstanding that the notes are linked to an index, they will trade as a single security.

Initial Listing Standards

Index-Linked Exchangeable Notes will be considered for listing and trading by NASDAQ pursuant to Rule 19b–4(e) under the Act,[11] provided:

- Both the issue and the issuer of such security meet the requirements of Rule 5730, Listing Requirements for Securities Not Specified Above (Other Securities), except that the minimum public distribution shall be 150,000 notes with a minimum of 400 public note-holders, except, if traded in thousand dollar denominations or redeemable at the option of the holders thereof on at least a weekly basis, then no minimum public distribution and no minimum number of holders.
- The issue has a minimum term of one year.
- The issuer will be expected to have a minimum tangible net worth in excess of $250,000,000, and to otherwise substantially exceed the earnings requirements set forth in Rule 5405(b). In the alternative, the issuer will be expected: (A) to have a minimum tangible net worth of $150,000,000 and to otherwise substantially exceed the earnings requirements set forth in Rule 5405(b); and (B) not to have issued Index-Linked Exchangeable Notes where the original issue price of all the issuer's other Index-Linked Exchangeable Note offerings (combined with other index-linked exchangeable note offerings of the issuer's affiliates) listed on a national securities exchange exceeds 25% of the issuer's net worth.
- The index to which an exchangeable-note is linked shall either be (A) indices that have been created by a third party and been reviewed and have been approved for the trading of options or other derivatives securities (''Third-Party Index'') either by the Commission under Section 19(b)(2) of the Act and rules thereunder or by NASDAQ under rules adopted pursuant to Rule 19b–4(e); or (B) indices which the issuer has created and for which NASDAQ will have obtained approval from either the Commission pursuant to Section 19(b)(2) and rules thereunder or from NASDAQ under rules adopted pursuant to Rule 19b–4(e) (''Issuer Index''). The Issuer Indices and their underlying securities must meet one of the following: (A) The procedures and criteria set forth in NOM Rules, Chapter XIV, Section 6(b) and (c), or (B) the criteria set forth in Rules 5715(b)(3) and (4), the index concentration limits set forth in NOM Rule Chapter XIV, Section 6, and NOM Rule Chapter XIV, Section 6(b)(12) insofar as it relates to NOM Rule Chapter XIV, Section 6(b)(6). Index-Linked Exchangeable Notes will be treated as equity instruments.

Continued Listing Standards

Beginning twelve months after the initial issuance of a series of Index-Linked Exchangeable Notes, NASDAQ will consider the suspension of trading in or removal from listing of that series of Index-Linked Exchangeable Notes under any of the following circumstances:

- If the series has fewer than 50,000 notes issued and outstanding;
- If the market value of all Index-Linked Exchangeable Notes of that series issued and outstanding is less than $1,000,000; or
- If such other event shall occur or such other condition exists which in the opinion of NASDAQ makes further dealings of NASDAQ inadvisable.

The proposed rule change relating to Index-Linked Exchangeable Notes is based on NYSEArca Equities Rule 5.2(j)(4).

Equity Gold Shares

Description

Proposed Rule 5711(b) would apply to Equity Gold Shares that represent units of fractional undivided beneficial interest in, and ownership of, the Equity Gold Trust. While Equity Gold Shares are not technically ''Index Fund Shares,'' and thus are not covered by NASDAQ Rule 5705, all other NASDAQ rules that reference ''Index Fund Shares'' shall also apply to Equity Gold Shares.

Applicability

Except to the extent that specific provisions in proposed Rule 5711(b) govern, or unless the context otherwise requires, the provisions of all other NASDAQ Rules and policies would be applicable to the trading of Equity Gold Shares on NASDAQ. The provisions set forth in proposed Rule 5711(d) relating to Commodity-Based Trust Shares would also apply to Equity Gold Shares.

The proposed rule change relating to Equity Gold Shares is based on NYSEArca Equities Rule 5.2(j)(5).

Trust Certificates

Proposed Rule 5711(c) would govern the listing standards applicable to Trust Certificates. NASDAQ will consider for trading, whether by listing or pursuant to unlisted trading privileges, Trust Certificates.

Description

Trust Certificates represent an interest in a special purpose trust (''Trust'') created pursuant to a trust agreement. The Trust will only issue Trust Certificates. Trust Certificates may or may not provide for the repayment of

[10] *See, e.g.,* NASDAQ Rule 4625.

[11] 17 CFR 240.19b–4(e).

the original principal investment amount. Trust Certificates pay an amount at maturity which is based upon the performance of specified assets as set forth below:

- An underlying index or indexes of equity securities (''Equity Reference Asset'');
- Instruments that are direct obligations of the issuing company, either exercisable throughout their life (*i.e.,* American style) or exercisable only on their expiration date (*i.e.,* European style), entitling the holder to a cash settlement in U.S. dollars to the extent that the foreign or domestic index has declined below (for a put warrant) or increased above (for a call warrant) the pre-stated cash settlement value of the index (''Index Warrants''); or
- A combination of two or more Equity Reference Assets or Index Warrants.

NASDAQ will file separate proposals under Section 19(b) of the Act before trading, either by listing or pursuant to unlisted trading privileges, Trust Certificates.

Continued Listing Standards

Commentary .01 to proposed Rule 5711(c) would state that NASDAQ will commence delisting or removal proceedings with respect to an issue of Trust Certificates (unless the Commission has approved the continued trading of such issue), under any of the following circumstances:

- If the aggregate market value or the principal amount of the securities publicly held is less than $400,000;
- If the value of the index or composite value of the indexes is no longer calculated or widely disseminated on at least a 15-second basis with respect to indexes containing only securities listed on a national securities exchange, or on at least a 60-second basis with respect to indexes containing foreign country securities; provided, however, that, if the official index value does not change during some or all of the period when trading is occurring on the NASDAQ Stock Market (for example, for indexes of foreign country securities, because of time zone differences or holidays in the countries where such indexes' component stocks trade) then the last calculated official index value must remain available throughout NASDAQ trading hours; or
- If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

Other Provisions

Proposed Commentary .02 to Rule 5711(c) would provide that the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Commentary .03 to Rule 5711(c) would provide that the trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee. No change is to be made in the trustee of a listed issue without prior notice to and approval of NASDAQ.

Proposed Commentary .04 to Rule 5711(c) would provide that voting rights will be as set forth in the applicable Trust prospectus.

Proposed Commentary .05 to Rule 5711(c) would provide that NASDAQ will implement written surveillance procedures for Trust Certificates.

Proposed Commentary .06 to Rule 5711(c) would provide that the Trust Certificates will be subject to NASDAQ's equity trading rules.

Proposed Commentary .07 to Rule 5711(c) would provide that prior to the commencement of trading of a particular Trust Certificates listing pursuant to this Rule, NASDAQ will evaluate the nature and complexity of the issue and, if appropriate, distribute a circular to Members providing guidance regarding compliance responsibilities (including suitability recommendations and account approval) when handling transactions in Trust Certificates.

Proposed Commentary .08 to Rule 5711(c) would provide that Trust Certificates may be exchangeable at the option of the holder into securities that participate in the return of the applicable underlying asset. In the event that the Trust Certificates are exchangeable at the option of the holder and contain an Index Warrant, then a Member must ensure that the Member's account is approved for options trading in accordance with the rules of the NASDAQ Options Market (''NOM'') in order to exercise such rights.

Proposed Commentary .09 to Rule 5711(c) would provide that Trust Certificates may pass-through periodic payments of interest and principle of the underlying securities.

Proposed Commentary .10 to Rule 5711(c) would provide that the Trust payments may be guaranteed pursuant to a financial guaranty insurance policy which may include swap agreements.

Proposed Commentary .11 to Rule 5711(c) would provide that the Trust Certificates may be subject to early termination or call features.

The proposed rule change relating to Trust Certificates is based on NYSEArca Equities Rule 5.2(j)(7).

Commodity-Based Trust Shares

Proposed Rule 5711(d) would permit the listing and trading, or trading pursuant to unlisted trading privileges, of Commodity-Based Trust Shares on NASDAQ. Proposed Rule 5711(d) would be applicable only to Commodity-Based Trust Shares. Except to the extent inconsistent with this Rule, or unless the context otherwise requires, the provisions of the trust issued receipts rules, Bylaws, and all other rules and procedures of the Board of Directors shall be applicable to the trading on NASDAQ of such securities. Commodity-Based Trust Shares are included within the definition of ''security'' or ''securities'' as such terms are used in the Bylaws and Rules of NASDAQ.

Description

''Commodity-Based Trust Shares,'' as defined in proposed Rule 5711(d)(iii)(A), means a security (1) that is issued by a Trust that holds a specified commodity deposited with the Trust; (2) that is issued by such Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (3) that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such Trust which will deliver to the redeeming holder the quantity of the underlying commodity. Proposed Rule 5711(d)(iii)(B) states that the term ''commodity'' is defined in Section 1(a)(4) of the Commodity Exchange Act.

Proposed Rule 5711(d)(iv) states that NASDAQ may trade, either by listing or pursuant to unlisted trading privileges, Commodity-Based Trust Shares based on an underlying commodity. Each issue of a Commodity-Based Trust Share will be designated as a separate series and will be identified by a unique symbol.

Initial Listing Standards

Proposed Rule 5711(d)(v)(A) states that NASDAQ will establish a minimum number of Commodity-Based Trust Shares required to be outstanding at the time of commencement of trading on NASDAQ.

Continued Listing Standards

Proposed Rule 5711(d)(v)(B) provides that following the initial 12 month period following commencement of trading on NASDAQ of Commodity-Based Trust Shares, NASDAQ will consider the suspension of trading in or removal from listing of such series under any of the following circumstances if:

- The Trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of Commodity-Based Trust Shares for 30 or more consecutive trading days;
- The Trust has fewer than 50,000 receipts issued and outstanding;
- The market value of all receipts issued and outstanding is less than $1,000,000;
- The value of the underlying commodity is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the sponsor, Trust, custodian or NASDAQ or NASDAQ stops providing a hyperlink on its Web site to any such unaffiliated commodity value;
- The Intraday Indicative Value [12] is no longer made available on at least a 15-second delayed basis; or
- Such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

Other Provisions

Upon termination of a Trust, NASDAQ requires that Commodity-Based Trust Shares issued in connection with such entity Trust be removed from NASDAQ listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of the Trust falls below a specified amount.

Proposed Rule 5711(d)(v)(C) provides that the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 5711(d)(v)(D) would apply the following requirements to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.
- No change is to be made in the trustee of a listed issue without prior notice to and approval of NASDAQ.

Proposed Rule 5711(d)(v)(E) states that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 5711(d)(vi) and (vii) describe the limitation of NASDAQ liability and requirements for Market Makers in Commodity-Based Trust Shares (see below for a general discussion of these requirements).

Commentary .01 to proposed NASDAQ Rule 5711(d) provides that a Commodity-Based Trust Share is a Trust Issued Receipt that holds a specified commodity deposited with the Trust.

Commentary .02 to proposed NASDAQ Rule 5711(d) provides that NASDAQ requires that Members provide all purchasers of newly issued Commodity-Based Trust Shares a prospectus for the series of Commodity-Based Trust Shares.

Commentary .03 to proposed NASDAQ Rule 5711(d) provides that transactions in Commodity-Based Trust Shares will occur during the trading hours specified in Rule 4120.

Commentary .04 to proposed NASDAQ Rule 5711(d) provides that NASDAQ will file separate proposals under Section 19(b) of the Exchange Act before the listing and/or trading of Commodity-Based Trust Shares.

The proposed rule change relating to Commodity-Based Trust Shares is based on NYSEArca Equities Rule 8.201.

Currency Trust Shares

NASDAQ proposes to adopt new NASDAQ Rule 5711(e) for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges, of Currency Trust Shares. Proposed Rule 5711(e) would be applicable only to Currency Trust Shares. Except to the extent inconsistent with the proposed Rule, or unless the context otherwise requires, the provisions of the trust issued receipts rules, Bylaws, and all other rules and procedures of the Board of Directors shall be applicable to the trading on NASDAQ of such securities. Currency Trust Shares are included within the definition of ''security'' or ''securities'' as such terms are used in the Bylaws and Rules of NASDAQ.

Description

Proposed Rule 5711(e)(iii) provides that the term ''Currency Trust Shares'' as used in these proposed rules means, unless the context otherwise requires, a security that:

- Is issued by a Trust that holds a specified non-U.S. currency or currencies deposited with the Trust;
- When aggregated in some specified minimum number may be surrendered to the Trust by an Authorized Participant (as defined in the Trust's prospectus) to receive the specified non-U.S. currency or currencies; and
- Pays beneficial owners interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the Trust.

Proposed Rule 5711(e)(iv) states that NASDAQ may trade, either by listing or pursuant to unlisted trading privileges, Currency Trust Shares that hold a specified non-U.S. currency or currencies. Each issue of Currency Trust Shares would be designated as a separate series and shall be identified by a unique symbol.

Initial Listing Standards

NASDAQ will establish a minimum number of Currency Trust Shares required to be outstanding at the time of commencement of trading on NASDAQ.

Continued Listing Standards

Proposed Rule 5711(e)(v)(B) provides that, following the initial 12 month period following commencement of trading on NASDAQ of Currency Trust Shares, NASDAQ will consider the suspension of trading in or removal from listing of such series under any of the following circumstances:

- If the Trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of Currency Trust Shares for 30 or more consecutive trading days;
- If the Trust has fewer than 50,000 Currency Trust Shares issued and outstanding;
- If the market value of all Currency Trust Shares issued and outstanding is less than $1,000,000;
- If the value of the applicable non-U.S. currency is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the sponsor, Trust, custodian or NASDAQ or NASDAQ stops providing a hyperlink on its Web site to any such unaffiliated applicable non-U.S. currency value;
- If the Intraday Indicative Value is no longer made available on at least a 15-second delayed basis; or
- If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

Upon termination of a Trust, NASDAQ would require that Currency

[12] The Intraday Indicative Value is an estimate, updated at least every 15 seconds, of the value of a share of each series during NASDAQ's Regular Market Session (as defined in Rule 4120(b)(4)(D)). *See, e.g.,* NASDAQ Rules 5705(b)(3)(C) and 5705(b)(6)(A).

Trust Shares issued in connection with such entity Trust be removed from NASDAQ listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of the Trust falls below a specified amount.

Other

Proposed Rule 5711(e)(v)(C) states that the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 5711(e)(v)(D) states that the following requirements apply to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.
- No change is to be made in the trustee of a listed issue without prior notice to and approval of NASDAQ.

Proposed Rule 5711(e)(v)(E) states that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 5711(e)(vi) and (vii) set forth the requirements respecting limitation of NASDAQ liability and Market Maker Accounts (see below for a general discussion of these requirements).

Proposed Rule 5711(e)(viii) states that NASDAQ may submit a rule filing pursuant to Section 19(b)(2) of the Act to permit the listing and trading of Currency Trust Shares that do not otherwise meet the standards set forth in Commentary .04 to proposed Rule 5711(e).

Commentary .01 to proposed Rule 5711(e) states that a Currency Trust Share is a Trust Issued Receipt that holds a specified non-U.S. currency or currencies deposited with the Trust.

Commentary .02 to proposed Rule 5711(e) states that NASDAQ requires that Members provide all purchasers of newly issued Currency Trust Shares a prospectus for the series of Currency Trust Shares.

Commentary .03 to proposed Rule 5711(e) provides that transactions in Currency Trust Shares will occur during the trading hours specified in NASDAQ Rule 4120.

Commentary .04 to proposed Rule 5711(e) provides that NASDAQ may approve an issue of Currency Trust Shares for listing and/or trading (including pursuant to unlisted trading privileges) pursuant to Rule 19b–4(e) under the Act. Such issue shall satisfy the criteria set forth in the proposed rule, together with the following criteria:

- A minimum of 100,000 shares of a series of Currency Trust Shares is required to be outstanding at commencement of trading (this would not apply to issues trading pursuant to unlisted trading privileges);
- The value of the applicable non-U.S. currency, currencies or currency index must be disseminated by one or more major market data vendors on at least a 15-second delayed basis;
- The Intraday Indicative Value must be calculated and widely disseminated by NASDAQ or one or more major market data vendors on at least a 15-second basis during the Regular Market Session (as defined in NASDAQ Rule 4120; and
- NASDAQ will implement written surveillance procedures applicable to Currency Trust Shares.

Commentary .05 to proposed Rule 5711(e) states that if the value of a Currency Trust Share is based in whole or in part on an index that is maintained by a broker-dealer, the broker-dealer would be required to erect a ''firewall'' around the personnel responsible for the maintenance of such index or who have access to information concerning changes and adjustments to the index, and the index shall be calculated by a third party who is not a broker-dealer. Additionally, any advisory committee, supervisory board or similar entity that advises an index licensor or administrator or that makes decisions regarding the index or portfolio composition, methodology and related matters must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the applicable index or portfolio.

Commentary .06 to proposed Rule 5711(e) provides that Currency Trust Shares will be subject to NASDAQ's equity trading rules.

Trading Halts

Proposed Commentary .07 to Rule 5711(e) states that if the Intraday Indicative Value or the value of the non-U.S. currency or currencies or the currency index applicable to a series of Currency Trust Shares is not being disseminated as required, NASDAQ may halt trading during the day on which such interruption first occurs. If such interruption persists past the trading day in which it occurred, NASDAQ will halt trading no later than the beginning of the trading day following the interruption. If NASDAQ becomes aware that the net asset value applicable to a series of Currency Trust Shares is not being disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value is available to all market participants.

The proposed rule change relating to Currency Trust Shares is based on NYSEArca Equities Rule 8.202.

Commodity Index Trust Shares

NASDAQ will consider for trading, whether by listing or pursuant to unlisted trading privileges, Commodity Index Trust Shares that meet the criteria of proposed Rule 5711(f).

Proposed Rule 5711(f)(ii) states that proposed Rule 5711(f) would be applicable only to Commodity Index Trust Shares. Except to the extent inconsistent with the proposed Rule, or unless the context otherwise requires, the provisions of the trust issued receipts rules, Bylaws, and all other rules and procedures of the Board of Directors shall be applicable to the trading on NASDAQ of such securities. Commodity Index Trust Shares are included within the definition of ''security'' or ''securities'' as such terms are used in the Bylaws and Rules of NASDAQ.

Description

Proposed Rule 5711(f)(iii) defines the term ''Commodity Index Trust Shares'' to mean, as used in these proposed Rules (unless the context otherwise requires), a security that (A) is issued by a Trust that (1) is a commodity pool as defined in the Commodity Exchange Act and regulations thereunder, and that is managed by a commodity pool operator registered with the Commodity Futures Trading Commission; and (2) that holds long positions in futures contracts on a specified commodity index, or interests in a commodity pool which, in turn, holds such long positions; and (B) when aggregated in some specified minimum number may be surrendered to the Trust by the beneficial owner to receive positions in futures contracts on a specified index and cash or short term securities. The term ''futures contract'' is commonly known as a ''contract of sale of a commodity for future delivery'' set forth in Section 2(a) of the Commodity Exchange Act.

Proposed Rule 5711(f)(iv) states that NASDAQ may trade, either by listing or pursuant to unlisted trading privileges, Commodity Index Trust Shares based on one or more securities. The Commodity Index Trust Shares based on particular securities would be designated as a

separate series and would be identified by a unique symbol.

Initial Listing Standards

Proposed Rule 5711(f)(v)(A) states that NASDAQ will establish a minimum number of Commodity Index Trust Shares required to be outstanding at the time of commencement of trading on NASDAQ.

Continued Listing Standards

Under proposed Rule 5711(f)(v)(B), NASDAQ will consider the suspension of trading in or removal from listing of a series of Commodity Index Trust Shares under any of the following circumstances:

- Following the initial twelve-month period beginning upon the commencement of trading of the Commodity Index Trust Shares, there are fewer than 50 record and/or beneficial holders of Commodity Index Trust Shares for 30 or more consecutive trading days;
- If the value of the applicable underlying index is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the sponsor, the Trust or the trustee of the Trust;
- If the net asset value for the trust is no longer disseminated to all market participants at the same time;
- If the Intraday Indicative Value is no longer made available on at least a 15-second delayed basis; or
- If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

Upon termination of a Trust, NASDAQ would require that Commodity Index Trust Shares issued in connection with such entity Trust be removed from NASDAQ listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of the Trust falls below a specified amount.

Proposed Rule 5711(f)(v)(C) provides that the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 5711(f)(v)(D) states that the following requirements apply to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.
- No change is to be made in the trustee of a listed issue without prior notice to and approval of NASDAQ.

Proposed Rule 5711(f)(v)(E) provides that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 5711(f)(vi) and (vii) set forth the requirements respecting limitation of NASDAQ liability and Market Maker Accounts (see below for a general discussion of these requirements).

Commentary .01 to proposed Rule 5711(f) states that a Commodity Index Trust Share is a Trust Issued Receipt that holds long positions in futures contracts on a specified commodity index, or interests in a commodity pool which, in turn, holds such long positions, deposited with the Trust.

Commentary .02 to proposed Rule 5711(f) states that NASDAQ requires that Members provide all purchasers of newly issued Commodity Index Trust Shares a prospectus for the series of Commodity Index Trust Shares.

Commentary .03 to proposed Rule 5711(f) states that transactions in Commodity Index Trust Shares will occur during the trading hours specified in Rule 4120.

Commentary .04 to proposed Rule 5711(f) states that NASDAQ will file separate proposals under Section 19(b) of the Act before trading, either by listing or pursuant to unlisted trading privileges, Commodity Index Trust Shares.

The proposed rule change relating to Commodity Index Trust Shares is based on NYSEArca Equities Rule 8.202.

Commodity Futures Trust Shares

Proposed Rule 5711(g) governs the listing of Commodity Futures Trust Shares. NASDAQ will consider for trading, whether by listing or pursuant to unlisted trading privileges, Commodity Futures Trust Shares that meet the criteria of proposed Rule 5711(g).

Proposed Rule 5711(g)(ii) states that proposed Rule 5711(g) would apply only to Commodity Futures Trust Shares. Except to the extent inconsistent with the proposed Rule, or unless the context otherwise requires, the provisions of the trust issued receipts rules, Bylaws, and all other rules and procedures of the Board of Directors shall be applicable to the trading on NASDAQ of such securities. Commodity Futures Trust Shares are included within the definition of ''security'' or ''securities'' as such terms are used in the Bylaws and Rules of NASDAQ.

Description

Proposed Rule 5711(g)(iii) states that the term ''Commodity Futures Trust Shares'' as used in the proposed Rules means, unless the context otherwise requires, a security that: (i) is issued by a Trust that is a commodity pool as defined in the Commodity Exchange Act and regulations thereunder, and that is managed by a commodity pool operator registered with the Commodity Futures Trading Commission, and holds positions in futures contracts that track the performance of a specified commodity, or interests in a commodity pool which, in turn, holds such positions; and (ii) is issued and redeemed daily in specified aggregate amounts at net asset value. The term ''futures contract'' is a ''contract of sale of a commodity for future delivery'' set forth in Section 2(a) of the Commodity Exchange Act. The term ''commodity'' is defined in Section 1(a)(4) of the Commodity Exchange Act.

Designation of an Underlying Commodity Futures Contract

Proposed Rule 5711(g)(iv) states that NASDAQ may trade, either by listing or pursuant to unlisted trading privileges, Commodity Futures Trust Shares based on an underlying commodity futures contract. Each issue of Commodity Futures Trust Shares shall be designated as a separate series and shall be identified by a unique symbol.

Initial Listing Standards

Proposed Rule 5711(g)(v)(A) states that NASDAQ will establish a minimum number of Commodity Futures Trust Shares required to be outstanding at the time of commencement of trading on NASDAQ.

Continued Listing Standards

Proposed Rule 5711(g)(v)(B) states that NASDAQ will consider the suspension of trading in or removal from listing of a series of Commodity Futures Trust Shares under any of the following circumstances:

- If, following the initial twelve-month period beginning upon the commencement of trading of the Commodity Futures Trust Shares: (1) the Trust has fewer than 50,000 Commodity Futures Trust Shares issued and outstanding; or (2) the market value of all Commodity Futures Trust Shares issued and outstanding is less than $1,000,000; or (3) there are fewer than 50 record and/or beneficial holders of Commodity Futures Trust Shares for 30 consecutive trading days;
- If the value of the underlying futures contracts is no longer calculated or available on at least a 15-second

delayed basis during NASDAQ's Regular Market Session (as defined in NASDAQ Rule 4120) from a source unaffiliated with the sponsor, the Trust or the trustee of the Trust;

• If the net asset value for the Trust is no longer disseminated to all market participants at the same time;

• If the Intraday Indicative Value is no longer disseminated on at least a 15-second delayed basis during NASDAQ's Regular Market Session (as defined in NASDAQ Rule 4120); or

• If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

Upon termination of a Trust, NASDAQ requires that Commodity Futures Trust Shares issued in connection with such trust be removed from NASDAQ listing. A Trust will terminate in accordance with the provisions of the Trust prospectus.

Proposed Rule 5711(g)(v)(C) states that the stated term of the Trust shall be as stated in the prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 5711(g)(v)(D) states that the following requirements apply to the trustee of a Trust:

• The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

• No change is to be made in the trustee of a listed issue without prior notice to and approval of NASDAQ.

Proposed Rule 5711(g)(v)(E) states that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 5711(g)(vi) and (vii) describe the requirements for Market Makers and the limitation of NASDAQ liability in Commodity Futures Trust Shares (see below for a general discussion of these requirements).

Proposed Rule 5711(g)(viii) states that NASDAQ will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Commodity Futures Trust Shares designated on different underlying futures contracts.

Commentary .01 to proposed Rule 5711(g) would require Members trading in Commodity Futures Trust Shares to provide all purchasers of newly issued Commodity Futures Trust Shares a prospectus for the series of Commodity Futures Trust Shares.

Commentary .02 to proposed Rule 5711(g) states that transactions in Commodity Futures Trust Shares will occur during the trading hours specified in Rule 4120.

Commentary .03 to proposed Rule 5711(g) states that if the Intraday Indicative Value or the value of the underlying futures contract is not being disseminated as required, NASDAQ may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value or the value of the underlying futures contract occurs. If the interruption to the dissemination of the Intraday Indicative Value or the value of the underlying futures contract persists past the trading day in which it occurred, NASDAQ will halt trading no later than the beginning of the trading day following the interruption.

In addition, if NASDAQ becomes aware that the net asset value with respect to a series of Commodity Futures Trust Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value is available to all market participants.

Commentary .04 to proposed Rule 5711(g) states that NASDAQ's rules governing the trading of equity securities apply.

Commentary .05 to proposed Rule 5711(g) states that NASDAQ will implement written surveillance procedures for Commodity Futures Trust Shares.

The proposed rule change relating to Commodity Futures Trust Shares is based on NYSEArca Equities Rule 8.204.

Partnership Units

Proposed Rule 5711(h) would govern the listing of Partnership Units. Under proposed Rule 5711(h)(i), NASDAQ will consider for trading, whether by listing or pursuant to unlisted trading privileges, Partnership Units that meet the criteria of proposed Rule 5711(h).

Description

Under proposed Rule 5711(h)(ii), the following terms as used in the proposed Rule would, unless the context otherwise requires, have the meanings herein specified.

Proposed Rule 5711(h)(ii)(A) states that the term ''commodity'' is defined in Section 1(a)(4) of the Commodity Exchange Act.

Proposed Rule 5711(h)(ii)(B) defines a Partnership Unit for purposes of the proposed Rule as a security (a) that is issued by a partnership that invests in any combination of futures contracts, options on futures contracts, forward contracts, commodities and/or securities; and (b) that is issued and redeemed daily in specified aggregate amounts at net asset value.

Proposed Rule 5711(h)(iii) states that NASDAQ may list and trade Partnership Units based on an underlying asset, commodity or security. Each issue of a Partnership Unit would be designated as a separate series and would be identified by a unique symbol.

Initial Listing Standards

Proposed Rule 5711(h)(iv)(A) states that NASDAQ will establish a minimum number of Partnership Units required to be outstanding at the time of commencement of trading on NASDAQ.

Continued Listing Standards

Proposed Rule 5711(h)(iv)(B) provides that NASDAQ will consider removal of Partnership Units from listing under any of the following circumstances:

• If, following the initial twelve month period from the date of commencement of trading of the Partnership Units, (a) the partnership has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of the Partnership Units for 30 or more consecutive trading days; (b) the partnership has fewer than 50,000 Partnership Units issued and outstanding; or (c) the market value of all Partnership Units issued and outstanding is less than $1,000,000;

• If the value of the underlying benchmark investment, commodity or asset is no longer calculated or available on at least a 15-second delayed basis or NASDAQ stops providing a hyperlink on its Web site to any such investment, commodity or asset value;

• If the Intraday Indicative Value is no longer made available on at least a 15- second delayed basis; or

• If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

Upon termination of a partnership, NASDAQ requires that Partnership Units issued in connection with such partnership be removed from NASDAQ listing. A partnership will terminate in accordance with the provisions of the partnership prospectus.

Proposed Rule 5711(h)(iv)(C) provides that the stated term of the partnership shall be as stated in the prospectus. However, such entity may be terminated under such earlier circumstances as may be specified in the Partnership prospectus.

Proposed Rule 5711(h)(iv)(D) would adopt the following requirements that

apply to the general partner of a partnership:

• The general partner of a partnership must be an entity having substantial capital and surplus and the experience and facilities for handling partnership business. In cases where, for any reason, an individual has been appointed as general partner, a qualified entity must also be appointed as general partner.

• No change is to be made in the general partner of a listed issue without prior notice to and approval of NASDAQ.

Proposed Rule 5711(h)(iv)(E) states that voting rights shall be as set forth in the applicable partnership prospectus.

Proposed Rule 5711(h)(v) and (vi) describe the limitation of NASDAQ liability and requirements for Market Makers in Partnership Units (see below for a general discussion of these requirements).

Proposed Rule 5711(h)(vii) states that NASDAQ will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Partnership Units designated on different underlying investments, commodities and/or assets.

Commentary .01 to proposed Rule 5711(h) states that NASDAQ requires that Members provide to all purchasers of newly issued Partnership Units a prospectus for the series of Partnership Units.

The proposed rule change relating to Partnership Units is based on NYSEArca Equities Rule 8.300.

Trust Units

NASDAQ proposes to add new Rule 5711(i) in order to permit trading, either by listing or pursuant to unlisted trading privileges, of Trust Units.

Proposed Rule 5711(i)(i) states that the provisions in proposed Rule 5711(i) are applicable only to Trust Units. In addition, except to the extent inconsistent with this Rule, or unless the context otherwise requires, the rules and procedures of the Board of Directors shall be applicable to the trading on NASDAQ of such securities. Trust Units are included within the definition of ''security,'' ''securities'' and ''derivative securities products'' as such terms are used in the Rules of NASDAQ.

Description

Proposed Rule 5711(i)(ii) states that the following terms as used in the proposed Rule shall, unless the context otherwise requires, have the meanings herein specified:

• The term ''commodity'' is defined in Section 1(a)(4) of the Commodity Exchange Act.

• A Trust Unit is a security that is issued by a trust or other similar entity that is constituted as a commodity pool that holds investments comprising or otherwise based on any combination of futures contracts, options on futures contracts, forward contracts, swap contracts, commodities and/or securities.

Proposed Rule 5711(i)(iii) states that NASDAQ may list and trade Trust Units based on an underlying asset, commodity, security or portfolio. Each issue of a Trust Unit shall be designated as a separate series and shall be identified by a unique symbol.

Initial Listing Standards

Proposed Rule 5711(i)(iv)(A) states that NASDAQ will establish a minimum number of Trust Units required to be outstanding at the time of commencement of trading on NASDAQ. NASDAQ will obtain a representation from the issuer of each series of Trust Units that the net asset value per share for the series will be calculated daily and will be made available to all market participants at the same time.

Continued Listing Standards

Proposed Rule 5711(i)(iv)(B)(1) states that NASDAQ will remove Trust Units from listing under any of the following circumstances:

• If following the initial twelve month period following the commencement of trading of Trust Units, (i) the trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of Trust Units for 30 or more consecutive trading days; (ii) the trust has fewer than 50,000 Trust Units issued and outstanding; or (iii) the market value of all Trust Units issued and outstanding is less than $1,000,000; or

• If such other event shall occur or condition exists which in the opinion of the NASDAQ makes further dealings on NASDAQ inadvisable.

Trading Halts

Proposed Rule 5711(i)(iv)(B)(2) states that NASDAQ will halt trading in a series of Trust Units if the circuit breaker parameters in Rule 4120(a)(11) have been reached. In exercising its discretion to halt or suspend trading in a series of Trust Units, NASDAQ may consider any relevant factors. In particular, if the portfolio and net asset value per share are not being disseminated as required, NASDAQ may halt trading during the day in which the interruption to the dissemination of the portfolio holdings or net asset value per share occurs. If the interruption to the dissemination of the portfolio holdings or net asset value per share persists past the trading day in which it occurred, NASDAQ will halt trading no later than the beginning of the trading day following the interruption.

Upon termination of a trust, NASDAQ would require that Trust Units issued in connection with such trust be removed from NASDAQ listing. A trust will terminate in accordance with the provisions of the prospectus.

Proposed Rule 5711(i)(iv)(C) provides that the stated term of the trust shall be as stated in the prospectus. However, such entity may be terminated under such earlier circumstances as may be specified in the prospectus.

Proposed Rule 5711(i)(iv)(D) would adopt the following requirements applicable to the trustee of a Trust:

• The trustee of a trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

• No change is to be made in the trustee of a listed issue without prior notice to and approval of NASDAQ.

Proposed Rule 5711(i)(iv)(E) states that voting rights shall be as set forth in the prospectus.

Proposed Rules 5711(i)(v) and (vi) describe the requirements for Market Makers and the limitation of NASDAQ liability respecting Trust Units (see below for a general discussion of these requirements).

Commentary .01 to proposed Rule 5711(i) states that NASDAQ requires that Members provide to all purchasers of newly issued Trust Units a prospectus for the series of Trust Units.

Commentary .02 to proposed Rule 5711(i) states that transactions in Trust Units will occur during the trading hours specified in NASDAQ Rule 4120.

Commentary .03 to proposed Rule 5711(i) states that NASDAQ will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Trust Units designated on different underlying investments, commodities, assets and/or portfolios.

The proposed rule change relating to Trust Units is based on NYSEArca Equities Rule 8.500.

Managed Trust Securities

Proposed Rule 5711(j) would adopt listing standards for Managed Trust Securities. Under proposed Rule 5711(j)(i), NASDAQ will consider for

trading, whether by listing or pursuant to unlisted trading privileges, Managed Trust Securities that meet the criteria of the proposed Rule. Proposed Rule 5711(j)(ii) states that the proposed Rule would apply only to Managed Trust Securities. Managed Trust Securities are included within the definition of ''security'' or ''securities'' as such terms are used in the Bylaws and Rules of NASDAQ.

Description

Proposed Rule 5711(j)(iii)(A) defines the term ''Managed Trust Securities'' to mean, unless the context otherwise requires, a security that is registered under the Securities Act of 1933, as amended, and which (1) is issued by a Trust that is a commodity pool as defined in the Commodity Exchange Act and regulations thereunder, and that is managed by a commodity pool operator registered with the Commodity Futures Trading Commission, and which holds long and/or short positions in exchange-traded futures contracts and/or certain currency forward contracts selected by the Trust's advisor consistent with the Trust's investment objectives, which will only include, exchange-traded futures contracts involving commodities, currencies, stock indices, fixed income indices, interest rates and sovereign, private and mortgage or asset backed debt instruments, and/or forward contracts on specified currencies, each as disclosed in the Trust's prospectus as such may be amended from time to time; and (2) is issued and redeemed continuously in specified aggregate amounts at the next applicable net asset value.

Proposed Rule 5711(j)(iii) also includes the following definitions concerning Managed Trust Securities:

• Disclosed Portfolio. Under proposed Rule 5711(j)(iii)(B), the term ''Disclosed Portfolio'' means the identities and quantities of the securities and other assets held by the Trust that will form the basis for the Trust's calculation of net asset value at the end of the business day.

• Intraday Indicative Value. Under proposed Rule 5711(j)(iii)(C), the term ''Intraday Indicative Value'' is the estimated indicative value of a Managed Trust Security based on current information regarding the value of the securities and other assets in the Disclosed Portfolio.

• Reporting Authority. Under proposed Rule 5711(j)(iii)(D), the term ''Reporting Authority'' in respect of a particular series of Managed Trust Securities means NASDAQ, an institution, or a reporting or information service designated by NASDAQ or by the Trust or the exchange that lists a particular series of Managed Trust Securities (if NASDAQ is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, the Intraday Indicative Value; the Disclosed Portfolio; the amount of any cash distribution to holders of Managed Trust Securities, net asset value, or other information relating to the issuance, redemption or trading of Managed Trust Securities. A series of Managed Trust Securities may have more than one Reporting Authority, each having different functions.

Proposed Rule 5711(j)(iv) states that NASDAQ may trade, either by listing or pursuant to unlisted trading privileges, Managed Trust Securities based on the underlying portfolio of exchange-traded futures and/or certain currency forward contracts described in the related prospectus. Each issue of Managed Trust Securities shall be designated as a separate trust or series and shall be identified by a unique symbol.

Initial Listing Standards

Under proposed Rule 5711(j)(v)(A), Managed Trust Securities will be listed and traded on NASDAQ subject to application of the following initial listing criteria:

• NASDAQ will establish a minimum number of Managed Trust Securities required to be outstanding at the time of commencement of trading on NASDAQ.

• NASDAQ will obtain a representation from the issuer of each series of Managed Trust Securities that the net asset value per share for the series will be calculated daily and that the net asset value and the Disclosed Portfolio will be made available to all market participants at the same time.

Continued Listing Standards

Under proposed Rule 5711(j)(v)(B), each series of Managed Trust Securities will be listed and traded on NASDAQ subject to application of the following continued listing criteria:

• The Intraday Indicative Value for Managed Trust Securities will be widely disseminated by one or more major market data vendors at least every 15 seconds during the time when the Managed Trust Securities trade on NASDAQ.

• The Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

• The Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.

Under proposed Rule 5711(j)(v)(B)(3), NASDAQ will consider the suspension of trading in or removal from listing of a series of Managed Trust Securities under any of the following circumstances:

• If, following the initial twelve-month period beginning upon the commencement of trading of the Managed Trust Securities: (A) The Trust has fewer than 50,000 Managed Trust Securities issued and outstanding; (B) the market value of all Managed Trust Securities issued and outstanding is less than $1,000,000; or (C) there are fewer than 50 record and/or beneficial holders of Managed Trust Securities for 30 consecutive trading days;

• If the Intraday Indicative Value for the Trust is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time;

• If the Trust issuing the Managed Trust Securities has failed to file any filings required by the Securities and Exchange Commission or if NASDAQ is aware that the Trust is not in compliance with the conditions of any exemptive order or no-action relief granted by the Securities and Exchange Commission to the Trust with respect to the series of Managed Trust Securities; or

• If such other event shall occur or condition exists which in the opinion of NASDAQ makes further dealings on NASDAQ inadvisable.

Trading Halts

Proposed Rule 5711(j)(v)(B)(4) states that, if the Intraday Indicative Value of a series of Managed Trust Securities is not being disseminated as required, NASDAQ may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption to the dissemination of the Intraday Indicative Value persists past the trading day in which it occurred, NASDAQ will halt trading no later than the beginning of the trading day following the interruption. If a series of Managed Trust Securities is trading on NASDAQ pursuant to unlisted trading privileges, NASDAQ will halt trading in that series as specified in Rule 4120(a) or (b) as applicable. In addition, if NASDAQ becomes aware that the net asset value or the Disclosed Portfolio with respect to a series of Managed Trust Securities is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value or the Disclosed

Portfolio is available to all market participants.

Proposed Rule 5711(j)(v)(B)(5) states that upon termination of a Trust, NASDAQ requires that Managed Trust Securities issued in connection with such Trust be removed from NASDAQ listing. A Trust will terminate in accordance with the provisions of the Trust prospectus.

Proposed Rule 5711(j)(v)(C) states that the term of the Trust shall be as stated in the prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 5711(j)(v)(D) would state that the following requirements apply to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.
- No change is to be made in the trustee of a listed issue without prior notice to and approval of NASDAQ.

Proposed Rule 5711(j)(v)(E) states that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 5711(j)(vi) and (vii) describe the regulatory requirements for registered Market Makers in Managed Trust Securities, and the limitation of NASDAQ liability respecting Managed Trust Securities (see below for a general discussion of these requirements).

Proposed Rule 5711(j)(viii) states that NASDAQ will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Managed Trust Securities.

In addition to the above, the Commentary to proposed Rule 5711(j) includes the following provisions:

Commentary .01 to proposed Rule 5711(j) states that NASDAQ requires that Members provide all purchasers of newly issued Managed Trust Securities a prospectus for the series of Managed Trust Securities.

Commentary .02 to proposed Rule 5711(j) states that transactions in Managed Trust Securities will occur during the trading hours specified in Rule 4120.

Commentary .03 to proposed Rule 5711(j) states that NASDAQ's rules governing the trading of equity securities apply.

Commentary .04 to proposed Rule 5711(j) states that NASDAQ will implement written surveillance procedures for Managed Trust Securities.

Commentary .05 to proposed Rule 5711(j) states that if the Trust's advisor is affiliated with a broker-dealer, the broker-dealer shall erect a ''fire wall'' around the personnel who have access to information concerning changes and adjustments to the Disclosed Portfolio. Personnel who make decisions on the Trust's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Trust portfolio.

The proposed rule change relating to Managed Trust Securities is based on NYSEArca Equities Rule 8.700.

Currency Warrants

Proposed Rule 5711(k) would govern the listing of Currency Warrants. Under proposed Rule 5711(k)(i), the listing of Currency Warrant issues is considered on a case-by-case basis. Currency Warrant issues will be evaluated for listing against the following criteria:

Initial Listing Standards

Proposed Rule 5711(k)(i)(A) requires the warrant issuer to have a minimum tangible net worth in excess of $250,000,000 and otherwise to exceed substantially the earnings requirements set forth in Rule 5405(b).[13] In the alternative, the warrant issuer will be expected to have a minimum tangible net worth of $150,000,000 and otherwise to exceed substantially the earnings requirements set forth in Rule 5405(b), and not to have issued warrants where the original issue price of all the issuer's currency warrant offerings (combined with currency warrant offerings of the issuer's affiliates) listed on a national securities exchange or traded through the facilities of NASDAQ exceeds 25% of the warrant issuer's net worth.

Proposed Rule 5711(k)(i)(B) states that the term must be one to five years from date of issuance.

Proposed Rule 5711(k)(i)(C) requires that there must be a minimum public distribution of 1,000,000 warrants together with a minimum of 400 public holders, and an aggregate market value of $4,000,000. In the alternative, there must be a minimum public distribution of 2,000,000 warrants together with a minimum number of public warrant holders determined on a case by case basis, an aggregate market value of $12,000,000 and an initial warrant price of $6.

[13] Rule 5405(b) sets forth initial listing standards for primary equity securities.

Under proposed Rule 5711(k)(i)(D), the warrants will be cash settled in U.S. dollars.

Under proposed Rule 5711(k)(i)(E), all currency warrants must include in their terms provisions specifying the time by which all exercise notices must be submitted, and that all unexercised warrants that are in the money will be automatically exercised on their expiration date or on or promptly following the date on which such warrants are delisted by NASDAQ (if such warrant issue has not been listed on another organized securities market in the United States).

Under proposed Rule 5711(k)(ii), NASDAQ will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Currency Warrants.

Regulatory Matters

Proposed Rule 5711(k)(iii) describes regulatory matters applicable to Currency Warrants. Specifically:

- No Member shall accept an order from a customer to purchase or sell a Currency Warrant unless the customer's account has been approved for options trading pursuant to NOM Rules Chapter XI, Section 7.
- Suitability. The provisions of NOM Rules Chapter XI, Section 9 shall apply to recommendations in Currency Warrants and the term ''option'' as used therein shall be deemed for purposes of this Rule to include such warrants.
- Discretionary Accounts. Any account in which a Member exercises discretion to trade in Currency Warrants shall be subject to the provisions of NOM Rules, Chapter XI, Section 10 with respect to such trading. For purposes of this Rule, the terms ''option'' and ''options contract'' as used in Chapter XI, Section 10 shall be deemed to include Currency Warrants.
- Supervision of Accounts. NOM Rules, Chapter XI, Section 8 shall apply to all customer accounts of a Member in which transactions in Currency Warrants are effected. The term ''option'' as used in Chapter XI, Section 8 shall be deemed to include Currency Warrants.
- Public Customer Complaints. NOM Rules, Chapter XI, Section 24 shall apply to all public customer complaints received by a Member regarding Currency Warrants. The term ''option'' as used in Chapter XI, Section 24 shall be deemed to include such warrants.
- Communications with Public Customers. Members participating in Currency Warrants shall be bound to comply with the Communications and Disclosures rule of FINRA, as

applicable, as though such rule were part of these Rules.

Trading Halts or Suspensions

Under proposed Rule 5711(k)(iv), trading on NASDAQ in any Currency Warrant will be halted whenever NASDAQ deems such action appropriate in the interests of a fair and orderly market or to protect investors. Trading in Currency Warrants that have been the subject of a halt or suspension by NASDAQ may resume if NASDAQ determines that the conditions which led to the halt or suspension are no longer present, or that the interests of a fair and orderly market are best served by a resumption of trading.

Reporting of Warrant Positions

Proposed Rule 5711(k)(v) would govern reporting of warrant positions. Proposed Rule 5711(k)(v)(A) would require each Member to file with NASDAQ a report with respect to each account in which the Member has an interest, each account of a partner, officer, director, or employee of such Member, and each customer account that has established an aggregate position (whether long or short) of 100,000 warrants covering the same underlying currency, combining for purposes of the proposed Rule: (1) Long positions in put warrants and short positions in call warrants, and (2) short positions in put warrants with long positions in call warrants. The report shall be in such form as may be prescribed by NASDAQ and shall be filed no later than the close of business on the next day following the day on which the transaction or transactions requiring the filing of such report occurred.

Proposed Rule 5711(k)(v)(B) states that whenever a report shall be required to be filed with respect to an account pursuant to the proposed Rule, the Member filing the same must file with NASDAQ such additional periodic reports with respect to such account as NASDAQ may from time to time require.

Proposed Rule 5711(k)(v)(C) states that all reports required by the proposed Rule shall be filed with NASDAQ in such manner and form as prescribed by NASDAQ.

The proposed rule change relating to Currency Warrants is based on NYSEArca Equities Rules 8.3, 8.4, 8.5, 8.6, 8.7, 8.8, 8.9, 8.12, and 8.13.

General Provisions

To the extent not specifically addressed in the respective proposed rules, the following general provisions apply to all of the proposed rules and subject securities affected by the proposed rules (''securities''):

Information Circular

Prior to the commencement of trading, NASDAQ will inform its Members in an Information Circular of the special characteristics and risks associated with trading the securities. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of the securities (and/or that the securities are not individually redeemable); (2) NASDAQ Rule 2310, which imposes suitability obligations on NASDAQ Members with respect to recommending transactions in the securities to customers; (3) how information regarding the Intraday Indicative Value is disseminated; (4) the requirement that Members deliver a prospectus to investors purchasing newly issued securities prior to or concurrently with the confirmation of a transaction; and (5) trading information.

In addition, the Information Circular will advise Members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the securities. Members purchasing securities for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

In addition, the Information Circular will reference that the securities are subject to various fees and expenses described in the registration statement. If applicable, the Information Circular will also reference that the CFTC has regulatory jurisdiction over the trading of futures contracts.

The Information Circular will also disclose the trading hours of the securities and, if applicable, the Net Asset Value (''NAV'') calculation time for the securities. The Information Circular will disclose that information about the securities and the corresponding indexes, if applicable, will be publicly available on the Web site for the securities. The Information Circular will also reference, if applicable, the fact that there is no regulated source of last sale information regarding physical commodities, and that the Commission has no jurisdiction over the trading of physical commodities or futures contracts on which the value of the securities may be based.

The Information Circular will also reference the risks involved in trading the securities during the Opening Process and the Post-Market Session when an updated Intraday Indicative Value will not be calculated or publicly disseminated and, if applicable, the risks involved in trading the securities during the Regular Market Session when the Intraday Indicative Value may be static or based in part on the fluctuation of currency exchange rates when the underlying markets have closed prior to the close of NASDAQ's Regular Market Session.

Limitation of NASDAQ Liability

Neither NASDAQ, any agent of NASDAQ, nor the Reporting Authority (if applicable), shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any applicable underlying index or asset value; the current value of the applicable positions or interests required to be deposited to a Trust, if applicable, in connection with issuance of the securities; net asset value; or any other information relating to the purchase, redemption, or trading of the securities, resulting from any negligent act or omission by NASDAQ, any agent of NASDAQ, or the Reporting Authority (if applicable), or any act, condition or cause beyond the reasonable control of NASDAQ, any agent of NASDAQ, or the Reporting Authority (if applicable), including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in the applicable positions or interests.

Market Maker Accounts

A registered Market Maker in the securities described below must file with NASDAQ, in a manner prescribed by NASDAQ, and keep current a list identifying all accounts for trading in:

- In the case of Commodity-Based Trust Shares, the applicable underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion (''Underlying Commodities'');
- In the case of Currency Trust Shares, the applicable underlying non-U.S. currency, options, futures or options on futures on such currency, or any other derivatives based on such currency, which the registered Market Maker may have or over which it may exercise investment discretion (''Underlying Currencies'');

• In the case of Commodity Index Trust Shares, the applicable physical commodities included in, or options, futures or options on futures on, an index underlying an issue of Commodity Index Trust Shares or any other derivatives based on such index or based on any commodity included in such index, which the registered Market Maker may have or over which it may exercise investment discretion (''Underlying Commodity Index Assets'');

• In the case of Commodity Futures Trust Shares, the applicable underlying commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion (''Underlying Commodity Futures'');

• In the case of Partnership Units, the applicable underlying asset or commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion (''Underlying Partnership Unit Assets'');

• In the case of Trust Units, the applicable underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion (''Underlying Trust Unit Assets''); and

• In the case of Managed Trust Securities, the underlying commodity or applicable currency, related futures or options on futures, or any other related derivatives, which a registered Market Maker may have or over which it may exercise investment discretion (''Underlying Managed Trust Assets'').

No registered Market Maker in the above mentioned securities shall trade in the respective Underlying Commodities, Underlying Currencies, Underlying Commodity Index Assets, Underlying Commodity Futures, Underlying Partnership Unit Assets, Underlying Trust Unit Assets, and/or the Underlying Managed Trust Assets (collectively, ''Underlying Assets'') in an account in which a market maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to NASDAQ.

In addition to the existing obligations under NASDAQ rules regarding the production of books and records (*see, e.g.,* Rule 4625), a registered Market Maker in the above mentioned securities is required to make available to NASDAQ such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the applicable Underlying Assets as may be requested by NASDAQ.

Trading Rules

NASDAQ deems the securities to be equity securities, thus rendering trading in the securities subject to NASDAQ's existing rules governing the trading of equity securities. The securities will trade on NASDAQ from 8 a.m. to 8 p.m. E.T. NASDAQ has appropriate rules to facilitate transactions in the securities during all trading sessions. The minimum price increment for quoting and entry of orders in equity securities traded on NASDAQ is $0.01, with the exception of securities that are priced less than $1.00 for which the minimum price increment for order entry is $0.0001.[14]

Surveillance

NASDAQ believes that its surveillance procedures are adequate to address any concerns about the trading of the securities on NASDAQ. Trading of the securities on NASDAQ will be subject to FINRA's surveillance procedures for derivative products.[15] NASDAQ may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members or affiliates of the ISG.[16]

In addition, to the extent that a fund invests in futures contracts, not more than 10% of the weight of such futures contracts in the aggregate shall consist of components whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. NASDAQ has a general policy prohibiting the distribution of material, non-public information by its employees.

As a general matter, NASDAQ has regulatory jurisdiction over its Members and their associated persons, which includes any person or entity controlling a Member, as well as a subsidiary or affiliate of a Member that is in the securities business. A subsidiary or affiliate of a Member that does business only in commodities or futures contracts would not be subject to NASDAQ jurisdiction, but NASDAQ could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a Member.

Trading Halts

With respect to trading halts, in addition to the halt requirements in the proposed rules, NASDAQ may consider all relevant factors in exercising its discretion to halt or suspend trading in the securities. Trading in the securities may be halted because of market conditions or for reasons that, in the view of NASDAQ, make trading in the securities inadvisable. These may include: (1) The extent to which trading in the underlying asset or assets is not occurring; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in the securities will be subject to trading halts caused by extraordinary market volatility pursuant to NASDAQ's ''circuit breaker'' Rule 4120(a)(11) or by the halt or suspension of the trading of the current underlying asset or assets.

If the applicable Intraday Indicative Value, value of the underlying index, or the value of the underlying asset or assets (*e.g.,* securities, commodities, currencies, futures contracts, or other assets) is not being disseminated as required, NASDAQ may halt trading during the day in which such interruption to the dissemination occurs. If the interruption to the dissemination of the applicable Intraday Indicative Value, value of the underlying index, or the value of the underlying asset or assets persists past the trading day in which it occurred, NASDAQ will halt trading no later than the beginning of the trading day following the interruption. In addition, if NASDAQ becomes aware that the net

[14] *See, e.g.,* Rule 4751.

Regulation NMS Rule 612, Minimum Pricing Increment, provides:

a. No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.01 if that bid or offer, order, or indication of interest is priced equal to or greater than $1.00 per share.

b. No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.0001 if that bid or offer, order, or indication of interest is priced less than $1.00 per share.

c. The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, quotation, or order, or any class or classes of persons, securities, quotations, or orders, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

17 CFR 242.612.

[15] FINRA surveils trading on NASDAQ pursuant to a regulatory services agreement. NASDAQ is responsible for FINRA's performance under this regulatory services agreement.

[16] For a list of the current members and affiliate members of ISG, see *www.isgportal.com.*

asset value with respect to a series of the securities is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value is available to all market participants.

Suitability

Currently, NASDAQ Rule 2310 governs Recommendations to Customers (Suitability), Fair Dealing with Customers, Suitability Obligations to Institutional Customers, and Direct Participation Programs.

Prior to the commencement of trading of any inverse, leveraged, or inverse leveraged securities, NASDAQ will inform its Members of the suitability requirements of NASDAQ Rule 2310 in an Information Circular. Specifically, Members will be reminded in the Information Circular that, in recommending transactions in these securities, they must have a reasonable basis to believe that (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such Member, and (2) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in the securities. In connection with the suitability obligation, the Information Circular will also provide that members must make reasonable efforts to obtain the following information: (1) The customer's financial status; (2) the customer's tax status; (3) the customer's investment objectives; and (4) such other information used or considered to be reasonable by such Member or registered representative in making recommendations to the customer.

In addition, FINRA has implemented increased sales practice and customer margin requirements for FINRA members applicable to inverse, leveraged, and inverse leveraged securities and options on such securities, as described in FINRA Regulatory Notices 09–31 (June 2009), 09–53 (August 2009) and 09–65 (November 2009) (''FINRA Regulatory Notices''). Members that carry customer accounts will be required to follow the FINRA guidance set forth in the FINRA Regulatory Notices. The Information Circular will reference the FINRA Regulatory Notices regarding sales practice and customer margin requirements for FINRA members applicable to inverse, leveraged, and inverse leveraged securities and options on such securities.

NASDAQ notes that, for such inverse, leveraged, and inverse leveraged securities, the corresponding funds seek leveraged, inverse, or leveraged inverse returns on a daily basis, and do not seek to achieve their stated investment objective over a period of time greater than one day because compounding prevents the funds from perfectly achieving such results. Accordingly, results over periods of time greater than one day typically will not be a leveraged multiple (+200%), the inverse (−100%) or a leveraged inverse multiple (−200%) of the period return of the applicable benchmark and may differ significantly from these multiples. NASDAQ's Information Circular, as well as the applicable registration statement, will provide information regarding the suitability of an investment in such securities.

2. Statutory Basis

The proposed rule change, as amended, is consistent with section 6(b) of the Act,[17] in general, and furthers the objectives of section 6(b)(5),[18] particularly, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, NASDAQ believes that the proposed rule change should enhance depth and liquidity, and should promote narrower markets in the subject securities. Furthermore, NASDAQ's listing requirements as proposed herein are at least as stringent as those of any other national securities exchange and, consequently, the proposed rule change is consistent with the protection of investors and the public interest.

Additionally, the proposal is designed to prevent fraudulent and manipulative acts and practices, as all of the proposed new products are subject to existing NASDAQ trading rules, together with specific requirements for registered market makers, books and record production, surveillance procedures, suitability and prospectus requirements, and requisite NASDAQ approvals, all set forth above.

The proposal is also designed to promote just and equitable principles of trade by way of initial and continued listing standards which, if not maintained, will result in the discontinuation of trading in the affected products. These requirements, together with the applicable NASDAQ equity trading rules (which apply to the proposed products), ensure that no investor would have an unfair advantage over another respecting the trading of the subject products. On the contrary, all investors will have the same access to, and use of, information concerning the specific products and trading in the specific products, all to the benefit of public customers and the marketplace as a whole.

Furthermore, the proposal is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system by adopting listing standards that will lead ultimately to the trading of the proposed new products on NASDAQ, just as they are currently traded on other exchanges. NASDAQ believes that individuals and entities permitted to make markets on NASDAQ in the proposed new products should enhance competition within the mechanism of a free and open market and a national market system, and customers and other investors in the national market system should benefit from more depth and liquidity in the market for the proposed new products.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

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–2012–013 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–2012–013. 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 Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2012–013 and should be submitted on or before March 1, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2994 Filed 2–8–12; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66321; File No. SR–NYSEArca–2011–95]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change Relating to Listing and Trading of the PIMCO Total Return Exchange Traded Fund Under NYSE Arca Equities Rule 8.600

February 3, 2012.

I. Introduction

On December 13, 2011, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') 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 to list and trade shares (''Shares'') of the PIMCO Total Return Exchange Traded Fund (''Fund'') under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on December 22, 2011.[3] The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by PIMCO ETF Trust (''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[4] The investment manager to the Fund is Pacific Investment Management Company LLC (''PIMCO'' or ''Adviser''). PIMCO Investments LLC serves as the distributor for the Fund, and State Street Bank & Trust Co. serves as the custodian and transfer agent for the Fund.

The Adviser is affiliated with a broker-dealer and has implemented a ''fire wall'' with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio. If PIMCO elects to hire a sub-adviser for the Fund that is also affiliated with a broker-dealer, such sub-adviser will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio.[5]

Description of the Fund

The Fund will seek maximum total return, consistent with preservation of capital and prudent investment management. The Fund will invest under normal market circumstances[6] at least 65% of its total assets in a diversified portfolio of Fixed Income Instruments[7] of varying maturities. The Fund will invest primarily (under normal market circumstances, at least 65% of its total assets) in investment-grade Fixed Income Instruments, but may invest up to 10% of its total assets in high-yield Fixed Income Instruments

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65988 (December 16, 2011), 76 FR 79741 (''Notice'').

[4] The Trust is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). On July 7, 2011, the Trust filed with the Commission Post-Effective Amendment No. 30 to Form N–1A relating to the Fund (File Nos. 333–155395 and 811–22250) (''Registration Statement''). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 28993 (November 10, 2009) (File No. 812–13571) (''Exemptive Order'').

[5] *See* Commentary .06 to NYSE Arca Equities Rule 8.600. In the event (a) the Adviser or any sub-adviser becomes newly affiliated with a broker-dealer, or (b) any new manager, adviser, or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

[6] The term ''under normal market circumstances'' includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[7] ''Fixed Income Instruments'' on which the Fund will focus will be: Debt securities issued or guaranteed by the U.S. Government, its agencies or government-sponsored enterprises (''U.S. Government Securities''); corporate debt securities of U.S. and non-U.S. issuers, including convertible securities and corporate commercial paper; mortgage-backed and other asset-backed securities; inflation-indexed bonds issued both by governments and corporations; structured notes, including hybrid or ''indexed'' securities and event-linked bonds; bank capital and trust preferred securities; loan participations and assignments; delayed funding loans and revolving credit facilities; bank certificates of deposit, fixed time deposits and bankers' acceptances; repurchase agreements on Fixed Income Instruments and reverse repurchase agreements on Fixed Income Instruments; debt securities issued by states or local governments and their agencies, authorities and other government-sponsored enterprises; obligations of non-U.S. governments or their subdivisions, agencies and government-sponsored enterprises; and obligations of international agencies or supranational entities.

Securities issued by U.S. Government agencies or government-sponsored enterprises may not be guaranteed by the U.S. Treasury.

(''junk bonds'') rated B3 through Ba1 by Moody's Investors Service, Inc., or equivalently rated by Standard & Poor's Ratings Services or Fitch, Inc., or, if unrated, determined by PIMCO to be of comparable quality. The average portfolio duration of the Fund normally will vary within two years of the duration of the Barclays Capital U.S. Aggregate Index, which as of May 31, 2011, was 5.19 years.

In selecting Fixed Income Instruments for the Fund, PIMCO will develop an outlook for interest rates, currency exchange rates, and the economy, analyze credit and call risks, and use other security selection techniques. The proportion of the Fund's assets committed to investments in Fixed Income Instruments with particular characteristics (such as quality, sector, interest rate, or maturity) will vary based on PIMCO's outlook for the U.S. economy and the economies of other countries in the world, the financial markets, and other factors.

PIMCO will attempt to identify areas of the bond market that are undervalued relative to the rest of the market. PIMCO will identify these areas by grouping Fixed Income Instruments into sectors, such as money markets, governments, corporates, mortgages, asset-backed and international. Once investment opportunities are identified, PIMCO will shift assets among sectors depending upon changes in relative valuations and credit spreads.

The Fund may invest in debt securities and instruments that are economically tied to foreign countries. PIMCO generally considers an instrument to be economically tied to a non-U.S. country if the issuer is a foreign government (or any political subdivision, agency, authority or instrumentality of such government), or if the issuer is organized under the laws of a non-U.S. country. In the case of certain money market instruments, such instruments will be considered economically tied to a non-U.S. country if either the issuer or the guarantor of such money market instrument is organized under the laws of a non-U.S. country.

The Fund may invest up to 30% of its total assets in securities denominated in foreign currencies and may invest beyond this limit in U.S. dollar-denominated securities of foreign issuers, subject to the Fund's 10% of total assets limit on investments in preferred stock, convertible securities, and other equity related securities.[8] The Fund will normally limit its foreign currency exposure (from non-U.S. dollar-denominated securities or currencies) to 20% of its total assets.

The Fund may invest up to 15% of its total assets in securities and instruments that are economically tied to emerging market countries. PIMCO has broad discretion to identify countries that it considers to qualify as emerging markets but generally considers an instrument to be economically tied to an emerging market country if the issuer or guarantor is a government of an emerging market country (or any political subdivision, agency, authority or instrumentality of such government), if the issuer or guarantor is organized under the laws of an emerging market country, or if the currency of settlement of the security is a currency of an emerging market country. While corporate debt securities and debt securities economically tied to an emerging market country generally must have $200 million or more par amount outstanding and significant par value traded to be considered as an eligible investment for the Fund, at least 80% of issues of such securities held by the Fund must have $200 million or more par amount outstanding.

The Fund may invest, without limitation, in mortgage- or asset-backed securities. The Fund may purchase or sell debt and equity securities on a when-issued, delayed delivery, or forward commitment basis. In addition, the Fund may, without limitation, seek to obtain market exposure to the securities in which it primarily invests by entering into a series of purchase and sale contracts or by using other investment techniques (such as buy backs or dollar rolls). The ''total return'' sought by the Fund will consist of income earned on the Fund's investments, plus capital appreciation, if any, which generally arises from decreases in interest rates, foreign currency appreciation, or improving credit fundamentals for a particular sector or security.

The Fund may invest in Brady Bonds, which are debt securities created through the exchange of existing commercial bank loans to sovereign entities for new obligations in connection with a debt restructuring, as well as in municipal bonds. The types of municipal bonds in which the Fund may invest include municipal lease obligations, municipal general obligation bonds, municipal cash equivalents, and pre-refunded and escrowed to maturity municipal bonds. The Fund may also invest in industrial development bonds, which are municipal bonds issued by a government agency on behalf of a private sector company and which, in most cases, are not backed by the credit of the issuing municipality. The Fund may invest in pre-refunded municipal bonds, which are tax-exempt bonds that have been refunded to a call date on or before the final maturity of principal and remain outstanding in the municipal market. Furthermore, the Fund may invest in securities issued by entities whose underlying assets are municipal bonds.

The Fund may invest in Lower Tier II, Upper Tier II, and Tier I bank capital securities, which are issued by banks to help fulfill their regulatory capital requirements. Bank capital is generally, but not always, investment grade. The Fund may invest in variable and floating rate debt securities, floating rate debt instruments, and engage in credit spread trades. The Fund may make short sales as part of its overall portfolio management strategies or to offset a potential decline in value of a security.

Other Portfolio Holdings

The Fund may engage in foreign currency transactions on a spot (cash) basis and enter into forward foreign currency exchange contracts. The Fund may enter into these contracts to hedge against foreign exchange risk, to increase exposure to a foreign currency, or to shift exposure to foreign currency fluctuations from one currency to another. The Fund may use one currency (or a basket of currencies) to hedge against adverse changes in the value of another currency (or a basket of currencies) when exchange rates between the two currencies are positively correlated. The Fund will segregate or ''earmark'' assets determined to be liquid by PIMCO in accordance with the procedures established by the Fund's Board of Trustees (or, as permitted by applicable law, enter into certain offsetting positions) to cover its obligations under forward foreign currency exchange contracts entered into for non-hedging purposes.

If PIMCO believes that economic or market conditions are unfavorable to investors, PIMCO may temporarily invest up to 100% of the Fund's assets in certain defensive strategies, including holding a substantial portion of the Fund's assets in cash, cash equivalents, or other highly rated, short-term debt securities, including debt securities issued or guaranteed by the U.S. government, its agencies or instrumentalities, and affiliated money market and/or short-term bond funds.

[8] The Fund will not invest in any non-U.S registered equity securities, except if such securities are traded on exchanges that are members of the Intermarket Surveillance Group (''ISG'').

The Fund may invest in, to the extent permitted by Section 12(d)(1)(A) of the 1940 Act, other affiliated and unaffiliated funds, such as open-end or closed-end management investment companies, including other exchange traded funds, provided that the Fund's investment in units or shares of investment companies and other open-end collective investment vehicles will not exceed 10% of the Fund's net assets. The Fund may invest securities lending collateral in one or more money market funds to the extent permitted by Rule 12d1–1 under the 1940 Act, including series of PIMCO Funds, an affiliated open-end management investment company managed by PIMCO.

The Fund may invest up to 10% of its total assets in preferred stock, convertible securities and other equity related securities. Consistent with the Exemptive Order, the Fund will not invest in options contracts, futures contracts, or swap agreements.

The Fund may not concentrate its investments in a particular industry, as that term is used in the 1940 Act, and as interpreted, modified, or otherwise permitted by regulatory authority having jurisdiction from time to time. The Fund may not, with respect to 75% of the Fund's total assets, purchase the securities of any issuer, except securities issued or guaranteed by the U.S. government or any of its agencies or instrumentalities, if, as a result (i) more than 5% of the Fund's total assets would be invested in the securities of that issuer, or (ii) the Fund would hold more than 10% of the outstanding voting securities of that issuer. For the purpose of this restriction, each state and each separate political subdivision, agency, authority, or instrumentality of such state, each multi-state agency or authority, and each guarantor are treated as separate issuers of municipal bonds.

The Fund may hold up to 15% of its net assets in illiquid securities. Certain financial instruments, including, but not limited to, Rule 144A securities, loan participations and assignments, delayed funding loans, revolving credit facilities, and fixed- and floating-rate loans will be included in the 15% limitation on illiquid securities.

The Fund intends to qualify annually and elect to be treated as a regulated investment company under Subchapter M of the Internal Revenue Code. The Fund will not invest in any non-U.S registered equity securities, except if such securities are traded on exchanges that are ISG members. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, while the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple of the Fund's broad-based securities market index.

Additional information regarding the Trust, Fund, Shares, Fund's investment strategies, risks, creation and redemption procedures, fees, portfolio holdings and disclosure policies, distributions and taxes, and information relating to the daily disclosure of the Fund's holdings, Portfolio Indicative Value (''PIV''), and net asset value (''NAV''), among others, can be found in the Notice and the Registration Statement, as applicable.[9]

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act[10] and the rules and regulations thereunder applicable to a national securities exchange.[11] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[12] which requires, among other things, that the Exchange's rules 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 notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[13] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the PIV, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session.[14] On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Trust's Web site will disclose the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of the NAV at the end of the business day.[15] The NAV of the Fund's Shares will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange (''NYSE''), generally 4 p.m. Eastern time (''E.T.'') on any business day. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The Trust's Web site will also include a form of the prospectus for the Fund, information relating to NAV, and other quantitative and trading information. Moreover, a basket composition file, which includes the security names and share quantities required to be delivered in exchange for the Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the National Securities Clearing Corporation.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market

[9] *See* Notice and Registration Statement, *supra* notes 3 and 4, respectively.

[10] 15 U.S.C. 78f.

[11] 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).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[14] According to the Exchange, several major market data vendors display and/or make widely available PIVs published on the CTA or other data feeds.

[15] On a daily basis, the Adviser will disclose for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio. The Web site information will be publicly available at no charge.

participants at the same time.[16] In addition, the Exchange will halt trading in the Shares under the specific circumstances set forth in NYSE Arca Equities Rule 8.600(d)(2)(D), and may halt trading in the Shares if trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[17] The Exchange will consider the suspension of trading in or removal from listing of the Shares if the PIV is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time.[18] The Exchange represents that the Adviser is affiliated with a broker-dealer, and such Adviser has implemented a ''fire wall'' with respect to the broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio.[19] Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.[20] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Commission also notes that the Exchange may obtain information via the ISG from other exchanges that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

The Exchange further represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange's surveillance procedures applicable to derivative products, which include Managed Fund Shares, are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Act,[21] as provided by NYSE Arca Equities Rule 5.3.

(6) The Fund will not: (a) Hold more than 15% of its net assets in illiquid securities, including, but not limited to, Rule 144A securities, loan participations and assignments, delayed funding loans, revolving credit facilities, and fixed- and floating-rate loans; (b) pursuant to the terms of the Exemptive Order, invest in options contracts, futures contracts, or swap agreements; or (c) invest in any non-U.S. registered equity securities, except if such securities are traded on exchanges that are ISG members.

(7) The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

(8) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[22] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change (SR–NYSEArca–2011–95) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–2944 Filed 2–8–12; 8:45 am]

BILLING CODE 8011–01–P

[16] *See* NYSE Arca Equities Rule 8.600(d)(1)(B).

[17] With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

[18] *See* NYSE Arca Equities Rule 8.600(d)(2)(C)(ii).

[19] *See supra* note 5 and accompanying text. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[20] *See* NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

[21] *See* 17 CFR 240.10A–3.

[22] 15 U.S.C. 78f(b)(5).

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents,

including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCRDP, Attn: Reports Clearance Officer, 107 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: (410) 966–2830, Email address: *OPLM.RCO@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than April 9, 2012. Individuals can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at (410) 965–8783 or by writing to the above email address.

1. *Request for Withdrawal of Application—20 CFR 404.640—0960–0015.* Form SSA–521 documents the information SSA needs to process the withdrawal of an application for benefits. A paper SSA–521 is the preferred instrument for executing a withdrawal request; however, any written request for withdrawal signed by the claimant or a proper applicant on the claimant's behalf will suffice. Individuals who wish to withdraw their applications for benefits complete Form SSA–521, or sign the completed form for each request to withdraw. SSA uses the information from the SSA–521 to process the request for withdrawal. The respondents are applicants for Retirement, Survivors, Disability, and Health Insurance benefits.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–521	39,000	1	5	3,250

2. *Request for Reconsideration—Disability Cessation—20 CFR 404.909, 416.1409—0960–0349.* SSA uses Form SSA–789–U4 to arrange for a hearing or to prepare a decision based on the evidence of record. Specifically, claimants or their representatives use Form SSA–789–U4 to (1) ask SSA to reconsider a determination; (2) indicate if they wish to appear at a disability hearing; (3) submit any additional information or evidence for use in the reconsidered determination; and (4) indicate if they will need an interpreter for the hearing. The respondents are applicants or claimants for Social Security benefits or Supplemental Security Income payments.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–789–U4	30,000	1	13	6,500

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collection would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than March 12, 2012. Individuals can obtain copies of the OMB clearance package by calling the SSA Reports Clearance Officer at (410) 965–8783 or by writing to the above email address.

Workers' Compensation/Public Disability Questionnaire—20 CFR 404.408—0960–0247. Section 224 of the Social Security Act provides for the reduction of disability insurance benefits (DIB) when the combination of DIB and any workers' compensation (WC) or certain Federal, State or local public disability benefits (PDB) exceeds 80 percent of the worker's pre-disability earnings. SSA uses Form SSA–546 to collect the data necessary to determine if the worker's receipt of WC or PDB payments should cause a reduction of DIB. The respondents are applicants for title II DIB.

Type of Request: Revision of an OMB-approved information collection.

Collection instrument	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–546 (Paper form)	2,000	1	15	500
MCS	248,000	1	15	62,000
Totals	250,000	.....	.....	62,500

Dated: February 6, 2012.

Faye Lipsky,

Reports Clearance Officer, Office of Regulations and Reports Clearance, Social Security Administration.

[FR Doc. 2012–2962 Filed 2–8–12; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2012—0014]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before April 9, 2012.

ADDRESSES: Comments must refer to the docket notice numbers cited at the beginning of this notice and be submitted to Docket Management, Room W12–140, Ground Floor, 1200 New Jersey Ave. SE., Washington, DC 20590 by any of the following methods.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Docket Management Facility; US Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Hand Delivery/Courier:* 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 am and 5 pm, Monday through Friday, except Federal Holidays. Telephone: 1–800 647–5527.
- *Fax:* 202 493–2251.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

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

Docket: For access to the docket to read background documents or comments received, go to the street address listed above. The internet access to the docket will be at *http://www.regulations.gov*. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection of information may be obtained at no charge from Mr. Hisham Mohamed, NHTSA, 1200 New Jersey Ave. SE., West Building, Room W43–437, NVS–131, Washington, DC 20590.

Mr. Mohamed's telephone number is (202) 366–0307. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) how to enhance the quality, utility, and clarity of the information to be collected;

(iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collection of information for which the agency is seeking approval from OMB:

Title: 49 CFR 575—Consumer Information Regulations (sections 103 and 105).

OMB Control Number: 2127–0049.

Form Number: None.

Affected Public: Motor vehicle manufacturers of light trucks and utility vehicles.

Requested Expiration Date of Approval: Three years from approval date.

Abstract: NHTSA must ensure that motor vehicle manufacturers comply with 49 CFR Part 575, Consumer Information Regulation part 575.103, Truck-camper loading and Part 575.105 Utility Vehicles. Part 575.103 requires that manufacturers of light trucks that are capable of accommodating slide-in campers provide information on the cargo weight rating and the longitudinal limits within which the center of gravity for the cargo weight rating should be located. Part 575.105 requires that manufacturers of utility vehicles affix a sticker in a prominent location alerting drivers that the particular handling and maneuvering characteristics of utility vehicles require special driving practices when these vehicles are operated.

Estimated Annual Burden: 300 hours.

Number of Respondents: 15.

Based on prior years' manufacturer submissions, the agency estimates that 15 responses will be submitted annually. Currently 12 light truck manufacturers comply with 49 CFR part 575. These manufacturers file one response annually and submit a additional response when they introduce a new model. Changes are rarely filed with the agency, but we estimate that at least three manufacturers will alter their information because of model changes. The light truck manufacturers gather only pre-existing data for the purposes of this regulation. Based on previous years' manufacturer information, the agency estimates that light truck manufacturers use a total of 20 hours to gather and arrange the data in its proper format (9 hours), to distribute the information to its dealerships and attach labels to light trucks that are capable of accommodating slide-in campers (4 hours), and to print the labels and

utility vehicle information in the owner's manual or a separate document included with the owner's manual (7 hours). The estimated annual burden hour is 300 hours. This number reflects the total responses (15) times the total hours (20). Prior years' manufacturer information indicates that it takes an average of $35.00 per hour for professional and clerical staff to gather data, distribute and print material. Therefore, the agency estimates that the cost associated with the burden hours is $10,500 ($35.00 per hour x 300 burden hours).

Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–3012 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket No. NHTSA–2012–0012]

Agency Requests Approval To Extend Information Collection(s): Section 410 Alcohol Impaired Driving Countermeasures

AGENCY: National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: The Department of Transportation (DOT) invites public comments about our intention to request the Office of Management and Budget (OMB) approval to extend information collection. The collection involves preparation of certifications, and documents detailing how specific grant criteria will be met. The information to be collected will be used to and/or is necessary because it is required under 23 CFR part 1313, to apply for Section 410 grant funds. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995, Public Law 104–13.

DATES: Written comments should be submitted by April 9, 2012.

ADDRESSES: You may submit comments identified by Docket No. DOT–NHTSA–2012–0012 through one of the following methods:

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

Fax: 1 (202) 493–2251.

Mail or Hand Delivery: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jackie Schraf, (202) 366–3990, NHTSA, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC, 20590.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2127–0021.

Title: 23 CFR, Part 1313, Alcohol Impaired Driving Countermeasures.

Form Numbers: NA.

Type of Review: Collection extension.

Background: An impaired driving incentive grant is available to States that have an alcohol fatality rate of 0.5 or less per 100 million vehicle miles traveled as determined by using the most recent Fatality Analysis Reporting System (FARS) data or that are one of the ten States that have the highest alcohol related fatality rates as determined by using the most recent FARS data. States designated as a high fatality rate State must submit a comprehensive plan for conducting high visibility enforcement and a report on the previous years activities.

States may also qualify through meeting specified program criteria. To demonstrate compliance using program criteria, a State must submit an application that shows how they meet the specified criteria. Three of eight criteria are required in FY 2006, four of eight criteria are required in FY 2007 and five of eight criteria are required in FY 2008, FY 2009 and beyond. A State designated as a high fatality rate State may also submit an application to qualify by meeting specified program criteria.

Respondents: 50 States, District of Columbia and Puerto Rico.

Estimated Number of Respondents: 47–50 States, District of Columbia and Puerto Rico.

Estimated Number of Responses: 1–2 applications.

Estimated Total Annual Burden: 1350 hours.

Estimated Frequency: One time per year.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Mary D. Gunnels,

Associate Administrator, Regional Operations and Program Delivery.

[FR Doc. 2012–2935 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2011–0082; Notice 1]

Volkswagen Group of America, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Receipt of petition.

SUMMARY: Volkswagen Group of America, Inc., (Volkswagen),[1] has determined that certain model year 2011 Volkswagen Jetta passenger cars equipped with a TDI engine and Goodyear Eagle Vector 205/55 R16 94V XL tires, do not fully comply with paragraph S4.2.1.2 of Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire selection and rims and motor home/recreation vehicle trailer load carrying capacity information for motor vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or less.* Volkswagen has filed an appropriate report pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports* (dated June 7, 2011).

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Volkswagen has

[1] Volkswagen Group of America, Inc. (Volkswagen) is a motor vehicle manufacturer and importer incorporated under the laws of the state of New Jersey.

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 Volkswagen'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 463 model year 2011 Volkswagen Jetta passenger cars equipped with a TDI engine and Goodyear Eagle Vector 205/55 R16 94V XL tires, and manufactured between March 18, 2011 and March 23, 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 463 [2] vehicles that Volkswagen no longer controlled at the time that it determined that a noncompliance existed in the subject vehicles.

Paragraph S4.2.1.2 of FMVSS No. 110 requires:

S4.2.1.2 The vehicle normal load on the tire shall not be greater than 94 percent of the load rating at the vehicle manufacturer's recommended cold inflation pressure for that tire.

Volkswagen explains that the noncompliance is that the recommended cold tire inflation pressure stated on the tire and loading information label is less than that calculated as prescribed by paragraph S4.2.1.2 of FMVSS No. 110 for the Goodyear Eagle Vector 205/55 R16 94V XL tires installed on the subject vehicles. The tire and loading information label shows a recommended tire pressure of 33 psi, however, it should read 34 psi.

Volkswagen argues that this noncompliance is inconsequential to motor vehicle safety because the noncompliant vehicle placards do not create an unsafe condition and all other labeling requirements have been met.

In summation, Volkswagen believes that the described noncompliance of its tire and loading information labels to meet the requirements of FMVSS No. 110 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.

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 a.m. to 5 p.m. 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 12, 2012.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: February 3, 2012.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2012–3010 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–59–P

[2] Volkswagen's petition, which was filed under 49 CFR Part 556, requests an agency decision to exempt Volkswagen as a vehicle manufacturer from the notification and recall responsibilities of 49 CFR part 573 for the 463 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 Volkswagen notified them that the subject noncompliance existed.

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA–2012–0021]

Pipeline Safety: Notice of Public Meetings on Improving Pipeline Leak Detection System Effectiveness and Understanding the Application of Automatic/Remote Control Valves

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of workshop.

SUMMARY: The recent passage of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 has set forth several mandates and reports to Congress that PHMSA must complete. Reports on leak detection and automatic/remote control valves are among these mandates. PHMSA is sponsoring these public meetings to further study how to encourage operators to expand the use of leak detection systems (LDS) and improve system effectiveness on the Nation's pipeline infrastructure and how remote control and automatic control valves can be installed to lessen the volume of natural gas and hazardous liquid released during catastrophic pipeline events.

DATES: The public meeting on Improving Pipeline Leak Detection System Effectiveness will be held on Tuesday, March 27, 2012, from 8 a.m. to 6 p.m. EDT. The public meeting on Understanding the Application of Automatic and Remote Control Valves will be held on Wednesday, March 28, 2012, from 8 a.m. to 4 p.m. EDT. Name badge pick-up and on-site registration will be available starting at 7:30 a.m.

each day. Refer to the meeting Web site for updated registration information, agenda and times at *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=75.* Please note that both meetings will be webcast in their entirety. The webcast link will be posted on the above meeting page prior to the event. All presentations will be available on the meeting Web site within days following these public meetings.

ADDRESSES: The public meetings will be held at The Hilton Washington, DC/Rockville Hotel, 1750 Rockville Pike, Rockville, MD 20852, Phone: 301–468–1100, Fax: 301–468–0308, *http://www1.hilton.com/en_US/hi/hotel/IADMRHF–Hilton-Washington-DC–Rockville-Hotel-Executive-Meeting-Ctr-Maryland/index.do.* Please contact the Hilton to reserve a room using ''U.S. Department of Transportation'' or ''USD'' for the room block name at the rate of $224/night. This room rate is available for the night of March 26 through the night of March 28 until the reserved rooms at this rate are taken. Please also contact the Hilton for information on facilities or services for individuals with disabilities or to request special assistance during these public meetings. The meeting room will be posted at the hotel on the days of the workshop.

Public Meetings Registration: Please visit *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=75* and click on these public meetings to register.

FOR FURTHER INFORMATION CONTACT: Patricia Jasion at 202–366–4774, or by email at *patricia.jasion@DOT.gov.*

SUPPLEMENTARY INFORMATION: PHMSA will be holding two public meetings designed to provide an open forum for exchanging information on the challenges associated with LDS and automatic/remote control valves. Specifically, these public meetings will facilitate individual panel discussions for the following objectives:

March 27

Improving Pipeline Leak Detection System Effectiveness

1. Inform the public, Federal and state regulatory agencies and legislators in Congress on state-of-the-art leak detection systems and the practical considerations involved with deploying and maintaining these systems.

2. Identify the constraints and issues with deploying systems on existing and new construction pipelines.

3. Collect public input that will help guide a PHMSA study investigating and documenting detection system challenges and considerations. Information from that study will help craft a future report to Congress.

March 28

Understanding the Application of Automatic Control and Remote Control Valves

1. Gather and disseminate information on the state-of-the-art of automatic/remote control valve operations on the practical considerations involved with installing, operating and maintaining these valves.

2. Identify the constraints with deploying systems on existing versus new construction pipelines.

3. Collect public input that will help guide a PHMSA study investigating and documenting automatic control and remote control valve challenges and considerations. Information from that final report will help craft a future report to Congress.

Preliminary Agenda for the Public Meeting on Improving Pipeline Leak Detection System Effectiveness—Tuesday, March 27

8 a.m. Welcome/Event Objectives/Importance
8:10 a.m. Panel 1: Considerations for Hazardous Liquid Pipeline Leak Detection Systems
10:10 a.m. Break
10:25 a.m. Panel 2: Hazardous Liquid Pipeline Leak Detection System Capabilities and Research
12:30 p.m. Lunch
1:30 p.m. Panel 3: Considerations for Natural Gas Pipeline Leak Detection Systems
3:30 p.m. Break
3:45 p.m. Panel 4: Natural Gas Pipeline Leak Detection System Capabilities and Research
5:45 p.m. Wrap-Up/Next Steps
6 p.m. Adjournment

Preliminary Agenda for the Public Meeting on Understanding the Application of Automatic Control and Remote Control Valves—Wednesday, March 28

8 a.m. Welcome/Event Objectives/Importance
8:10 a.m. Panel 1: Valve Considerations for Hazardous Liquid Pipelines
10:10 a.m. Break
10:25 a.m. Panel 2: Valve Considerations for Natural Gas Transmission Pipelines
12:30 p.m. Lunch
2 p.m. Panel 3: Valve Capabilities, Limitations and Research
4 p.m. Wrap-Up/Next Steps
4:15 p.m. Adjournment

Please note that there are objectives for each panel and that they are posted on the meeting Web site. This information will explicitly illustrate the rigor of considerations regarding the subject matter and how they tie to the event goals.

Webcasting: Both public meetings will be webcasted. Please refer to this event listed on *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=75* for more information.

Issued in Washington, DC on February 2, 2012.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2012–2929 Filed 2–8–12; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2011–87

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2011–87, Alabama Low-Income Housing Relief Credit.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Alabama Low-Income Housing Relief Credit.

OMB Number: 1545–2220.

Notice Number: Notice 2011–87.

Abstract: The Internal Revenue Service is suspending certain requirements under § 42 of the Internal Revenue Code for low-income housing

credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by severe storms, tornadoes, straight-line winds and flooding in Alabama beginning on April 15, 2011.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 600.

Estimated Average Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 150.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 1, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2980 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Agency Information Collection Activity; Proposed Collection

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Hedging Transactions.

OMB Number: 1545–1480.

Regulation Project Number: REG–107047–00 (TD 8985–final).

Abstract: This document contains final regulations relating to the character of gain or loss from hedging transactions. The regulations reflect changes to the law made by the Ticket to Work and Work Incentives Improvement Act of 1999. The regulations affect businesses entering into hedging transactions.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 127,100.

Estimated Time per Respondent: 1 hour, 20 minutes.

Estimated Total Annual Burden Hours: 171,050.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 3, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2988 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 97–22

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 97–22, Examination of returns and claims for refund, credits

or abatement; determination of correct tax liability.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Examination of returns and claims for refund, credits or abatement; determination of correct tax liability.

OMB Number: 1545–1533.

Revenue Procedure Number: Revenue Procedure 97–22.

Abstract: This revenue procedure provides guidance to taxpayers who maintain books and records by using an electronic storage system that either images their paper books and records or transfers their computerized books and records to an electronic storage media, such as an optical disk. The information requested in the revenue procedure is required to ensure that records maintained in an electronic storage system will constitute records within the meaning of Internal Revenue Code section 6001.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for-profit institutions, farms, Federal Government, and state, local or tribal governments.

Estimated Number of Respondents: 50,000.

Estimated Time per Respondent: 20 hours, 1 minute.

Estimated Total Annual Burden Hours: 1,000,400.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 3, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2992 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2009–14

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2009–14, Pre-filing Agreement Program.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Certain Transfers of Domestic Stock or Securities by U.S. Persons to Foreign Corporations.

OMB Number: 1545–1684.

Regulation Project Number: Revenue Procedure 2009–14.

Abstract: Revenue Procedure 2009–14 describes a program under which certain large business taxpayers may request examination and resolution of specific issues relating to tax returns. The resolution of such issues under the program will be memorialized by a type of closing agreement under Code section 7121 called a pre-filing agreement.

Current Actions: There are no changes to the burden previously approved for this collection. We are making this submission for renewal purposes.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents/ Recordkeepers: 216.

Estimated Time per Response: 60 hours, 48 minutes.

Estimated Total Annual Burden Hours: 13,134.

The following paragraph applies to all the collections of information covered by this notice.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

(b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 3, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2996 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5498–ESA

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5498–ESA, Coverdell ESA Contribution Information.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Coverdell ESA Contribution Information.

OMB Number: 1545–1815.

Form Number: 5498–ESA.

Abstract: Form 5498–ESA is used by trustees or issuers of Coverdell Education Savings accounts to report contributions and rollovers to these accounts to beneficiaries.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organization.

Estimated Number of Responses: 150,000.

Estimated Time per Response: 7 minutes.

Estimated Total Annual Burden Hours: 18,000.

The following paragraph applies to all of the collections of information covered by this notice:

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

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 3, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–3003 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Agency Information Collection Activity; Proposed Collection

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Assumptions of Partner Liabilities.

OMB Number: 1545–1843.

Regulation Project Number: TD 9207 (Final & Temp), REG–106736–00 (NPRM).

Abstract: In order to be entitled to a deduction with respect to the economic performance of a contingent liability that was contributed by a partner and assumed by a partnership, the partner, or former partner of the partnership, must receive notification of economic performance of the contingent liability from the partnership or other partner assuming the liability.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households.

Estimated Number of Respondents: 250.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 125.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 3, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–3002 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 99–50

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 99–50, Combined Information Reporting.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of revenue procedure should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Combined Information Reporting.

OMB Number: 1545–1667.

Revenue Procedure Number: Revenue Procedure 99–50.

Abstract: Revenue Procedure 99–50 permits combined information reporting by a successor business entity (*i.e.,* a corporation, partnership, or sole proprietorship) in certain situations following a merger or an acquisition. Combined information reporting may be elected by a successor with respect to certain Forms 1042–S, all forms in the series 1098, 1099, and 5498, and Forms W–2G. The successor must file a statement with the IRS indicating what forms are being filed on a combined basis.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and farms.

Estimated Number of Respondents: 6,000.

Estimated Average Time per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 3, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2993 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2004–53

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 96–60, Procedure for filing Forms in certain acquisitions.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue

Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Procedure for filing Forms W–2 in certain acquisitions.

OMB Number: 1545–1510.

Revenue Procedure Number: Revenue Procedure 2004–53.

Abstract: The information is required by the Internal Revenue Service to assist predecessor and successor employers in complying with the reporting requirements under Internal Revenue Code sections 6051 and 6011 for Forms W–2 and 941.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 553,500.

Estimated Time per Respondent: 12 minutes.

Estimated Total Annual Burden Hours: 110,700.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 3, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2990 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for VITA/TCE Program Forms

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning VITA/TCE Program Forms 14310, 8653, 8654, and 14024.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: VITA/TCE Program Forms.

OMB Number: 1545–2222.

Form Number: Forms 14310, 8653, 8654, and 14024.

Abstract: The Internal Revenue Service offers free assistance with tax return preparation and tax counseling using specially trained volunteers. The Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs assist seniors and individuals with low to moderate incomes, those with disabilities, and those for whom English is a second language.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 2,130.

Estimated Time per Respondent: 3 minutes.

Estimated Total Annual Burden Hours: 97.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 2, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2987 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8906

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent

burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8906, Distilled Spirits Credit.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Qualified Railroad Track Maintenance Credit.

OMB Number: 1545–1982.

Form Number: Form 8906.

Abstract: Form 8906, Distilled Spirits Credit, was developed to carry out the provisions of IRC section 5011(a). This section allows eligible wholesalers and persons subject to IRC section 5055 an income tax credit for the average cost of carrying excise tax on bottled distilled spirits. The new form provides a means for the eligible taxpayer to compute the amount of credit.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, Farms.

Estimated Number of Respondents: 300.

Estimated Time per Respondent: 1 hour 52 minutes.

Estimated Total Annual Burden Hours: 558.

The following paragraph applies to all of the collections of information covered by this notice:

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

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 3, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2983 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning designated Roth contributions under Section 402A.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Allan Hopkins, (202) 622–6665, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Designated Roth Contributions Under Section 402A.

OMB Number: 1545–1992.

Regulation Project Number: REG–146459–05 (TD 9324).

Abstract: These final regulations provide guidance concerning the taxation of distributions from designated Roth accounts under qualified cash or deferred arrangements under section 401(k).

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, not-for-profit institutions, and Federal, state, local or tribal governments.

Estimated Number of Respondents: 357,000.

Estimated Time per Respondent: 2 hrs, 19 minutes.

Estimated Total Annual Burden Hours: 828,000.

The following paragraph applies to all of the collections of information covered by this notice.

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

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

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection

techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 2, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2985 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2011–83

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2011–83, Pennsylvania Low-Income Housing Relief Credit.

DATES: Written comments should be received on or before April 9, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Pennsylvania Low-Income Housing Relief Credit.

OMB Number: 1545–2218.

Notice Number: Notice 2011–83.

Abstract: The Internal Revenue Service is suspending certain requirements under § 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by Hurricane Irene in Pennsylvania during the period of August 26, 2011 to August 30, 2011, and Tropical Storm Lee beginning on September 3, 2011.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 600.

Estimated Average Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 150.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 1, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–2986 Filed 2–8–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

United States Mint

Pricing for 2012 Infantry Soldier Silver Dollar and 2012 Star-Spangled Banner Commemorative Coin Products

AGENCY: United States Mint, Department of the Treasury.

ACTION: Notice.

SUMMARY: The United States Mint is announcing adjusted pricing for the 2012 Infantry Soldier Silver Dollar and 2012 Star-Spangled Banner Commemorative Coin products:

Product	Introductory price	Regular price
Infantry Soldier Proof Silver Dollar	$49.95	$54.95
Infantry Soldier Uncirculated Silver Dollar	44.95	49.95
Infantry Soldier Silver Dollar Special Set	N/A	51.95
Star-Spangled Banner Proof Silver Dollar	49.95	54.95
Star-Spangled Banner Uncirculated Silver Dollar	44.95	49.95
Star-Spangled Banner Bicentennial Silver Dollar Set	N/A	53.95

The introductory pricing period for the 2012 Infantry Soldier Silver Dollar begins February 16, 2012, and ends March 19, 2012. The introductory pricing period for the 2012 Star-Spangled Banner Commemorative Coin Program begins March 5, 2012, and ends April 5, 2012.

FOR FURTHER INFORMATION CONTACT: B. B. Craig, Associate Director for Sales and Marketing; United States Mint; 801 9th Street NW., Washington, DC 20220; or call (202) 354–7500.

Authority: Public Law 110–357, sec. 5a; Public Law 111–232, sec. 6a; 31 U.S.C. 5111 & 9701.

Dated: February 3, 2012.

Richard A. Peterson,

Deputy Director, United States Mint.

[FR Doc. 2012–2981 Filed 2–8–12; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

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Part II

Department of Commerce

Patent and Trademark Office

37 CFR Parts 42 and 90

Practice Guide for Proposed Trial Rules and Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions; Proposed Rules

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 42

[Docket No.: PTO–P–2011–0094]

Practice Guide for Proposed Trial Rules

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Request for Comments.

SUMMARY: The Leahy-Smith America Invents Act establishes several new trial proceedings to be conducted by the Patent Trial and Appeal Board (Board) including *inter partes* review, post-grant review, the transitional program for covered business method patents, and derivation proceedings. The Leahy-Smith America Invents Act also requires the United States Patent and Trademark Office (Office or USPTO) to promulgate rules specific to each proceeding. In separate rulemakings elsewhere in this issue and in the February 10, 2012, issue of the **Federal Register**, the Office proposes rules relating to Board trial practice for the new proceedings. The Office publishes in this document a practice guide for the proposed trial rules to advise the public on the general framework of the proposed regulations, including the structure and times for taking action in each of the new proceedings.

DATES: Written comments must be received on or before April 9, 2012 to ensure consideration.

ADDRESSES: Comments on the practice guide should be sent by electronic mail message over the Internet addressed to: *patent_trial_rules@uspto.gov*. Comments may also be submitted by postal mail addressed to: Mail Stop Patent Board, Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of ''Lead Judge Michael Tierney, Practice Guide for Patent Proposed Trial Rules.'' Comments on the proposed rules should be directed to the addresses provided in the notices of proposed rulemaking.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. *See* the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

Although comments may be submitted by postal mail, the Office prefers to receive comments by electronic mail message over the Internet because sharing comments with the public is more easily accomplished. Electronic comments are preferred to be submitted in plain text, but also may be submitted in ADOBE® portable document format or MICROSOFT WORD® format. Comments not submitted electronically should be submitted on paper in a format that facilitates convenient digital scanning into ADOBE® portable document format.

The comments will be available for public inspection at the Board of Patent Appeals and Interferences, currently located in Madison East, Ninth Floor, 600 Dulany Street, Alexandria, Virginia. Comments also will be available for viewing via the Office's Internet Web site (*http://www.uspto.gov*). Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Michael Tierney, Lead Administrative Patent Judge, Board of Patent Appeals and Interferences, by telephone at (571) 272–9797.

SUPPLEMENTARY INFORMATION:

Executive Summary

The proposed regulations lay out a framework for conducting the proceedings aimed at streamlining and converging the issues for decision. In doing so, the Office's goal is to conduct proceedings in a timely, fair and efficient manner. Further, the Office designed the proceedings to allow each party to determine the preferred manner of putting forward its case, subject to the disinterested guidance of judges who determine the needs of a particular case through procedural and substantive rulings throughout the proceedings.

Background

The Leahy-Smith America Invents Act (AIA) establishes several new trial proceedings to be conducted by the Board including: (1) *Inter partes* review (IPR); (2) post-grant review (PGR); (3) a transitional program for covered business method patents (CBM); and (4) derivation proceedings. The AIA requires the USPTO to promulgate rules specific to each proceeding, with the PGR, IPR and CBM rules in effect one year after AIA enactment and the derivation rules in effect 18 months after AIA enactment. This Practice Guide is intended to advise the public on the general framework of the proposed rules, including the structure and times for taking action in each of the new proceedings.

In developing the proposed rules and this guide, the Office expresses its gratitude for the thoughtful and comprehensive comments provided by the public, which are available on the USPTO Web site: *http://www.uspto.gov/patents/law/comments/aia_implementation.jsp.*

Statutory Requirements

The AIA provides certain minimum requirements for each of the new proceedings. Provided below is a brief overview of these requirements.

Proceedings begin with the filing of a petition to institute a trial. The petition must be timely filed and be accompanied by the evidence the petitioner seeks to rely upon. For IPR, PGR, and CBM, the patent owner is afforded an opportunity to file a preliminary response. 35 U.S.C. 313, as amended, and 35 U.S.C. 323.

The Director may institute a trial where the petitioner establishes that the standards for instituting the requested trial are met. Conversely, the Director may not authorize a trial where the information presented in the petition, taking into account any preliminary patent owner response, fails to meet the requisite standard for instituting the trial, *e.g.,* 35 U.S.C. 314, as amended, and 35 U.S.C. 324. Where there are multiple matters in the Office involving the same patent, the Director may determine how the proceeding will proceed, including providing for stay, transfer, consolidation, or termination of any such matter, *e.g.,* 35 U.S.C. 315, as amended, and 35 U.S.C. 325.

The AIA requires that the Board conduct AIA trials and that the Director prescribe regulations concerning the conduct of those trials. 35 U.S.C. 6, 135 and 316, as amended, and 35 U.S.C. 326. For example, for IPR, PGR, and CBM, the AIA mandates the promulgation of rules including motions to seal, procedures for filing supplemental information, standards and procedures for discovery, sanctions for improper use of the proceeding, entry of protective orders, and oral hearings. Additionally, the AIA mandates the promulgation of rules for IPR, PGR, and CBM concerning the submission of a patent owner response with supporting evidence and allowing the patent owner a motion to amend the patent.

A petitioner and a patent owner may terminate the proceeding with respect to the petitioner by filing a written agreement with the Office, unless the Office has already decided the merits of the proceeding, *e.g.,* 35 U.S.C. 317, as amended, and 35 U.S.C. 327. If no petitioner remains in the proceeding,

the Office may terminate the review or proceed to a final written decision. For derivation proceedings, the parties may arbitrate issues in the proceeding, but nothing precludes the Office from determining the patentability of the claimed inventions involved in the proceeding. 35 U.S.C. 135, as amended. Where a trial has been instituted and not dismissed, the Board will issue a final written decision with respect to the involved patent and/or applications. 35 U.S.C. 135 and 35 U.S.C. 318, as amended, and 35 U.S.C. 328.

For IPR, PGR and CBM, the AIA requires that the Office consider the effect of the regulations on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete the proceedings. 35 U.S.C. 316, as amended, and 35 U.S.C. 326. In developing the general trial rules, as well as the individual proceeding specific rules, the Office has taken these considerations into account. Further, the individual proceeding specific rules take into account the jurisdictional and timing requirements for the particular proceedings.

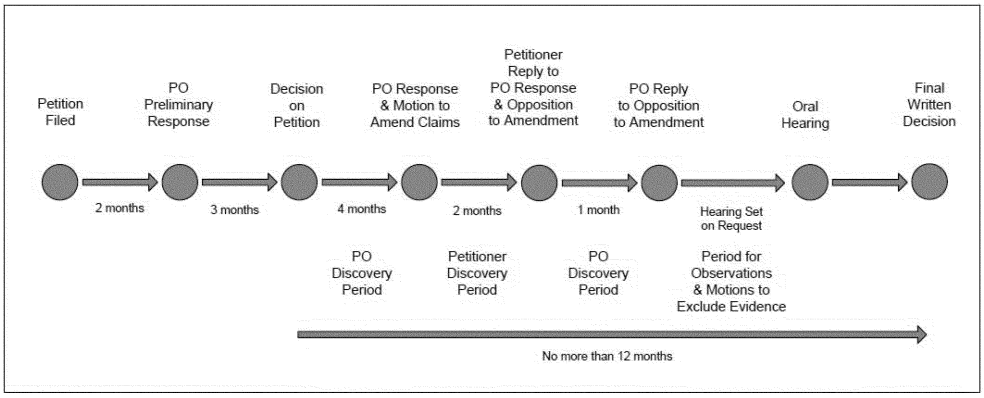
General Overview

Generally, the proceedings begin with the filing of a petition that identifies all of the claims challenged and the grounds and supporting evidence on a claim-by-claim basis. Within two months of notification of a filing date, the patent owner in an IPR, PGR, or CBM proceeding may file a preliminary response to the petition, including a simple statement that patent owner elects not to respond to the petition prior to the institution of a review. The Board will determine whether to institute the requested proceeding within three months of the date the patent owner's preliminary response was due or was filed, whichever is first.

In instituting a trial, the Board will narrow the issues for final decision by authorizing the trial to proceed only on the challenged claims for which the threshold requirements for the proceeding have been met. Further, the Board will identify which of the grounds the trial will proceed upon on a claim-by-claim basis. Any claim or issue not included in the authorization for review is not part of the trial. A party dissatisfied with the Board's determination may request rehearing as to points believed to have been overlooked or misapprehended. *See* proposed § 42.71(c)(1).

The Board will enter a Scheduling Order (Appendix A) concurrent with the decision to institute the proceeding. The Scheduling Order will set due dates for the proceeding taking into account the complexity of the proceeding but ensuring that the trial is completed within one year of institution.

For example, a Scheduling Order for an IPR might provide a four month deadline for patent owner discovery and for filing a patent owner response and motion to amend. Once the patent owner's response and motion to amend have been filed, the Scheduling Order might provide the petitioner with two months for discovery and for filing a petitioner's reply to the response and the petitioner's opposition to the amendment. The Scheduling Order might then provide the patent owner with one month for discovery and for filing a patent owner reply to petitioner's opposition to a patent owner amendment. A representative timeline is provided below:



Sequence of discovery. Once instituted, absent special circumstances, discovery will proceed in a sequenced fashion. For example, the patent owner may begin deposing the petitioner's declarants once the proceeding is instituted. After patent owner has filed a patent owner response and any motion to amend the claims, the petitioner may depose the patent owner's declarants. Similarly, after the petitioner has filed a reply to the patent owner's response and an opposition to an amendment, the patent owner may depose the petitioner's declarants and file a reply in support of its claim amendments. Where the patent owner relies upon new declaration evidence in support of its amendments, the petitioner will be authorized to depose the declarants and submit observations on the deposition. Once the time for taking discovery in the trial has ended, the parties will be authorized to file motions to exclude evidence believed to be inadmissible. Admissibility of evidence is generally governed by the Federal Rules of Evidence.

Sequence of filing responses and motions. An initial conference call will be held about one month from the date of institution to discuss the motions that the parties intend to file and to determine if any adjustment needs to be made to the Scheduling Order. After a patent owner response has been filed, along with any motion to amend the claims, the petitioner will have the opportunity to depose the patent owner's declarants. The petitioner will then file a reply to the patent owner's response and any opposition to the patent owner's amendment. Both parties will be permitted an opportunity to file motions to exclude an opponent's evidence believed to be inadmissible. After all motions have been filed, the parties will be afforded an opportunity to have an oral argument at the Board.

Summary of the Proposed Rules

The following is a general summary of the rules for the proceedings.

I. General Procedures

The rules are to be implemented so as to ensure the just, speedy, and inexpensive resolution of a proceeding

and, where appropriate, the rules may be modified to accomplish these goals, proposed § 42.1(b); proposed § 42.5(a) and (b) (references to proposed § 42.x refer to title 37 of the Code of Federal Regulations).

A. Jurisdiction and Management of the Record

1. *Jurisdiction:* 35 U.S.C. 6(b), as amended, provides that the Board is to conduct derivation proceedings, *inter partes* reviews, and post-grant reviews. The Board also conducts transitional program for covered business method reviews, which are subject to Board review under 35 U.S.C. 6(b), as amended, and 35 U.S.C. 326(c) and Public Law 112–29, § 18. The Board therefore will have exclusive jurisdiction within the Office over every application and patent that is involved in a derivation, IPR, PGR or CBM proceeding. *Ex parte* reexamination proceedings and *inter partes* reexamination proceedings are not involved applications or patents in proceedings and are treated separately unless specifically consolidated with a proceeding.

2. *Prohibition on Ex Parte Communications:* All substantive communications with the Board regarding a proceeding must include all parties to the proceeding, except as otherwise authorized, proposed § 42.5(d). In general, it would be prudent to avoid substantive *ex parte* discussions of a pending trial with a Board member or Board employee. The prohibition on *ex parte* communications does not extend to: (1) Ministerial communications with support staff (for instance, to arrange a conference call); (2) conference calls or hearings in which opposing counsel declines to participate; (3) informing the Board in one proceeding of the existence or status of a related Board proceeding; or (4) reference to a pending case in support of a general proposition (for instance, citing a published opinion from a pending case or referring to a pending case to illustrate a systemic problem).

Arranging a conference call with the Board. When arranging a conference call, be prepared to discuss with a Trial Section paralegal why the call is needed and what materials may be needed during the call, *e.g.,* a particular exhibit.

Refusal to participate. The Board has the discretion to permit a hearing or conference call to take place even if a party refuses to participate. In such cases, the Board may require additional safeguards, such as the recording of the communication and the entry of the recording into the record.

B. Counsel

Need for lead and back-up counsel. A party represented by counsel should designate both a lead as well as a back-up counsel who can conduct business on behalf of the lead counsel, as instances may arise where lead counsel may be unavailable. Proposed § 42.10(a).

Power of attorney. A power of attorney must be filed with the designation of counsel, unless the designated counsel is already counsel of record. Proposed § 42.10(b).

Pro hac vice. The Board, consistent with current practice, may recognize counsel *pro hac vice* during a proceeding upon a showing of good cause, subject to such conditions as the Board may impose. Proposed § 42.10(c). Proceedings before the Office can be technically complex. For example, it is expected that amendments to a patent will be sought. Consequently, the grant of a motion to appear *pro hac vice* is a discretionary action taking into account the specifics of the proceedings. Similarly, the revocation of *pro hac vice* is a discretionary action taking into account various factors, including incompetence, unwillingness to abide by the Office's Rules of Professional Conduct, and incivility.

C. Electronic Filing

Electronic filing is the default manner in which documents are to be filed with the Board. Proposed § 42.6(b). Electronic filing of legal documents is being implemented across the country in state and federal courts. The use of electronic filing aids in the efficient administration of the proceeding, improves public accessibility, and provides a more effective document management system for the Office and parties. The manner of submission will be established by the Board and will be published on the Web site of the Office (*www.uspto.gov*).

Paper filing may be used where appropriate, but must be accompanied by a motion explaining the need for non-electronic filing. Based upon experience with contested cases, the Board does not expect to receive many requests to file paper submissions. Circumstances where a paper filing may be warranted include those occasions where the Office's electronic filing system is unable to accept filings. Alternatively, if a problem with electronic filing arises during normal business hours, a party may contact the Board and request a one-day extension of time for due dates that are set by rule or orders of the Board.

D. Mandatory Notices

The rules require that parties to a proceeding provide certain mandatory notices, including identification of the real parties in interest, related matters, lead and back-up counsel and service information. Proposed § 42.8. Where there is a change of information, a party must file a revised notice within 21 days of the change. Proposed § 42.8(a)(3).

1. *Real Party in Interest or privy:* The identification of the real party in interest helps the Office identify potential conflicts of interests and helps identify potential statutory bars.

Whether a party who is not a named participant in a given proceeding nonetheless constitutes a ''real party in interest'' or ''privy'' to that proceeding is a highly fact-dependent question. *See generally Taylor* v. *Sturgell,* 553 U.S. 880 (2008); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure §§ 4449, 4451 (2d ed. 2011). Such questions will be handled by the Board on a case-by-case basis taking into consideration how courts have viewed the terms ''real party in interest'' and ''privy.'' *See, e.g., Taylor,* 553 U.S. at 893–895 and 893 n.6 (noting that ''[t]he list that follows is meant only to provide a framework [for the decision], not to establish a definitive taxonomy'').

While there are multiple bases upon which a non-party may be recognized as a ''real party in interest'' or ''privy,'' a common consideration is whether the non-party exercised or could have exercised control over a party's participation in a proceeding. *See, e.g., Id.* at 895; *see generally* Wright & Miller § 4451. The concept of control generally means that ''it should be enough that the nonparty has the actual measure of control or opportunity to control that might reasonably be expected between two formal coparties.'' Wright & Miller § 4451. Courts and commentators agree, however, that there is no ''bright-line test'' for determining the necessary quantity or degree of participation to qualify as a ''real party in interest'' or ''privy'' based on the control concept. *Gonzalez* v. *Banco Cent. Corp.,* 27 F.3d 751, 759 (1st Cir. 1994). *See also* Wright & Miller § 44512 (''The measure of control by a nonparty that justifies preclusion cannot be defined rigidly.''). Accordingly, the proposed rules do not enumerate particular factors regarding a ''control'' theory of ''real party in interest'' or ''privy'' under the statute.

Many of the same considerations that apply in the context of ''res judicata'' will likely apply in the ''real party in interest'' or ''privy'' contexts. *See Gonzalez,* 27 F.3d at 759; *see generally* Wright & Miller § 4451. Other considerations may also apply in the unique context of statutory estoppel. *See generally, e.g., In re Arviv*

Reexamination Proceeding, Control No. 95/001,526, Decision Dismissing § 1.182 and § 1.183 Petitions, at 6 (Apr. 18, 2011); *In re Beierbach Reexamination Proceeding,* Control No. 95/000,407, Decision on § 1.182 and § 1.183 Petitions, at 6 (July 28, 2010); *In re Schlecht Inter Partes Reexamination Proceeding,* Control No. 95/001,206, Decision Dismissing Petition, at 5 (June 22, 2010); *In re Guan Inter Partes Reexamination Proceeding,* Control No. 95/001,045, Decision Vacating Filing Date, at 8 (Aug. 25, 2008).

2. *Related Matters:* Parties to a proceeding are to identify any other judicial or administrative matter that would affect, or be affected by, a decision in the proceeding. Judicial matters include actions involving the patent in federal court. Administrative matters that would be affected by a decision in the proceeding include every application and patent claiming, or which may claim, the benefit of the priority of the filing date of the party's involved patent or application as well as any *ex parte* and *inter partes* reexaminations for an involved patent.

3. *Identification of service information:* Parties are required to identify service information to allow for efficient communication between the Board and the parties. Additionally, while the Board is authorized to provide notice by means other than mailing to the correspondence address of record, it is ultimately the responsibility of the applicant or patent owner to maintain a proper correspondence address in the record. *Ray* v. *Lehman,* 55 F.3d 606, 610 (Fed. Cir. 1995).

E. Public Availability and Confidentiality

The proposed rules aim to strike a balance between the public's interest in maintaining a complete and understandable file history and the parties' interest in protecting truly sensitive information.

1. *Public availability:* The record of a proceeding, including documents and things, shall be made available to the public, except as otherwise ordered. Proposed § 42.14. Accordingly, a document or thing will be made publicly available, unless a party files a motion to seal, which is granted by the Board.

2. *Confidential information:* The rules identify confidential information in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development or commercial information. Proposed § 42.54.

3. *Motion to seal:* A party intending a document or thing to be sealed may file a motion to seal the document or thing. Proposed § 42.14. The document or thing will be provisionally sealed on receipt of the motion and remain so pending the outcome of the decision on motion.

4. *Protective orders:* A party from whom discovery of confidential information is sought may file a motion to seal where the motion contains a proposed protective order. Proposed § 42.54. Specifically, protective orders may be issued for good cause by the Board to protect a party from disclosing confidential information. Proposed § 42.54. Guidelines on proposing a protective order in a motion to seal, including a Standing Protective Order, are provided in Appendix B. The document or thing will be protected on receipt of the motion and remain so, pending the outcome of the decision on motion.

5. *Confidential information in a petition:* A petitioner filing confidential information with a petition may file a motion to seal concurrent with the petition, where the motion to seal contains a proposed protective order. The confidential information may be served to the patent owner under seal. The patent owner may only access the sealed information if it agrees to the terms of the proposed protective order. The institution of the proceeding will constitute a grant of the motion to seal unless otherwise ordered by the Board. Proposed § 42.55.

The proposed rule seeks to streamline the process of seeking protective orders prior to the institution of the review while balancing the need to protect confidential information against an opponent's ability to access information used to challenge the opponent's claims.

6. *Expungement of confidential information:* Confidential information that is subject to a protective order ordinarily would become public 45 days after denial of a petition to institute a trial or 45 days after final judgment in a trial. There is an expectation that information will be made public where the existence of the information is referred to in a decision to grant or deny a request to institute a review or is identified in a final written decision. A party seeking to maintain the confidentiality of information, however, may file a motion to expunge the information from the record prior to the information becoming public. Proposed § 42.56. The rule balances the needs of the parties to submit confidential information with the public interest in maintaining a complete and understandable file history for public notices purposes. The rule encourages parties to redact sensitive information, where possible, rather than seeking to seal entire documents.

F. Discovery

Discovery is a tool to develop a fair record and to aid the Board in assessing the credibility of witnesses. To streamline the proceedings, the rules and Scheduling Order provide a sequenced discovery process upon institution of the trial. Specifically, each party will be provided respective discovery periods, with the patent owner going first. The sequenced discovery allows parties to conduct meaningful discovery before they are required to submit their respective motions and oppositions. Thus, discovery before the Board is focused on what the parties reasonably need to respond to the grounds raised by an opponent. In this way, the scope of the trial continually narrows.

1. *Routine discovery: Routine discovery includes:* (1) Production of any exhibit cited in a paper or testimony, (2) the cross examination of the other sides declarant, and (3) information that is inconsistent with a position advanced during the proceeding. Routine discovery places the parties on a level playing field and streamlines the proceeding. Board authorization is not required to conduct routine discovery, although the Board will set the times for conducting this discovery in its Scheduling Order.

2. *Additional discovery:* A request for additional discovery must be in the form of a motion, although the parties may agree to discovery amongst themselves. The standard for granting such requests varies with the proceeding. An ''interests of justice'' standard applies in IPR and derivations, whereas the more liberal ''good cause'' standard applies in PGR and CBM. An additional discovery request could be granted under either standard, for example, when a party raises an issue where the evidence on that issue is uniquely in the possession of the party that raised it.

3. *Compelled testimony:* A party can request authorization to compel testimony under 35 U.S.C. 24. If a motion to compel testimony is granted, testimony may be (1) *ex parte,* subject to subsequent cross examination, or (2) *inter partes. Therriault* v. *Garbe,* 53 USPQ2d 1179, 1184 (BPAI 1999). Prior to moving for or opposing compelled testimony, the parties should discuss which procedure is appropriate.

4. *Live testimony:* Cross-examination may be ordered to take place in the presence of an administrative patent

judge. Occasionally, the Board will require live testimony where the Board considers the demeanor of a witness critical to assessing credibility. Examples of where such testimony has been ordered in contested cases before the Board include cases where derivation or inequitable conduct is an issue or where testimony is given through an interpreter.

5. *Times and locations for taking cross examination:* The rules do not provide specific time limits for cross examination. The Board expects to handle such issues via an Order requiring the parties to confer to reach agreement on reasonable times, dates, and locations for cross examination of witnesses.

The Board has issued such Orders in contested cases and has not experienced problems arising from such Orders.

II. Petitions and Motions Practice

A. General Motions Practice Information

1. *Motions practice:* The proceedings begin with the filing of a petition that lays out the petitioner's grounds and supporting evidence for the requested proceeding. Additional relief in a proceeding must be requested in the form of a motion. Proposed § 42.20(a).

2. *Prior authorization:* Generally, a motion will not be entered without prior Board authorization. Proposed § 42.20(b). Exceptions include motions where it is impractical for a party to seek prior Board authorization and motions for which authorization is automatically granted. Motions where it is not practical to seek prior Board authorization include motions to seal and motions filed with a petition, such as motions to waive page limits. Motions where authorization is automatically granted include requests for rehearing, observations on cross-examination, and motions to exclude evidence. The Board expects that the Scheduling Order will pre-authorize and set times for the filing of observations on cross-examination and motions to exclude evidence based on inadmissibility. *See* Appendix A, Scheduling Order.

Typically, authorization for a motion is obtained during an initial conference call, which generally occurs within one month of the institution of IPR, PGR, CBM, and derivation proceedings. Additionally, where more immediate relief is required or the request arises after the initial conference call, a party should institute a conference call to obtain such authorization. The Board has found that this practice simplifies a proceeding by focusing the issues early, reducing costs and efforts associated with motions that are beyond the scope of the proceeding. By taking an active role in the proceeding, the Board can eliminate delay in the proceeding and ensure that attorneys are prepared to resolve the relevant disputed issues.

3. *Page Limits:* Petitions, motions, oppositions, and replies filed in a proceeding are subject to page limits in order to streamline the proceedings. Proposed § 42.24. The rules set a limit of 50 pages for petitions requesting inter partes reviews and derivation proceedings, 70 pages for petitions requesting post-grant review and covered business method patent reviews, and 15 pages for motions. Proposed § 42.24(a). Oppositions are limited to an equal number of pages as the corresponding motion. Proposed § 42.24(b). Replies to petitions are limited to 15 pages and replies to motions are limited to 5 pages. Proposed § 42.24(c).

Federal courts routinely use page limits to manage motions practice as ''[e]ffective writing is concise writing.'' *Spaziano* v. *Singletary,* 36 F.3d 1028, 1031 n.2 (11th Cir. 1994). Federal courts have found that page limits ease the burden on both the parties and the courts, and patent cases are no exception. *Broadwater* v. *Heidtman Steel Prods., Inc.,* 182 F. Supp. 2d 705, 710 (S.D. Ill. 2002) (''Counsel are strongly advised, in the future, to not ask this Court for leave to file any memoranda (supporting or opposing dispositive motions) longer than 15 pages. The Court has handled complicated patent cases and employment discrimination cases in which the parties were able to limit their briefs supporting and opposing summary judgment to 10 or 15 pages.'').

Although parties are given wide latitude in how they present their cases, the Board's experience is that the presentation of an overwhelming number of issues tends to detract from the argument being presented, and can cause otherwise meritorious issues to be overlooked or misapprehended. Thus, parties should avoid submitting a repository of all the information that a judge could possibly consider, and instead focus on simple, well organized, easy to follow arguments supported by readily identifiable evidence of record. Another factor to keep in mind is that the judges of the Board are familiar with the general legal principles involved in issues which come before the Board. Accordingly, extended discussions of general patent law principles are not necessary.

4. *Testimony Must Disclose Underlying Facts or Data:* The Board expects that most petitions and motions will rely upon affidavits of experts. Affidavits expressing an opinion of an expert must disclose the underlying facts or data upon which the opinion is based. *See* Fed. R. Evid. 705; and proposed § 42.65. Opinions expressed without disclosing the underlying facts or data may be given little or no weight. *Rohm & Haas Co.* v. *Brotech Corp.,* 127 F.3d 1089, 1092 (Fed. Cir. 1997) (nothing in the Federal Rules of Evidence or Federal Circuit jurisprudence requires the fact finder to credit unsupported assertions of an expert witness).

5. *Tests and Data:* Parties often rely on scientific tests and data to support their positions. Examples include infra-red spectroscopy graphs, high-performance liquid-chromatography data, etc. In addition to providing the explanation required in proposed § 42.65, a party relying on the test should provide any other information the party believes would assist the Board in understanding the significance of the test or the data.

6. *Secondary Indicia of Nonobviousness:* The Board expects that most petitions will raise issues of obviousness. In determining whether the subject matter of a claim would have been obvious over the prior art, the Board may review objective evidence of secondary considerations.

B. Petition

Proceedings begin with the filing of a petition. The petition lays out the petitioner's grounds and supporting evidence, on a challenged claim-by-claim basis, for instituting the requested proceeding.

1. *Filing date—Minimum Procedural Compliance:* To obtain a filing date, the petition must meet certain minimum standards. Generally, the standards required for a petition are those set by statute for the proceeding requested. For example, an IPR requires that a complete petition be filed with the required fee, and include a certificate of service for the petition, fee, and evidence relied upon. Proposed § 42.106. A complete petition for IPR requires that the petitioner certify that the patent is eligible for *inter partes* review and that the petitioner is not barred or estopped from requesting the review, and must identify the claims being challenged and the specific basis for the challenge. Proposed § 42.104. Similar petition requirements apply to PGR (proposed § 42.204) and derivations (proposed § 42.404). CBM reviews also require a petition demonstrate that the patent for which review is sought is a covered business method patent. Proposed § 42.304.

2. *Burden of Proof for Statutory Institution Thresholds:* The burden of proof in a proceeding before the Board is a preponderance of the evidence. Proposed § 42.1(d).

3. *Specific Requirements for Petition:* A petitioner must certify that the patent or application is available for review and that the petitioner is not barred or estopped from seeking the proceeding. Proposed §§ 42.104, 42.204, 42.304, and 42.405. Additionally, a petitioner must identify all the claims that are challenged and the specific statutory grounds on which the challenge to the claim is based, provide a claim construction for the challenged claims, and state the relevance of the evidence to the issues raised. *Id.* For IPR, PGR, and CBM proceedings, a petitioner must also identify how the construed claim is unpatentable over the relevant evidence.

4. *Covered Business Method/ Technological Invention:* A petitioner in a CBM proceeding must demonstrate that the patent for which review is sought is a covered business method patent. Proposed § 42.304(a). Covered business method patents do not include patents for technological inventions.

The following claim drafting techniques would not typically render a patent a technological invention:

(a) Mere recitation of known technologies, such as computer hardware, communication or computer networks, software, memory, computer-readable storage medium, scanners, display devices or databases, or specialized machines, such as an ATM or point of sale device.

(b) Reciting the use of known prior art technology to accomplish a process or method, even if that process or method is novel and non-obvious.

(c) Combining prior art structures to achieve the normal, expected, or predictable result of that combination.

The following are examples of covered business method patents that are subject to a CBM review proceeding:

(a) A patent that claims a method for hedging risk in the field of commodities trading.

(b) A patent that claims a method for verifying validity of a credit card transaction.

The following are examples of patents that claim a technological invention that would not be subject to a CBM review proceeding:

(a) A patent that claims a novel and non-obvious hedging machine for hedging risk in the field of commodities trading.

(b) A patent that claims a novel and non-obvious credit card reader for verifying the validity of a credit card transaction.

5. *General Practice Tips:*

Claim Charts. While not required, a petitioner may file a claim chart to explain clearly and succinctly what the petitioner believes a claim means in comparison to something else, such as another claim, a reference, or a specification. Where appropriate, claim charts can streamline the process of identifying key features of a claim and comparing those features with specific evidence. Claim charts submitted as part of a petition or motion count towards applicable page limits. A claim chart from another proceeding that is submitted as an exhibit, however, will not count towards page limits.

C. Preliminary Patent Owner Response

For IPR, PGR, and CBM proceedings, a patent owner may file a preliminary response no later than two months after the grant of a filing date. Proposed §§ 42.107(b) and 42.207(b). The preliminary response may present evidence other than testimonial evidence to demonstrate that no review should be instituted. Proposed §§ 42.107(c) and 42.207(c).

Potential preliminary responses include:

(1) The petitioner is statutorily barred from pursuing a review.

(2) The references asserted to establish that the claims are unpatentable are not in fact prior art.

(3) The prior art lacks a material limitation in all of the independent claims.

(4) The prior art teaches or suggests away from a combination that the petitioner is advocating.

(5) The petitioner's claim interpretation for the challenged claims is unreasonable.

(6) If a petition for post-grant review raises 35 U.S.C. 101 grounds, a brief explanation as to how the challenged claims are directed to a patent-eligible invention.

Where a patent owner seeks to expedite the proceeding, the patent owner may file an election to waive the preliminary patent owner response. Proposed §§ 42.107(b) and 42.207(b). No adverse inference will be taken by such an election. Moreover, a patent owner may file a statutory disclaimer of one or more challenged claims to streamline the proceedings. Where no challenged claims remain, the Board would terminate the proceeding. Where one or more challenged claims remain, the Board's decision on institution would be based solely on the remaining claims. See *Sony* v. *Dudas,* 2006 WL 1472462 (E.D.Va. 2006).

D. Institution of Review

1. *Statutory Threshold Requirements:* Generally, the Director may institute a proceeding where a petitioner meets the threshold requirements, although each proceeding has a different threshold requirement for institution. Each of the statutory threshold requirements are summarized below.

(a) *Inter Partes* Review: 35 U.S.C. 314(a), as amended, provides that the Director may not authorize institution of an *inter partes* review, unless the Director determines that the information presented in the petition filed under 35 U.S.C. 311, as amended, and any response filed under 35 U.S.C. 313, as amended, shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition. The ''reasonable likelihood'' standard is a somewhat flexible standard that allows the judge room for the exercise of judgment.

(b) *Post-Grant Review:* 35 U.S.C. 324(a) provides that the Director may not authorize institution of a post-grant review, unless the Director determines that the information presented in the petition filed under 35 U.S.C. 321, if such information is not rebutted, would demonstrate that it is more likely than not that at least one of the claims challenged in the petition is unpatentable. 35 U.S.C. 324(b) provides that the determination required under 35 U.S.C. 324(a) may also be satisfied by a showing that the petition raises a novel or unsettled legal question that is important to other patents or patent applications.

(c) *Covered Business Method Patent Review:* Section 18(a)(1) of the AIA provides that the transitional proceeding for covered business method patents will be regarded as, and will employ the standards and procedures of, a post-grant review under chapter 32 of title 35 United States Code, subject to certain exceptions. Section 18(a)(1)(B) of the Leahy-Smith America Invents Act specifies that a person may not file a petition for a transitional proceeding with respect to a covered business method patent, unless the person or person's real party in interest or privy has been sued for infringement of the patent or has been charged with infringement under that patent. A covered business method patent means a patent that claims a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service. Covered business method patents do not include patents for technological inventions.

(d) *Derivation:* 35 U.S.C. 135(a), as amended, provides that an applicant for a patent may file a petition to institute a derivation proceeding. 35 U.S.C.

135(a), as amended, provides that the petition must state with particularity the basis for finding that a named inventor in the earlier application derived the claimed invention from an inventor named in the petitioner's application and, without authorization, filed the earlier application. The petition must be filed within one year of the first publication by the earlier applicant of a claim to the same or substantially the same invention, must be made under oath, and must be supported by substantial evidence. 35 U.S.C. 135(a), as amended, also provides that the Director may institute a derivation proceeding, if the Director determines that the petition demonstrates that the standards for instituting a derivation proceeding are met.

2. *Considerations in Instituting a Review:* The Board institutes the trial on behalf of the Director. Proposed § 42.4(a). In instituting the trial, the Board will consider whether or not a party has satisfied the statutory institution requirements. As part of its consideration, the Board may take into account the existence of another proceeding before the Board under 35 U.S.C. 315(d), as amended, and whether the same or substantially the same prior art or arguments were previously presented to the Office under 35 U.S.C. 325(d).

3. *Content of Decision on Whether to Institute:* In instituting a trial, the Board will streamline the issues for final decision by authorizing the trial to proceed only on the challenged claims for which the threshold requirements for the proceeding have been met. The Board will identify the grounds the trial will proceed upon on a claim-by-claim basis. Any claim or issue not included in the authorization for review is not part of the trial.

The Board expects that a Scheduling Order (Appendix A) will be provided concurrent with the decision to institute the proceeding. The Scheduling Order will set due dates for taking action accounting for the complexity of the proceeding but ensuring that the trial is completed within one year of institution.

Where no trial is instituted, a decision to that effect will be provided. The Board expects that the decision will contain a short statement as to why the requirements were not met, although this may not be necessary in all cases. A party dissatisfied with a decision may file a request for rehearing before the Board, but the Board's determination on whether to institute a trial is final and nonappealable. 35 U.S.C. 135(a) and 314(d), as amended, 35 U.S.C. 324(e); and proposed § 42.71(c).

E. Initial Conference Call (One Month After Instituting Trial)

The Board expects to initiate a conference call within about one month from the date of institution of the trial to discuss the Scheduling Order and any motions that the parties anticipate filing during the trial. Generally, the Board would require a list of proposed motions to be filed no later than two business days prior to the conference call. An accurate motions list is necessary to provide the Board and the opposing parties adequate notice to prepare for the conference call and to plan for the proceeding. The Board's contested cases experience demonstrates that discussing the proposed motions aids the administration of justice by (1) helping the Board and counsel adjust the schedule for taking action, (2) permitting the Board to determine whether the listed motions are both necessary and sufficient to resolve the issues raised, and (3) revealing the possibility that there may be a dispositive issue that may aid the settlement of the trial. Submission of a list would not preclude the filing of additional motions not contained in the list. However, the Board may require prior authorization to file an additional motion and the set times are not likely to change as a consequence of the new motion.

F. Patent Owner Response

For IPR, PGR, and CBM, the patent owner will be provided an opportunity to respond to the petition once a trial has been instituted. 35 U.S.C. 316(a)(8), as amended, and 35 U.S.C. 326(a)(8). For a derivation proceeding, the applicant or patent owner alleged to have derived the invention will be provided an opportunity to respond to the petition once the trial has been instituted, App. A–2, Scheduling Order.

The response is filed as an opposition to the petition and is subject to the page limits for oppositions. Proposed §§ 42.120 and 42.220. The response should identify all the involved claims that are believed to be patentable and state the basis for that belief. Additionally, the response should include any affidavits or additional factual evidence sought to be relied upon and explain the relevance of such evidence. As with the petition, the response may contain a claim chart identifying key features of a claim and comparing those features with specific evidence. Where the patent owner elects not to file a response, the patent owner will arrange for a conference call with the Board to discuss whether or not the patent owner is abandoning the contest.

G. Amendments

1. *IPR, PGR, and CBM Amendments:* Patent owners in IPR, PGR and CBM may file amendments subject to certain conditions. Only one motion to amend will be permitted, absent a joint request by the petitioner and patent owner to materially advance settlement of the proceeding, or upon the request of the patent owner for good cause showing. 35 U.S.C. 316(d)(1), as amended, and 35 U.S.C. 326(d)(1). Patent owners seeking to amend their claims would identify their intent to file such a motion in a conference call with the Board. During the call, the patent owner will be expected to identify the number and general scope of substitute claims that would be filed in the motion to amend. Proposed §§ 42.121(a) and 42.221(a). A patent owner will not be required to identify a fully developed claim set.

2. *Amendments in Derivation Proceedings:* The filing of an amendment by a petitioner or respondent in a derivation proceeding will be authorized upon a showing of good cause. An example of good cause is where the amendment materially advances settlement between the parties or seeks to cancel claims. The Board expects, however, that requests to cancel all of a party's disputed claims will be treated as a request for adverse judgment.

3. *General Practice Tips on Amendments:* Amendments are expected to be filed at the due dates set for filing a patent owner response or respondent opposition to a petition. For amendments sought later in the proceeding, a demonstration of good cause will be required. Amendments filed late in the proceeding may impair a petitioner's ability to mount a full response in time to meet the statutory deadline for the proceeding. Hence, in evaluating good cause, the Board will take into account the timing of the submission with requests made earlier in the proceeding requiring less compelling reasons than would be required for amendments later in the proceeding. Cancellation of claims, however, will generally be permitted even late in the proceeding as will amendments seeking to correct simple and obvious typographical error to reduce the number of issues in dispute.

Amendments should clearly state ''original,'' ''cancelled,'' ''replaced by proposed substitute,'' or ''proposed substitute for original claim X.''

Amendments should clearly state where the specification and any drawings disclose all the limitations in

the proposed substitute claims. If the Board is unable to determine how the specification and drawings support the proposed substitute claims, entry of the amendment will not be permitted.

Amendments should clearly state the patentably distinct features for proposed substitute claims. This will aid the Board in determining whether the amendment narrows the claims and if the amendment is responsive to the grounds of unpatentability involved in the trial.

The number of substitute claims must be ''reasonable.'' There is a general presumption that only one substitute claim would be needed to replace each challenged claim. This presumption may be rebutted by a demonstration of need. The presumption balances the one-year timeline for final decision against the patent owner's need to appropriately define their invention.

H. Petitioner Opposition to Amendment

A petitioner will be afforded an opportunity to fully respond to a patent owner's amendment. The time for filing an opposition will generally be set in a Scheduling Order. No authorization is needed to file an opposition to an amendment. Petitioners may supplement evidence submitted with their petition to respond to new issues arising from proposed substitute claims. This includes the submission of new expert declarations that are directed to the proposed substitute claims.

I. Petitioner Reply to Patent Owner Response and Reply to Opposition To Amend

A reply may only respond to arguments raised in the corresponding opposition. Proposed § 42.23. While replies can help crystalize issues for decision, a reply that raises a new issue or belatedly presents evidence will not be considered and may be returned. The Board will not attempt to sort proper from improper portions of the reply. Examples of indications that a new issue has been raised in a reply include new evidence necessary to make out a prima facie case for the patentability or unpatentability of an original or proposed substitute claim, and new evidence that could have been presented in a petition or amendment.

J. Additional Motions

There are many types of motions that may be filed in a proceeding in addition to motions to amend. Examples of additional motions include motions to exclude evidence, motions to seal, motions for joinder, motions to file supplemental information, motions for judgment based on supplemental information, motions for observations on cross-examination, etc.

Where a party believes it has a basis to request relief on a ground not identified in the rules, the party should contact the Board and arrange for a conference call to discuss the requested relief with the judge handling the proceeding.

K. Oral Argument

Each party to a proceeding will be afforded an opportunity to present their case before at least three members of the Board. The time for requesting an oral argument is normally set in the Scheduling Order but may be modified on a case-by-case basis.

Generally, a petitioner to a hearing will go first followed by the patent owner or respondent after which a rebuttal may be given by the petitioner. The order may be reversed, *e.g.,* where the only dispute is whether the patent owner's proposed substitute claims overcome the grounds for unpatentability set forth in the petition.

Special equipment or needs. A party should advise the Board as soon as possible before an oral argument of any special needs. Examples of such needs include additional space for a wheelchair, an easel for posters, or an overhead projector. Parties should not make assumptions about the equipment the Board may have on hand. Such requests should be directed in the first instance to a Board Trial Section paralegal at (571) 272–9797.

Demonstrative exhibits. The Board has found that elaborate demonstrative exhibits are more likely to impede than help an oral argument. The most effective demonstrative exhibits tend to be a handout or binder containing the demonstrative exhibits. The pages of each exhibit should be numbered to facilitate identification of the exhibits during the hearing, particularly if the hearing is recorded.

Live testimony. The Board does not expect live testimony at oral argument.

No new evidence and arguments. A party may rely upon evidence that has been previously submitted in the proceeding and may only present arguments relied upon in the papers previously submitted. No new evidence or arguments may be presented at the oral hearing.

L. Settlement

There are strong public policy reasons to favor settlement between the parties to a proceeding. The Board will be available to facilitate settlement discussions, and where appropriate, may require a settlement discussion as part of the proceeding. The Board expects that a proceeding will terminate after the filing of a settlement agreement, unless the Board has already decided the merits of the proceeding.

M. Final Decision

For IPR, PGR and CBM, the Board will enter a final written decision not more than one year from the date a trial is instituted, except that the time may be extended up to six months for good cause. The Board expects that a final written decision will address the issues necessary for resolving the proceedings.

In the case of derivation proceedings, although not required by statute, the Board expects to provide a final decision not more than one year from the institution of the proceeding. The Board will provide a final decision as to whether an inventor named in the earlier application derived the claimed invention from an inventor named in the petitioner's application and filed the earlier application claiming such invention without authorization.

N. Rehearing Requests

A party dissatisfied with a decision of the Board may file a request for rehearing. Proposed § 42.71. The burden of showing that a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and where each matter was previously addressed in a motion, an opposition, or a reply. Evidence not already of record at the time of the decision will not be admitted absent a showing of good cause.

Appendix A–1: Scheduling Order for Inter Partes Review, Post-Grant Review, and Covered Business Method Patents Review (Based on the Proposed Trial Rules)

A. Due Dates

This order sets due dates for the parties to take action after institution of the proceeding. The parties may stipulate different dates for Due Dates 1 through 5 (earlier or later, but no later than Due Date 6). A notice of the stipulation, specifically identifying the changed due dates, must be promptly filed. The parties may not stipulate an extension of Due Dates 6–7.

In stipulating different times, the parties should consider the effect of the stipulation on times to object to evidence (proposed § 42.64(b)(1)), to supplement evidence (proposed § 42.64(b)(2)), to conduct cross examination, and to draft papers depending on the evidence and cross examination testimony (*see* section B, below).

1. Due Date 1

The patent owner is not required to file anything in response to the petition. The patent owner may file—

a. A response to the petition, and

b. A motion to amend the patent, if authorized.

Any response or amendment must be filed by Due Date 1. If the patent owner elects not to file anything, the patent owner must arrange a conference call with the parties and the Board.

2. Due Date 2

Any reply to the patent owner's response and opposition to amendment filed by petitioner under proposed § 42.23 must be filed by this date.

3. Due Date 3

The patent owner must file any reply to the petitioner's opposition by this date.

4. Due Date 4

a. The petitioner must file any motion for an observation on the cross examination testimony of a reply witness (see section C, below). Proposed § 42.20.

b. Each party must file any motion to exclude evidence (proposed § 42.64(c)) and any request for oral argument (proposed § 42.70(a)).

5. Due Date 5

a. The patent owner must file any response to a petitioner observation on cross examination testimony.

b. Each party must file any opposition to a motion to exclude.

6. Due Date 6

Each party must file any reply for a motion to exclude.

B. Cross Examination

Except as the parties might otherwise agree, for each due date—

1. Cross examination begins after any supplemental evidence is due (proposed § 42.64(b)).

2. Cross examination ends five business days before the next due date (proposed § 42.64(b)).

C. Motion for Observation on Cross Examination

A motion for observation on cross examination provides the petitioner with a mechanism to draw the Board's attention to relevant cross examination testimony of a reply witness, since no further substantive paper is permitted after the reply. The observation must be a concise statement of the relevance of the precisely identified testimony to a precisely identified argument or portion of an exhibit. Each observation should not exceed a single, short paragraph. The patent owner may respond to the observation. Any response must be equally concise and specific.

DUE DATE APPENDIX

Due Date 1	4 months.
Patent owner post-institution response to the petition	
Patent owner post-institution motion to amend patent	
Due Date 2	2 months.
Petitioner reply to patent owner response	
Petitioner opposition to patent owner amendment	
Due Date 3	1 month.
Patent owner reply to petitioner opposition	
Due Date 4	3 weeks.
Petitioner motion for observation regarding cross examination of reply witness	
Motion to exclude	
Request for oral argument	
Due Date 5	2 weeks
Patent owner response to observation	
Opposition to motion to exclude	
Due Date 6	1 week.
Reply to opposition to motion to exclude	
Due Date 7	Set on request.
Oral argument	

Appendix A–2: Scheduling Order for Derivation Proceedings (Based on the Proposed Trial Rules)

A. Due Dates

This order sets due dates for the parties to take action in this proceeding. The parties may stipulate different dates for Due Dates 1 through 5 (earlier or later, but not later than Due Date 6). A notice of the stipulation, specifically identifying the changed due dates, must be promptly filed. The parties may not stipulate an extension of Due Dates 6–7.

In stipulating different times, the parties should consider the effect of the stipulation on times to object to evidence (proposed § 42.64 (b)(1)), to supplement evidence (proposed § 42.64(b)(2)), to conduct cross examination, and to draft papers depending on the evidence and cross examination testimony (*see* section B, below).

1. Due Date 1

The respondent is not required to file anything in response to the petition. The respondent may file—

a. A response to the petition, and

b. A motion to amend, if authorized.

Any such response or motion to amend must be filed by Due Date 1. If the respondent elects not to file anything, the respondent must arrange a conference call with the parties and the Board.

2. Due Date 2

The petitioner must file any reply to the respondent's response and opposition to amendment.

3. Due Date 3

The respondent must file any reply to the petitioner's opposition by this date.

4. Due Date 4

a. The petitioner must file any observation on the cross examination testimony of a reply witness (see section C, below).

b. Each party must file any motion to exclude evidence (proposed § 42.64(c)) and any request for oral argument (proposed § 42.70(a)).

5. Due Date 5

a. The respondent must file any response to a petitioner observation on cross examination testimony.

b. Each party must file any opposition to a motion to exclude.

6. Due Date 6

Each party must file any reply for a motion to exclude.

B. Cross Examination

Except as the parties might otherwise agree, for each due date—

1. Cross examination begins after any supplemental evidence is due (proposed § 42.64(b)(2)).

2. Cross examination ends five business days before the next due date.

C. Motion for Observation on Cross Examination

A motion for observation on cross examination provides the petitioner with a mechanism to draw the Board's attention to relevant cross examination testimony of a reply witness, since no further substantive paper is permitted after the reply. The observation must be a concise statement of the relevance of the precisely identified testimony to a precisely identified argument or portion of an exhibit. Each observation should not exceed a single, short paragraph.

The patent owner may respond to the observation. Any response must be equally concise and specific.

DUE DATE APPENDIX

Due Date 1	4 months.
Respondent post-institution response to the petition	
Respondent post-institution motion to amend	
Due Date 2	2 months.
Petitioner reply to Respondent response	
Petitioner opposition to Respondent amendment	
Due Date 3	1 month.
Respondent reply to petitioner opposition	
Due Date 4	3 weeks.
Petitioner motion for observation regarding cross examination of reply witness	
Motion to exclude	
Request for oral argument	
Due Date 5	2 weeks.
Respondent response to observation	
Opposition to motion to exclude	
Due Date 6	1 week.
Reply to opposition to motion to exclude	
Due Date 7	Set on request.
Oral argument	

Appendix B: Protective Order Guidelines (Based on the Proposed Trial Rules)

(a) *Purpose.* This document provides guidance on the procedures for filing of motions to seal and the entry of protective orders in proceedings before the Board. The protective order governs the protection of confidential information contained in documents, discovery, or testimony adduced, exchanged, or filed with the Board. The parties are encouraged to agree on the entry of a stipulated protective order. Absent such agreement, the default standing protective order will be automatically entered.

(b) *Timing; lifting or modification of the Protective Order.* The terms of a protective order take effect upon the filing of a Motion to Seal by a party, and remain in place until lifted or modified by the Board either on the motion of a party for good cause shown or *sua sponte* by the Board.

(c) *Protective Order to Govern Treatment of Confidential Information.* The terms of a protective order govern the treatment of the confidential portions of documents, testimony, and other information designated as confidential, as well as the filing of confidential documents or discussion of confidential information in any papers filed with the Board. The Board shall have the authority to enforce the terms of the Protective Order, to provide remedies for its breach, and to impose sanctions on a party and a party's representatives for any violations of its terms.

(d) *Contents.* The Protective Order shall include the following terms:

(1) *Designation of Confidential Information.* The producing party shall have the obligation to clearly mark as ''PROTECTIVE ORDER MATERIAL'' any documents or information considered to be confidential under the Protective Order.

(2) *Persons Entitled to Access to Confidential Information.* A party receiving confidential information shall strictly restrict access to that information to the following individuals who first have signed and filed an Acknowledgement as provided herein:

(A) *Parties.* Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(B) *Party Representatives.* Representatives of record for a party in the proceeding.

(C) *Experts.* Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(D) *In-house counsel.* In-house counsel of a party.

(E) *Other Employees of a Party.* Employees, consultants, or other persons performing work for a party, other than in-house counsel and in-house counsel's support staff, who sign the Acknowledgement, shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

(F) *The Office.* Employees and representatives of the U.S. Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and staff, other Office support personnel, court reporters, and other persons acting on behalf of the Office.

(G) *Support Personnel.* Administrative assistants, clerical staff, court reporters, and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding. Such support personnel shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(3) *Protection of Confidential Information.* Persons receiving confidential information shall take reasonable care to maintain the confidentiality of that information, including:

(i) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;

(ii) Otherwise using reasonable efforts to maintain the confidentiality of the information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;

(iii) Ensuring that support personnel of the recipient who have access to the confidential information understand and abide by the obligation to maintain the confidentiality of information received that is designated as confidential; and

(iv) Limiting the copying of confidential information to a reasonable number of copies needed to conduct the proceeding and maintaining a record of the locations of such copies.

(4) *Treatment of Confidential Information.* Persons receiving confidential information shall use the following procedures to maintain confidentiality of documents and other information—

(A) *Documents and Information Filed With the Board.*

(i) A party may file documents or information with the Board under seal, together with a non-confidential description of the nature of the confidential information that is under seal and the reasons why the information is confidential and should not be made available to the public. The submission shall be treated as confidential and remain under seal, unless upon motion of a party and after a hearing on the issue, or *sua sponte,* the Board determines that the documents or information does not qualify for confidential treatment.

(ii) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file

confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made publicly available. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal, unless upon motion of a party and after a hearing on the issue, or *sua sponte,* the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(B) *Documents and Information Exchanged Among the Parties.* Information designated as confidential that is disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as ''PROTECTIVE ORDER MATERIAL'' and shall be produced in a manner that maintains its confidentiality.

(5) *Confidential Testimony.* Any person subject to deposition in a proceeding may, on the record at the deposition, preliminarily designate the entirety of the person's testimony and all transcriptions thereof as Confidential, pending further review. Within 10 days of the receipt of the transcript of the deposition, that person, or the person's representative, shall advise the opposing party of those portions of the testimony to which a claim of confidentiality is to be maintained, and the reasons in support of that claim. Such portions shall be treated as confidential and maintained under seal in any filings to the Board unless, upon motion of a party and after a hearing on the issue, or *sua sponte,* the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(6) *Other Restrictions Imposed By the Board.* In addition to the foregoing, the Board may, in its discretion, include other terms and conditions in a Protective Order it enters in any proceeding.

(7) *Requirement of Acknowledgement.* Any person receiving confidential information during a proceeding before the Board shall, prior to receipt of any confidential information, first sign an Acknowledgement, under penalty of perjury, stating the following:

(A) The person has read the Protective Order and understands its terms;

(B) The person agrees to be bound by the Protective Order and will abide by its terms;

(C) The person will use the confidential information only in connection with that proceeding and for no other purpose;

(D) The person shall only extend access to the confidential information to support personnel, such as administrative assistants, clerical staff, paralegals and the like, who are reasonably necessary to assist him or her in the proceeding. The person shall inform such support personnel of the terms and requirements of the Protective Order prior to disclosure of any confidential information to such support personnel and shall be personally responsible for their compliance with the terms of the Protective Order; and

(E) The person agrees to submit to the jurisdiction of the Office for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

(e) *Filing of Executed Protective Order.* The party filing a Motion to Seal shall include with its supporting papers a copy of a proposed Protective Order, signed by the party or its representative of record, certifying that the party accepts and agrees to the terms of the Protective Order. Prior to the receipt of confidential information, any other party to the proceeding also shall file a copy of the proposed Protective Order, signed by the party or its representative of record, certifying that the party accepts and agrees to the terms of the proposed Protective Order. The proposed Protective Order shall remain in effect until superseded by a Protective Order entered by the Board.

(f) *Duty To Retain Acknowledgements.* Each party to the proceeding shall maintain a signed Acknowledgement from each person acting on its behalf who obtains access to confidential information after signing an Acknowledgement, as set forth herein, and shall produce such Acknowledgements to the Office upon request.

(g) *Motion to Seal.* A party may file an opposition to the motion that may include a request that the terms of the proposed Protective Order be modified including limiting the persons who are entitled to access under the Order. Any such opposition shall state with particularity the grounds for modifying the proposed Protective Order. The party seeking the modification shall have the burden of proving that such modifications are necessary. While the motion is pending, no disclosure of confidential information shall be made to the persons for whom disclosure is opposed, but the filing of the motion shall not preclude disclosure of the confidential information to persons for whom disclosure is not opposed and shall not toll the time for taking any action in the proceeding.

(h) *Other Proceedings.* Counsel for a party who receives confidential information in a proceeding will not be restricted by the Board from representing that party in any other proceeding or matter before the Office. Confidential information received in a proceeding may not be used in any other PTO proceeding in which the providing party is not also a party.

(i) *Disposal of Confidential Information.* Within one month after final termination of a proceeding, including any appeals, or within one month after the time for appeal has expired, each party shall assemble all copies of all confidential information it has received, including confidential information provided to its representatives and experts, and shall destroy the confidential information and provide a certification of destruction to the party who produced the confidential information.

DEFAULT PROTECTIVE ORDER

The following Standing Protective Order will be automatically entered into the proceeding upon the filing of a petition for review or institution of a derivation:

Standing Protective Order

This standing protective order governs the treatment and filing of confidential information, including documents and testimony.

1. Confidential information shall be clearly marked ''PROTECTIVE ORDER MATERIAL.''

2. Access to confidential information is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) *Parties.* Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(B) *Party Representatives.* Representatives of record for a party in the proceeding.

(C) *Experts.* Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(D) *In-house counsel.* In-house counsel of a party.

(E) *Other Employees of a Party.* Employees, consultants or other persons performing work for a party, other than in-house counsel and in-house counsel's support staff, who sign the Acknowledgement shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

(F) *The Office.* Employees and representatives of the Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

(G) *Support Personnel.* Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

3. Persons receiving confidential information shall use reasonable efforts to maintain the confidentiality of the information, including:

(A) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;

(B) Otherwise using reasonable efforts to maintain the confidentiality of the information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;

(C) Ensuring that support personnel of the recipient who have access to the confidential information understand and abides by the obligation to maintain the confidentiality of information received that is designated as confidential; and

(D) Limiting the copying of confidential information to a reasonable number of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

4. Persons receiving confidential information shall use the following procedures to maintain the confidentiality of the information:

(A) *Documents and Information Filed With the Board.*

(i) A party may file documents or information with the Board under seal, together with a non-confidential description of the nature of the confidential information that is under seal and the reasons why the information is confidential and should not be made available to the public. The submission shall be treated as confidential and remain under seal, unless, upon motion of a party and after a hearing on the issue, or *sua sponte,* the Board determines that the documents or information does not qualify for confidential treatment.

(ii) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public. The nonconfidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal unless, upon motion of a party and after a hearing on the issue, or *sua sponte,* the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(B) *Documents and Information Exchanged Among the Parties.*

Information designated as confidential that is disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as ''PROTECTIVE ORDER MATERIAL'' and shall be produced in a manner that maintains its confidentiality.

(k) *Standard Acknowledgement of Protective Order.* The following form may be used to acknowledge the protective orders and gain access to information covered by a protective order:

[CAPTION]

Standard Acknowledgment for Access to Protective Order Material

I _____, affirm that I have read the Protective Order; that I will abide by its terms; that I will use the confidential information only in connection with this proceeding and for no other purpose; that I will only allow access to support staff who are reasonably necessary to assist me in this proceeding; that prior to any disclosure to such support staff I informed or will inform them of the requirements of the Standing Protective Order; that I am personally responsible for the requirements of the terms of the Standing Protective Order and I agree to submit to the jurisdiction of the Office and the United States District Court for the Eastern District of Virginia for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

[Signature]

Dated: January 31, 2012.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2012–2523 Filed 2–8–12; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 42 and 90

[Docket No. PTO–P–2011–0082]

RIN 0651–AC70

Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Patent and Trademark Office (Office or USPTO) proposes new rules of practice to implement the provisions of the Leahy-Smith America Invents Act that provide for trials before the Patent Trial and Appeal Board (Board). The proposed rules would provide a consolidated set of rules relating to Board trial practice for *inter partes* review, post-grant review, the transitional program for covered business method patents, and derivation proceedings. The proposed rules would also provide a consolidated set of rules to implement the provisions of the Leahy-Smith America Invents Act related to seeking judicial review of Board decisions.

DATES: The Office solicits comments from the public on this proposed rulemaking. Written comments must be received on or before April 9, 2012 to ensure consideration.

ADDRESSES: Comments should be sent by electronic mail message over the Internet addressed to: *patent_trial_rules@uspto.gov.* Comments may also be submitted by postal mail addressed to: Mail Stop Patent Board, Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of ''Lead Judge Michael Tierney, Patent Trial Proposed Rules.''

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. *See* the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

Although comments may be submitted by postal mail, the Office prefers to receive comments by electronic mail message over the Internet because sharing comments with the public is more easily accomplished. Electronic comments are preferred to be submitted in plain text, but also may be submitted in ADOBE® portable document format or MICROSOFT WORD® format. Comments not submitted electronically should be submitted on paper in a format that facilitates convenient digital scanning into ADOBE® portable document format.

The comments will be available for public inspection at the Board of Patent Appeals and Interferences, currently located in Madison East, Ninth Floor, 600 Dulany Street, Alexandria, Virginia. Comments also will be available for viewing via the Office's Internet Web site (*http://www.uspto.gov*). Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Michael Tierney, Lead Administrative Patent Judge, Scott Boalick, Lead Administrative Patent Judge, Robert Clarke, Administrative Patent Judge, and Joni Chang, Administrative Patent Judge, Board of Patent Appeals and Interferences, by telephone at (571) 272–9797.

SUPPLEMENTARY INFORMATION: On September 16, 2011, the Leahy-Smith America Invents Act was enacted into law (Pub. L. 112–29, 125 Stat. 284 (2011)). The purpose of the Leahy-Smith America Invents Act and these proposed regulations is to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs. The preamble of this notice sets forth in detail the procedures by which the Board will conduct trial proceedings. The USPTO is engaged in a transparent process to create a timely, cost-effective alternative to litigation. Moreover, the rulemaking process is designed to ensure the integrity of the trial procedures. *See* 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b). The proposed rules would provide a consolidated set of rules relating to

Board trial practice for *inter partes* review, post-grant review, the transitional program for covered business method patents, and derivation proceedings. *See* 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b).

This notice proposes rules to implement the provisions of the Leahy-Smith America Invents Act that provide for trials to be conducted by the Board. In particular, the proposed rules would provide a consolidated set of rules relating to Board trial practice for *inter partes* review, post-grant review, derivation proceedings, and the transitional program for covered business method patents by adding a new part 42 including a new subpart A to title 37 of the Code of Federal Regulations. The proposed rules would also provide a consolidated set of rules to implement the provisions of the Leahy-Smith America Invents Act related to seeking judicial review of Board decisions by adding a new part 90 to title 37 of the Code of Federal Regulations.

Additionally, the Office in separate rulemakings proposes to add a new subpart B to 37 CFR part 42 (RIN 0651–AC71) to provide rules specific to *inter partes* review, a new subpart C to 37 CFR part 42 (RIN 0651–AC72) to provide rules specific to post-grant review, a new subpart D to 37 CFR part 42 (RIN 0651–AC73; RIN 0651–AC75) to provide rules specific to the transitional program for covered business method patents, and a new subpart E to 37 CFR part 42 (RIN 0651–AC74) to provide rules specific to derivation proceedings. For the proposed rules, the Office also developed a Trial Practice Guide (which will be revised accordingly when the Office implements the final rules). The notices of proposed rulemaking and the Trial Practice Guide are published in this issue and the next issue (February 10, 2012) of the **Federal Register**.

The instant notice refers to the proposed rules in subparts B through E of part 42 set forth in the other notices. Moreover, rather than repeating the statutory provisions set forth in the Leahy-Smith America Invents Act for the implementation of *inter partes* review, post-grant review, transitional program covered business method patents, and derivation that are provided in the other notices of proposed rulemaking, the instant notice only summarizes the provisions related to the Board and judicial review of Board decisions that are not provided in the other notices.

Patent Trial and Appeal Board

Section 7 of the Leahy-Smith America Invents Act amends 35 U.S.C. 6 and provides for the constitution and duties of the Patent Trial and Appeal Board. 35 U.S.C. 6(a), as amended, provides that the Patent Trial and Appeal Board members will include the Director, Deputy Director, Commissioner for Patents, Commissioner for Trademarks, and administrative patent judges. 35 U.S.C. 6(a), as amended, further provides that ''administrative patent judges shall be persons of competent legal knowledge and scientific ability and are appointed by the Secretary, in consultation with the Director.'' 35 U.S.C. 6(b), as amended, specifies that the duties of the Patent Trial and Appeal Board are to: (1) Review adverse decisions of examiners upon an application for patent; (2) review appeals of reexaminations pursuant to section 134(b); (3) conduct derivation proceedings pursuant to 35 U.S.C. 135; and (4) conduct *inter partes* reviews and post-grant reviews pursuant to chapters 31 and 32 of title 35, United States Code. Further, § 7 of the Leahy-Smith America Invents Act amends 35 U.S.C. 6 by adding paragraphs (c) and (d). New paragraph (c) of 35 U.S.C. 6 provides that each appeal, derivation proceeding, post-grant review including covered business method patent review, and *inter partes* review shall be heard by at least 3 members of the Board, who shall be designated by the Director.

Judicial Review of Patent Trial and Appeal Board Decisions

The Leahy-Smith America Invents Act amends title 35, United States Code, to provide for certain changes to the provisions for judicial review of Board decisions, such as amending 35 U.S.C. 134, 141, 145, 146, and 306 to change the Board's name to ''Patent Trial and Appeal Board'' and to provide for judicial review of the final decisions of the Board in *inter partes* reviews, post-grant reviews, covered business method patent reviews, and derivation proceedings. The Leahy-Smith America Invents Act also revises the provisions related to filing an appeal or commencing a civil action in interferences under 35 U.S.C. 141 or 146, respectively.

In particular, § 3(j) of the Leahy-Smith America Invents Act eliminates references to interferences. Section 3(j)(1) of the Leahy-Smith America Invents Act amends each of 35 U.S.C. 145 and 146 by striking the phrase ''Board of Patent Appeals and Interferences'' each place it appears and inserting ''Patent Trial and Appeal Board.'' Section (3)(j)(2)(A) of the Leahy-Smith America Invents Act amends 35 U.S.C. 146 by: (i) Striking ''an interference'' and inserting ''a derivation proceeding;'' and (ii) striking ''the interference'' and inserting ''the derivation proceeding.'' Section (3)(j)(3) of the Leahy-Smith America Invents Act amends the section heading for 35 U.S.C. 134 to read as follows: ''§ 134. Appeal to the Patent Trial and Appeal Board.'' Section (3)(j)(4) of the Leahy-Smith America Invents Act amends the section heading for 35 U.S.C. 146 to read as follows: ''§ 146. Civil action in case of derivation proceeding.'' Section (3)(j)(6) of the Leahy-Smith America Invents Act amends the item relating to 35 U.S.C. 146 in the table of sections for chapter 13 of title 35, United States Code, to read as follows: ''146. Civil action in case of derivation proceeding.''

Section 6(f)(3)(C) of the Leahy-Smith America Invents Act provides that the authorization to appeal or have remedy from derivation proceedings in 35 U.S.C. 141(d) and 35 U.S.C. 146, as amended, and the jurisdiction to entertain appeals from derivation proceedings under 28 U.S.C. 1295(a)(4)(A), as amended, shall be deemed to extend to any final decision in an interference that is commenced before the effective date (the date that is one year after the enactment date) and that is not dismissed pursuant to § 6(f)(3)(A) of the Leahy-Smith America Invents Act.

Section 6(h)(2)(A) of the Leahy-Smith America Invents Act amends 35 U.S.C. 306 by striking ''145'' and inserting ''144.''

Section 7(c)(1) of the Leahy-Smith America Invents Act amends 35 U.S.C. 141, entitled ''Appeal to Court of Appeals for the Federal Circuit.'' 35 U.S.C. 141(a), as amended, will provide that an applicant who is dissatisfied with the final decision in an appeal to the Patent Trial and Appeal Board under 35 U.S.C. 134(a) may appeal the Board's decision to the United States Court of Appeals for the Federal Circuit. 35 U.S.C. 141(a), as amended, will further provide that, by filing an appeal to the United States Court of Appeals for the Federal Circuit, the applicant waives his or her right to proceed under 35 U.S.C. 145.

Section 7(c)(1) of the Leahy-Smith America Invents Act amends 35 U.S.C. 141(b) to make clear that a patent owner who is dissatisfied with the final decision in an appeal of a reexamination to the Patent Trial and Appeal Board under 35 U.S.C. 134(b) may appeal the Board's decision only to the United States Court of Appeals for the Federal Circuit.

Section 7(c)(1) of the Leahy-Smith America Invents Act amends 35 U.S.C. 141(c) to provide that a party to an *inter partes* review or a post-grant review

who is dissatisfied with the final written decision of the Patent Trial and Appeal Board under 35 U.S.C. 318(a) or 328(a) may appeal the Board's decision only to the United States Court of Appeals for the Federal Circuit.

Section 7(c)(1) of the Leahy-Smith America Invents Act amends 35 U.S.C. 141(d) to provide that a party to a derivation proceeding who is dissatisfied with the final decision of the Patent Trial and Appeal Board in the proceeding may appeal the decision to the United States Court of Appeals for the Federal Circuit, but such appeal shall be dismissed if any adverse party to such derivation proceeding, within 20 days after the appellant has filed notice of appeal in accordance with 35 U.S.C. 142, files notice with the Director that the party elects to have all further proceedings conducted as provided in 35 U.S.C. 146, as amended. 35 U.S.C. 141(d), as amended, will also provide that if the appellant does not, within 30 days after the filing of such notice by the adverse party, file a civil action under 35 U.S.C. 146, the Board's decision shall govern the further proceedings in the case.

Section 7(c)(2) of the Leahy-Smith America Invents Act amends 28 U.S.C. 1295(a)(4)(A) to read as follows:

''(A) the Patent Trial and Appeal Board of the United States Patent and Trademark Office with respect to a patent application, derivation proceeding, reexamination, post-grant review, or inter partes review under title 35, at the instance of a party who exercised that party's right to participate in the applicable proceeding before or appeal to the Board, except that an applicant or a party to a derivation proceeding may also have remedy by civil action pursuant to section 145 or 146 of title 35; an appeal under this subparagraph of a decision of the Board with respect to an application or derivation proceeding shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;''

Section 7(c)(3) of the Leahy-Smith America Invents Act amends 35 U.S.C. 143 by striking the third sentence and inserting the following:

In an ex parte case, the Director shall submit to the court in writing the grounds for the decision of the Patent and Trademark Office, addressing all of the issues raised in the appeal. The Director shall have the right to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board in a derivation proceeding under section 135 or in an inter partes or post-grant review under chapter 31 or 32

Section 7(c)(3) of the Leahy-Smith America Invents Act further amends 35 U.S.C. 143 by striking the last sentence.

Section 7(e) of the Leahy-Smith America Invents Act provides that the amendments made by § 7 of the Leahy-Smith America Invents Act shall take effect upon the expiration of the 1-year period beginning on the date of the enactment of the Leahy-Smith America Invents Act and shall apply to proceedings commenced on or after that effective date, with the following exceptions. First, that the extension of jurisdiction to the United States Court of Appeals for the Federal Circuit to entertain appeals of decisions of the Patent Trial and Appeal Board in reexaminations under the amendment made by § 7(c)(2) shall be deemed to take effect on the date of the enactment of the Leahy-Smith America Invents Act and shall extend to any decision of the Board of Patent Appeals and Interferences with respect to a reexamination that is entered before, on, or after the date of the enactment of this Act. Second, that the provisions of 35 U.S.C. 6, 134, and 141, in effect on the day before the effective date of the amendments made by § 7 of the Leahy-Smith America Invents Act shall continue to apply to *inter partes* reexaminations requested under 35 U.S.C. 311 before such effective date. Third, that the Patent Trial and Appeal Board may be deemed to be the Board of Patent Appeals and Interferences for purposes of appeals of *inter partes* reexaminations requested under 35 U.S.C. 311 before the effective date of the amendments made by § 7 of the Leahy-Smith America Invents Act. And finally, that the Director's right under the fourth sentence of 35 U.S.C. 143, as amended by § 7(c)(3) of the Leahy-Smith America Invents Act, to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board shall be deemed to extend to *inter partes* reexaminations requested under 35 U.S.C. 311 before the effective date of the amendments made by § 7 of the Leahy-Smith America Invents Act.

Section 9(a) of the Leahy-Smith America Invents Act amends 35 U.S.C. 32, 145, 146, 154(b)(4)(A), and 293 by striking ''United States District Court for the District of Columbia'' each place that term appears and inserting ''United States District Court for the Eastern District of Virginia.'' Section 9(b) of the Leahy-Smith America Invents Act provides that amendments made by § 9 of the Leahy-Smith America Invents Act shall take effect on the date of the enactment of this Act and shall apply to any civil action commenced on or after that date.

Discussion of Specific Rules

The proposed rules would provide a consolidated set of rules relating to Board trial practice for *inter partes* review, post-grant review, derivation proceedings, and the transitional program for covered business method patents by adding a new part 42 including a new subpart A to title 37 of the Code of Federal Regulations. Interference proceedings would not be covered by a new part 42 and the rules in part 41 governing contested cases and interferences would continue to remain in effect so as to not disrupt ongoing interference proceedings. Additionally, the proposed rules would also provide a consolidated set of rules to implement the provisions of the Leahy-Smith America Invents Act relating to filing appeals from Board decisions by adding a new part 90 to title 37 of Code of Federal Regulations.

Title 37 of the Code of Federal Regulations, Parts 42 and 90, are proposed to be added as follows:

Part 42—Trial Practice Before the Patent Trial and Appeal Board

General

Section 42.1: Proposed § 42.1 would set forth general policy considerations for part 42.

Proposed § 42.1(a) would define the scope of the rules.

Proposed § 42.1(b) would provide a rule of construction for all the rules in proposed part 42. The proposed rule would mandate that all the Board's rules be construed to achieve the just, speedy, and inexpensive resolution of Board proceedings. This proposed rule reflects considerations identified in 35 U.S.C. 316(b) and 326(b), which state that the Office is to take into account the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the proceedings in promulgating regulations.

Proposed § 42.1(c) would require that decorum be exercised in Board proceedings, including dealings with opposing parties. Board officials would be similarly expected to treat parties with courtesy and decorum.

Proposed § 42.1(d) would provide that the default evidentiary standard for each issue in a Board proceeding is a preponderance of the evidence. This proposed rule implements the statute, which directs that unpatentability issues must be proven by a preponderance of the evidence. 35 U.S.C. 316(e), as amended, and 35 U.S.C. 326(e). The proposed rule is also consistent with 35 U.S.C. 135(b), which provides that the Director shall establish regulations requiring sufficient evidence to prove and rebut a claim of derivation. *See Price* v. *Symsek,* 988 F.2d 1187, 1193 (Fed. Cir. 1993).

Section 42.2: Proposed § 42.2 would set forth definitions for Board proceedings under proposed part 42.

The proposed definition of affidavit would provide that *affidavit* means affidavits or declarations under § 1.68. The proposed definition also provides that a transcript of an *ex parte* deposition or a declaration under 28 U.S.C. 1746 may be used as an affidavit.

The proposed definition of Board would rename ''the Board of Patent Appeals and Interferences'' to ''the Patent Trial and Appeal Board.'' The proposed definition would also provide that *Board* means a panel of the Board or a member or employee acting with the authority of the Board, consistent with 35 U.S.C. 6(b), as amended.

The proposed definition of business day would provide that *business day* means a day other than a Saturday, Sunday, or Federal holiday within the District of Columbia.

The proposed definition of confidential information would provide that *confidential information* means trade secret or other confidential research, development or commercial information. The proposed definition would be consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information.

The proposed definition of final would provide that *final* means final for purposes of judicial review. The proposed definition would also provide that a decision is final only if it disposes of all necessary issues with regard to the party seeking judicial review, and does not indicate that further action is required.

The proposed definition of hearing would make it clear that a *hearing* is a consideration of the issues involved in the trial.

The proposed definition of involved would provide that *involved* means an application, patent, or claim that is the subject of the proceeding.

The proposed definition of judgment would provide that *judgment* means a final written decision by the Board. The proposed definition is consistent with the requirement under 35 U.S.C. 318(a) and 328(a), as amended, that the Board issue final written decisions for reviews that are instituted and not dismissed. The proposed definition is also consistent with 35 U.S.C. 135(d), as amended, which provides for final decisions of the Board in derivation proceedings.

The proposed definition of motion would clarify that *motions* are requests for remedies but that the term motion does not include petitions seeking to institute a trial.

The proposed definition of Office would provide that *Office* means the United States Patent and Trademark Office.

The proposed definition of panel would provide that a *panel* is at least three members of the Board. The proposed definition is consistent with 35 U.S.C. 6(c), as amended, that each derivation proceeding, *inter partes* review, post-grant review, covered business method patent review proceeding shall be heard by at least three members of the Board.

The proposed definition of *party* would include at least the petitioner and the patent owner, as well as any applicant in a derivation proceeding.

The proposed definition of petition would provide that a *petition* is a request that a trial be instituted and is consistent with the requirements of 35 U.S.C. 135(a) and 311, as amended, 35 U.S.C. 321.

The proposed definition of petitioner would provide that a *petitioner* is a party requesting a trial be instituted. This proposed definition is consistent with the requirements of 35 U.S.C. 135(a) and 311(a), as amended, and 35 U.S.C. 321(a), which provide that persons seeking the institution of a trial may do so by filing a petition.

The proposed definition of preliminary proceeding would provide that a *preliminary proceeding* begins with the filing of a petition for instituting a trial and ends with a written decision as to whether a trial will be instituted.

The proposed definition of proceeding would provide that a *proceeding* means a trial or preliminary proceeding. This proposed definition would encompass both the portion of the proceeding that occurs prior to institution of a trial and the trial itself.

The proposed definition of rehearing would provide that *rehearing* means reconsideration.

The proposed definition of trial would provide that a *trial* is a contested case instituted by the Board based upon a petition. This proposed definition would encompass all contested cases before the Board, except for interferences. The proposed definition would exclude interferences so that interferences would continue, without disruption, to use the rules provided in part 41. The existence of a contested case would be a predicate for authorizing a subpoena under 35 U.S.C. 24. As with part 41, *inter partes* reexaminations under 35 U.S.C. 134(c) are not considered contested cases for the purposes of proposed part 42. Similarly, written requests to make a settlement agreement available would not be considered contested cases.

Section 42.3: Proposed § 42.3 would set forth the jurisdiction of the Board in a Board proceeding.

Proposed § 42.3(a) would provide the Board with jurisdiction over applications and patents involved in a Board proceeding. This is consistent with 35 U.S.C. 6(b), as amended, which provides that the Board is to conduct derivation proceedings, *inter partes* reviews, and post-grant reviews. Additionally, the proposed rule is consistent with the Board's role in conducting the transitional program for covered business method patent reviews pursuant to § 18 of the Leahy-Smith America Invents Act, as covered business method patent reviews are subject to 35 U.S.C. 326(c), which provides that the Board conduct the review.

Proposed § 42.3(b) would provide that a petition to institute a trial must be filed with the Board in a timely manner.

Section 42.4: Proposed § 42.4 would provide for notice of trial.

Proposed § 42.4(a) would specifically delegate the determination to institute a trial to an administrative patent judge.

Proposed § 42.4(b) would provide that the Board will send a notice of a trial to every party to the proceeding.

Proposed § 42.4(c) would provide that the Board may authorize additional modes of notice. Note that the failure to maintain a current correspondence address may result in adverse consequences. *Ray* v. *Lehman,* 55 F.3d 606, 610 (Fed. Cir. 1995) (finding notice of maintenance fee provided by the Office to an obsolete, but not updated, address of record to have been adequate).

Section 42.5: Proposed § 42.5 would set forth the conduct of the trial.

Proposed §§ 42.5(a) and (b) would permit administrative patent judges wide latitude in administering the proceedings to balance the ideal of precise rules against the need for flexibility to achieve reasonably fast, inexpensive, and fair proceedings. The decision to waive a procedural requirement, for example default times for taking action, would be committed to the discretion of the administrative patent judge. By permitting the judges to authorize relief under parts 1, 41, and 42, the proposed rule avoids delay and permits related issues to be resolved in the same proceeding in a uniform and efficient manner.

Proposed § 42.5(c) would provide that the Board may set times by order. The proposed rule also provides that good cause must be shown for extensions of

time and to excuse late actions. Late action will also be excused by the Board if it concludes that doing so is in the interests of justice. This proposed requirement to show good cause to extend times and to file belated papers is consistent with the requirements of 35 U.S.C. 316(a)(11), as amended, and 35 U.S.C. 326(a)(11), which provide that the Board issue a final decision not less than 1 year after institution of the review, extendable for good cause shown. The proposed rule is also consistent with 35 U.S.C. 135(b), as amended, which provides that the Director shall prescribe regulations setting forth standards for the conduct of derivation proceedings.

Proposed § 42.5(d) would prohibit *ex parte* communications about a proceeding with a Board member or Board employee actually conducting the proceeding. Under the proposed rule, the initiation of an *ex parte* communication could result in sanctions against the initiating party. The prohibition would include communicating with any member of a panel acting in the proceeding or seeking supervisory review in a proceeding without including the opposing party in the communication. In general, under these proposed rules, it would be wisest to avoid substantive discussions of a pending trial with a Board member or Board employee. The prohibition on *ex parte* communications would not extend to: (1) Ministerial communications with support staff (for instance, to arrange a conference call); (2) hearings in which opposing counsel declines to participate; (3) informing the Board in one proceeding of the existence or status of a related Board proceeding; or (4) reference to a pending case in support of a general proposition (for instance, citing a published opinion from a pending case or referring to a pending case to illustrate a systemic problem).

Section 42.6: Proposed § 42.6 would set forth the procedure for filing documents, including exhibits, and service.

Proposed § 42.6(a) would provide guidance for the filing of papers. Under proposed § 42.6(a), papers to be filed would be required to meet standards similar to those required in patent prosecution, § 1.52(a), and in the filings at the Federal Circuit under Fed. R. App. P. 32. The proposed prohibition against incorporation by reference would minimize the chance that an argument would be overlooked and would eliminate abuses that arise from incorporation and combination. In *DeSilva* v. *DiLeonardi,* 181 F.3d 865, 866–67 (7th Cir. 1999), the court rejected ''adoption by reference'' as a self-help increase in the length of the brief and noted that incorporation is a pointless imposition on the court's time as it requires the judges to play archeologist with the record. The same rationale applies to Board proceedings. *Cf. Globespanvirata, Inc.* v. *Tex. Instruments, Inc.,* 2005 WL 3077915, *1 (D. N.J. 2005) (Defendants provided cursory statements in motion and sought to make their case through incorporation of expert declaration and a claim chart. Incorporation by reference of argument not in motion was held to be a violation of local rules governing page limitations and was not permitted by the court); *S. Indus., Inc.* v. *JL Audio, Inc.,* 29 F. Supp. 2d 878, 881–82 (N.D. Ill. 1998) (Parties should not use line spacing, font size, or margins to evade page limits).

Proposed § 42.6(b) would set electronic filing as the default manner in which documents in a proceeding are filed with the Board. The procedures for electronic filings in the proposed rule would be consistent with the procedures for submission of electronic filings set forth in § 2.126(b). Section 2.126(b) is a rule of the Trademark Trial and Appeal Board (TTAB) which provides that submissions may be made to the TTAB electronically according to parameters established by the Board and published on the Web site of the Office.

The use of electronic filing, such as that used with the Board's Interference Web Portal, facilitates public accessibility and is consistent with the requirements of 35 U.S.C. 316(a)(1), as amended, and 35 U.S.C. 326(a)(1), which state that the files of a proceeding are to be made available to the public, except for those documents filed with the intent that they be sealed. Where needed, a party may file by means other than electronic filing but a motion explaining such a need must accompany the non-electronic filing. In determining whether alternative filing methods would be authorized, the Office would consider the entity size and the ability of the party to file electronically.

Proposed § 42.6(c) would require that exhibits be filed with the first document in which the exhibit is cited so as to allow for uniformity in citing to the record.

Proposed § 42.6(d) would prohibit the filing of duplicate documents absent Board authorization.

Proposed § 42.6(e) would require service simultaneous with the filing of the document, as well as require certificates of service. Additional procedures to be followed when filing documents may be provided via a standing order of the Board. *See In re Sullivan,* 362 F.3d 1324 (Fed. Cir. 2004).

Section 42.7: Proposed § 42.7 would provide that the Board may vacate or hold in abeyance unauthorized papers and would limit the filing of duplicate papers. This proposed rule would provide a tool for preventing abuses that can occur in filing documents and would ensure that the parties and the Board are consistent in their citation to the underlying record.

Section 42.8: Proposed § 42.8 would provide for certain mandatory notices to be provided by the parties, including identification of the real parties in interest, related matters, lead and back-up counsel, and service information. The proposed rule would require the identification of lead and back-up counsel and service information. The mandatory notices concerning real parties in interest and related matters are consistent with the requirements of 35 U.S.C. 315, as amended, and 35 U.S.C. 325. These statutes describe the relationship between the trial and other related matters and authorize, among other things, suspension of other proceedings before the Office on the same patent and lack of standing for real parties in interest that have previously filed civil actions against a patent for which a trial is requested. Mandatory notices are also needed to judge any subject matter estoppel triggered by a prior Board, district court, or U.S. International Trade Commission proceeding.

Examples of related administrative matters that would be affected by a decision in the proceeding include every application and patent claiming, or which may claim, the benefit of the priority of the filing date of the party's involved patent or application as well as any *ex parte* and *inter partes* reexaminations for an involved patent.

The need for identification of the real party in interest helps identify potential conflicts of interests for the Office. In the case of the Board, a conflict would typically arise when an official has an investment in a company with a direct interest in a Board proceeding. Such conflicts can only be avoided if the parties promptly provide information necessary to identify potential conflicts. The identity of a real party-in-interest might also affect the credibility of evidence presented in a proceeding. The Board would consider, on a case-by case basis, relevant case law to resolve a real party in interest or privy dispute that may arise during a proceeding. Further, in *inter partes* and post-grant review proceedings before the Office, the petitioner (including any real party-in-interest or privy of the petitioner) is

estopped from relitigating any ground that was or reasonably could have been raised. *See* 35 U.S.C. 315(e)(1), as amended, and 35 U.S.C. 325(e)(1). What constitutes a real party-in-interest or privy is a highly fact-dependent question. *See generally* 18A *Wright & Miller Fed. Prac. & Proc.* §§ 4449, 4451; *Taylor* v. *Sturgell,* 553 U.S. 880 (2008). While many factors can lead to a determination that a petitioner was a real party-in-interest or privy in a previous proceeding, actual control or the opportunity to control the previous proceeding is an important clue that such a relationship existed. *See, e.g., Taylor,* 553 U.S. at 895; *see generally* 18A *Wright & Miller* § 4451. Factors for determining actual control or the opportunity to control include existence of a controlling interest in the petitioner.

Section 42.9: Proposed § 42.9 would permit action by an assignee to the exclusion of an inventor. Orders permitting an assignee of a partial interest to act to the exclusion of an inventor or co-assignee would rarely be granted, and such orders would typically issue only when the partial assignee was in a proceeding against its co-assignee. *Ex parte Hinkson,* 1904 Comm'r. Dec. 342.

Section 42.10: Proposed § 42.10(a) would provide that the Board may require a party to designate a lead counsel. The proposed rule would remind parties to designate back-up counsel who can conduct business on behalf of the lead counsel as instances arise where lead counsel may be unavailable.

Proposed § 42.10(b) would provide that a power of attorney must be filed for counsel not of record in the party's involved patent or application.

Proposed § 42.10(c) would allow for *pro hac vice* representation before the Board subject to such conditions as the Board may impose. The Board may recognize counsel *pro hac vice* during a proceeding upon a showing of good cause. Proceedings before the Office can be technically complex. For example, it is expected that amendments to a patent will be sought. Consequently, the grant of a motion to appear *pro hac vice* is a discretionary action taking into account the specifics of the proceedings. Similarly, the revocation of *pro hac vice* is a discretionary action taking into account various factors, including incompetence, unwillingness to abide by the Office's Rules of Professional Conduct, and incivility.

The proposed rule, if adopted, would allow for this practice in the new proceedings authorized by the Leahy-Smith America Invents Act.

Proposed § 42.10(d) would provide a limited delegation to the Board under 35 U.S.C. 2(b)(2) and 32 to regulate the conduct of counsel in Board proceedings. The proposed rule would delegate to the Board the authority to conduct counsel disqualification proceedings while the Board has jurisdiction over a proceeding. The rule would delegate to the Chief Administrative Patent Judge the authority to make final a decision to disqualify counsel in a proceeding before the Board for the purposes of judicial review. This delegation would not derogate from the Director the prerogative to make such decisions, nor would it prevent the Chief Administrative Patent Judge from further delegating authority to an administrative patent judge.

Proposed § 42.10(e) provides that counsel may not withdraw from a proceeding before the Board unless the Board authorizes such withdrawal.

Section 42.11: Proposed § 42.11 would remind parties, and individuals associated with the parties, of their duty of candor and good faith to the Office as honesty before the Office is essential to the integrity of the proceeding.

Section 42.12: Proposed § 42.12 would provide rules for sanctions in trial proceedings before the Board. 35 U.S.C. 316(a)(6), as amended, and 35 U.S.C. 326(a)(6) require that the Director prescribe sanctions for abuse of discovery, abuse of process, and any other improper use of the proceeding in *inter partes* review, post-grant review, and covered business method patent review proceedings. The proposed rule is also consistent with 35 U.S.C. 135(b), as amended, which provides that the Director shall prescribe regulations setting standards for the conduct of derivation proceedings.

Proposed § 42.12(a) would identify types of misconduct for which the Board may impose sanctions. The proposed rule would explicitly provide that misconduct includes failure to comply with an applicable rule, abuse of discovery, abuse of process, improper use of the proceeding and misrepresentation of a fact. An example of a failure to comply with an applicable rule includes failure to disclose a prior relevant inconsistent statement.

Proposed § 42.12(b) would recite the list of sanctions that may be imposed by the Board.

Section 42.13: Proposed § 42.13 would provide a uniform system of citation to authority. The proposed rule would codify existing Board practice and extends it to trial proceedings. Under the proposed rule, a citation to a single source, in the priority order set out in the rule, would be sufficient, thus minimizing the citation burden on the public.

Section 42.14: Proposed § 42.14 would provide that the record of a proceeding be made available to the public, except as otherwise ordered. An exception to public availability would be those documents or things accompanied by a motion to seal the document or thing. The proposed rule reflects the provisions of 35 U.S.C. 316(a)(1), as amended, and 35 U.S.C. 326(a)(1), which require that *inter partes* review and post-grant review files be made available to the public, except that any petition or document filed with the intent that it be sealed, if accompanied by a motion to seal, be treated as sealed pending the outcome of the ruling on the motion to seal.

Fees

Sections 10(d) and (e) of the Leahy-Smith America Invents Act set out a process that must be followed when the Office is using its authority under section 10(a) to set or adjust patent fees. *See* Public Law 112–29, 125 Stat. at 317–18. This process does not feasibly permit the fees described herein to be in place by September 16, 2012 (the effective date of many of the Board procedures required by the Leahy-Smith America Invents Act and described herein). Therefore, the Office is setting these fees pursuant to its authority under 35 U.S.C. 41(d)(2) in this rule making, which provides that fees for all processing, services, or materials relating to patents not specified in 35 U.S.C. 41 are to be set at amounts to recover the estimated average cost to the Office of such processing, services, or materials. *See* 35 U.S.C. 41(d)(2).

The Office is also in the process of developing a proposal to adjust patent fees under section 10 of the Leahy-Smith America Invents Act. The fees proposed in this notice will be revisited in furtherance of the Director's fee setting efforts in this area.

Section 42.15: Proposed § 42.15 would set fees for the new trial proceedings.

Proposed § 42.15(a) would set the fee for a petition to institute an *inter partes* review of a patent based upon the number of challenged claims, and reflects the requirements of 35 U.S.C. 311 and 312(a), as amended, that the Director set fees for the petition and that the petition be accompanied by payment of the fee established. Basing the fees on the number of claims challenged allows for ease of calculation and reduces the chance of insufficient payment. Further, the proposed fees are generally reflective of the complexity of

the case because the number of claims often impacts the complexity of the petition and increases the demands placed on the patent owner as well as the deciding officials. *Cf. In re Katz Interactive Call Processing Patent Litig.,* 639 F.3d 1303, 1309 (Fed. Cir. 2011) (limiting number of asserted claims is appropriate to efficiently manage a case).

To understand the scope of a dependent claim, the claims from which the dependent claim depends must be construed along with the dependent claim. Accordingly, for fee calculation purposes, each claim challenged will be counted as well as any claim from which a claim depends, unless the parent claim is also separately challenged. The following examples are illustrative.

Example 1: Claims 1–30 are challenged where each of claims 2–30 are dependent claims and depend only upon claim 1. There are 30 claims challenged for purposes of fee calculation.

Example 2: Claims 20–40 are challenged where each of claims 20–40 are dependent claims and depend only upon claim 1. As claims 20–40 depend from claim 1, claim 1 counts toward the total number of claims challenged. Thus, there are 21 claims challenged for fee calculation purposes.

Example 3: Claims 1, 11–20, and 31–40 are challenged. Each of claims 1 and 31–40 are independent claims. Each of claims 11–20 are dependent claims and depend upon claim 9, which in turn depends upon claim 8, which in turn depends upon claim 1. As claims 11–20 depend upon parent claims 8 and 9, claims 8 and 9 would count as challenged claims towards the total number of claims challenged. As claim 1 is separately challenged, it would not count twice towards the total number of claims challenged. Thus, there are 23 claims challenged for fee calculation purposes.

Example 4: Claims 1, 11–20, and 31–40 are challenged. Each of claims 1 and 31–40 are independent claims. Claim 11 depends upon claim 1 and claims 12–20 depend upon claim 11. As each of the challenged claims is based on a separately challenged independent claim, we need not include any further claims for fee calculations purposes. Thus, there are 21 challenged claims.

Proposed § 42.15(b) would set the fee for a petition to institute a post-grant review or a covered business method patent review of a patent based upon the number of challenged claims, and would reflect the requirements of 35 U.S.C. 321, as amended, and 35 U.S.C. 322(a) that the Director set fees for the petition and that the petition be accompanied by payment of the fee established. The analysis of the number of claims challenged for fee calculation purposes would be the same as for proposed § 42.15(a).

Item (C) of the Rulemaking Considerations section of this notice, *infra,* provides the Office's analysis of the cost to provide the services requested for each of the proceedings.

Proposed § 42.15(c) would set the fee for a petition to institute a derivation proceeding in the amount of $400. Derivation proceedings concern allegations that an inventor named in an earlier application, without authorization, derived the claimed invention from an inventor named in the petition. The fee is set to recover the treatment of the petition as a request to transfer jurisdiction from the examining corps to the Board and not the costs of instituting and performing the derivation trial which is necessary to complete the examination process for the applicant seeking the derivation.

Proposed § 42.15(d) would set the fee for filing written requests to make a settlement agreement available in the amount of $400.

Petition and Motion Practice

Section 42.20: Proposed § 42.20(a) would provide that relief, other than a petition to institute a trial, must be in the form of a motion. The proposed rule is consistent with the requirements of 35 U.S.C. 316(a)(1) and 316(d), as amended, and 35 U.S.C. 326(a)(1) and 326(d) which provide that requests to seal a document and requests to amend the patent be filed in the form of a motion.

Proposed § 42.20(b) would provide that motions will not be entered absent Board authorization, and authorization may be provided in an order of general applicability or during the proceeding. Generally, the Board expects that authorization would follow the current Board practice where a conference call would be required before an opposed motion is filed as quite often the relief requested in such motions can be granted (or denied) in a conference call. This practice has significantly increased the speed and reduced the costs in contested cases.

Proposed § 42.20(c) would place the burden of proof on the moving party. A motion that fails to justify the relief on its face could be dismissed or denied without regard to subsequent briefing.

Proposed § 42.20(d) would provide that the Board may order briefing on any issue appropriate for a final written determination on patentability. Specifically, 35 U.S.C. 318(a), as amended, and 328(a) require that where a review is instituted and not dismissed the Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added. The proposed rule would provide for Board ordered briefing where appropriate in order to efficiently and effectively render its final decision on patentability.

Section 42.21: Proposed § 42.21(a) would provide that the Board may require a party to file a notice stating the relief it requests and the basis for that relief in Board proceedings. The proposed rule would make clear that a notice must contain sufficient detail to serve its notice function. The proposed rule would provide an effective mechanism for administering cases efficiently and placing opponents on notice.

Proposed § 42.21(b) would state the effect of a notice. The proposed rule would make it clear that failure to state a sufficient basis for relief would warrant a denial of the request.

Proposed § 42.21(c) would permit correction of a notice after the time set for filing the notice, but would set a high threshold for entry of the correction, *i.e.,* if the entry was in the interests of justice. The proposed rule is consistent with 35 U.S.C. 316(a)(11), as amended, and 35 U.S.C. 326(a)(11), which require good cause be shown to extend the time for entering a final decision. In determining whether good cause is shown, the Board would be permitted to consider the ability of the Board to complete timely the proceeding should the request be granted. Hence, requests made at the outset of a proceeding would be more likely to demonstrate good cause than requests made later in the proceeding.

Section 42.22: Proposed § 42.22 concerns the general content of motions.

Proposed § 42.22(a) would require that each petition or motion be filed as a separate paper to reduce the chance that an argument would be overlooked and reduce the complexity of any given paper. Proposed § 42.22(a)(1)–(3) would provide for a statement of precise relief requested, a statement of material facts, and statement of the reasons for relief. Vague arguments and generic citations to the record are fundamentally unfair to an opponent and do not provide sufficient notice to an opponent and creates inefficiencies for the Board.

Proposed § 42.22(b) would require the movant to make showings ordinarily required for the requested relief in other parts of the Office. Many actions, particularly corrective actions like changes in inventorship, filing reissue applications, and seeking a retroactive foreign filing license, are governed by other rules of the Office. By requiring the same showings the proposed rule would keep practice uniform throughout the Office.

Proposed § 42.22(c) would provide that a petition or motion shall contain

a statement of facts with specific citations to the portions of the record that support a particular fact. Providing specific citations to the record gives notice to an opponent of the basis for the fact and provides the Board the information necessary for effective and efficient administration of the proceeding.

Proposed § 42.22(d) would allow the Board to order additional showings or explanations as a condition for authorizing a motion. Experience has shown that placing conditions on motions helps provide guidance to the parties as to what issues and facts are of particular importance and ensures that the parties are aware of controlling precedent that should be addressed in a particular motion.

Section 42.23: Proposed § 42.23 would provide that oppositions and replies must comply with the content requirements for a motion and that a reply may only respond to arguments raised in the corresponding opposition. Oppositions and replies may rely upon appropriate evidence to support the positions asserted. Reply evidence, however, must be responsive and not merely new evidence that could have been presented earlier to support the movant's motion.

Section 42.24: Proposed § 42.24 would provide page limits for petitions, motions, oppositions, and replies. 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b) provide considerations that are to be taken into account when prescribing regulations, including the integrity of the patent system, the efficient administration of the Office, and the ability to timely complete the trials. The page limits proposed in this rule are consistent with these considerations.

Federal courts routinely use page limits in managing motions practice as ''[e]ffective writing is concise writing.'' *Spaziano* v. *Singletary,* 36 F.3d 1028, 1031 n.2 (11th Cir. 1994). Many district courts restrict the number of pages that may be filed in a motion including, for example, the District of Delaware, the District of New Jersey, the Eastern District of Texas, the Northern, Central, and Southern Districts of California, and the Eastern District of Virginia.

Federal courts have found that page limits ease the burden on both the parties and the courts, and patent cases are no exception. *Eolas Techs., Inc.* v. *Adobe Sys., Inc.,* No. 6:09–CV–446, at 1 (E.D. Tex. Sept. 2, 2010) (''The Local Rules' page limits ease the burden of motion practice on both the Court and the parties.''); *Blackboard, Inc.* v. *Desire2Learn, Inc.,* 521 F. Supp. 2d 575, 576 (E.D. Tex. 2007) (The parties ''seem to share the misconception, popular in some circles, that motion practice exists to require federal judges to shovel through steaming mounds of pleonastic arguments in Herculean effort to uncover a hidden gem of logic that will ineluctably compel a favorable ruling. Nothing could be farther from the truth.''); *Broadwater* v. *Heidtman Steel Prods., Inc.,* 182 F. Supp. 2d 705, 710 (S.D. Ill. 2002) (''Counsel are strongly advised, in the future, to not ask this Court for leave to file any memoranda (supporting or opposing dispositive motions) longer than 15 pages. The Court has handled complicated patent cases and employment discrimination cases in which the parties were able to limit their briefs supporting and opposing summary judgment to 10 or 15 pages.'' (Emphasis omitted)).

The Board's experience with page limits in interference motions practice is consistent with that of the federal courts. The Board's use of page limits has shown it to be beneficial without it being unduly restrictive for the parties. Page limits have encouraged the parties to focus on dispositive issues, easing the burden of motions practice on the parties and on the Board.

The Board's experience with page limits in interference practice is informed by its use of different approaches over the years. In the early 1990s, page limits were not routinely used for motions, and the practice suffered from lengthy and unacceptable delays. To reduce the burden on the parties and on the Board and thereby reduce the time to decision, the Board instituted page limits in the late 1990s for every motion. Page limit practice was found to be effective in reducing the burdens on the parties and improving decision times at the Board. In 2006, the Board revised the page limit practice and allowed unlimited findings of fact and generally limited the number of pages containing argument. Due to abuses of the system, the Board recently reverted back to page limits for the entire motion (both argument and findings of fact).

Proposed § 42.24(a) would provide specific page limits for petitions and motions. The proposed rule would set a limit of 50 pages for petitions requesting *inter partes* reviews and derivation proceedings, 70 pages for petitions requesting post-grant review and covered business method patent reviews, and 15 pages for motions.

The Board's current practice in interferences is to limit motions for judgment on priority of invention to 50 pages, miscellaneous motions to 15 pages and other motions to 25 pages. Hence, non-priority motions for judgment of unpatentability are currently limited to 25 pages. The Board's current page limits are consistent with the 25 page limits in the Northern, Central, and Southern Districts of California, and the Middle District of Florida and exceed the limits in the District of Delaware (20), the Northern District of Illinois (15), the District of Massachusetts (20), the Eastern District of Michigan (20), the Southern District of Florida (20), and the Southern District of Illinois (20).

In a typical proceeding before the Board, a party may be authorized to file: A single motion for unpatentability based on prior art; a single motion for unpatentability based upon failure to comply with 35 U.S.C. 112, lack of written description and/or enablement; and potentially another motion for lack of compliance with 35 U.S.C. 101, although a 35 U.S.C. 101 motion may be required to be combined with the 35 U.S.C. 112 motion. Each of these motions is currently limited to 25 pages in length, unless good cause is shown that the page limits are unduly restrictive for a particular motion.

A petition requesting the institution of a trial proceeding would be similar to motions currently filed with the Board. Specifically, petitions to institute a trial seek a final written decision that the challenged claims are unpatentable, where derivation is a form of unpatentability. Accordingly, a petition to institute a trial based on prior art would under current practice be limited to 25 pages, and by consequence, a petition raising unpatentability based on prior art and unpatentability under 35 U.S.C. 101 and/or 112 would be limited to 50 pages.

Under the proposed rules, an *inter partes* review petition would be based upon any grounds identified in 35 U.S.C. 311(b), as amended, *i.e.,* only a ground that could be raised under 35 U.S.C. 102 or 103 and only on the basis of patents or printed publications. Generally, under current practice, a party is limited to filing single prior art motions, limited to 25 pages in length. The proposed rule would provide up to 50 pages in length for a motion requesting *inter partes* review. Thus, as the proposed page limit doubles the default page limit currently set for a motion before the Board, a 50 page limit is considered sufficient in all but exceptional cases and is consistent with the considerations provided in 35 U.S.C. 316(b), as amended.

Under the proposed rules, a post-grant review petition would be based upon any grounds identified in 35 U.S.C. 321(b), *e.g.,* failure to comply with 35 U.S.C. 101, 102, 103, and 112 (except

best mode). Under current practice, a party would be limited to filing two or three motions, each limited to 25 pages, for a maximum of 75 pages. Where there is more than one motion for unpatentability based upon different statutory grounds, the Board's experience is that the motions contain similar discussions of technology and claim constructions. Such overlap is unnecessary where a single petition for unpatentability is filed. Thus, the 70 proposed page limit is considered sufficient in all but exceptional cases.

Covered business method patent review is similar in scope to that of post-grant review as there is substantial overlap in the statutory grounds permitted for review. Thus, the proposed page limit for proposed covered business method patent reviews of 70 pages is the same as that proposed for post-grant review.

Petitions to institute derivation proceedings raise a subset of the issues that are currently raised in interferences in a motion for judgment on priority of invention. Currently, motions for judgment on priority of invention, including issues such as conception, corroboration, and diligence, are generally limited to 50 pages in length. Thus, the 50 proposed page limit is considered sufficient in all but exceptional cases.

The proposed rule would provide that petitions to institute a trial must comply with the stated page limits but may be accompanied by a motion that seeks to waive the page limits. The petitioner must show in the motion how a waiver of the page limits is in the interests of justice. A copy of the desired non-page limited petition must accompany the motion. Generally, the Board would decide the motion prior to deciding whether to institute the trial.

Current Board practice provides a limit of 25 pages for other motions and 15 pages for miscellaneous motions. The Board's experience is that such page limits are sufficient for the filing parties and do not unduly burden the opposing party and the Board. Petitions for instituting a trial would generally replace the current practice of filing motions for unpatentability. Most motions for relief are expected to be similar to the current interference miscellaneous motion practice. Accordingly, the proposed rule would provide a 15 page limit for motions as this is considered sufficient for most motions but may be adjusted where the limit is determined to be unduly restrictive for the relief requested. A party may contact the Board and arrange for a conference call to discuss the need for additional pages for a particular motion. Except for a motion to waive the page limit accompanying a petition seeking review, any motion to waive a page limit must be granted in advance of filing a motion, opposition or reply for which the waiver is necessary.

Proposed § 42.24(b) would provide page limits for oppositions. Current interference practice provides an equal number of pages for an opposition as its corresponding motion. This is generally consistent with motions practice in federal courts. The proposed rule would continue the current practice.

Proposed § 42.24(c) would provide page limits for replies. Current interference practice provides a 15-page limit for priority motion replies, a 5 page limit for miscellaneous (procedural) motion replies, and a 10 page limit for all other motions. The proposed rule is consistent with current interference practice for procedural motions. The proposed rule would provide a 15 page limit for reply to petitions requesting a trial, which the Office believes is sufficient based on current practice. Current interference practice has shown that such page limits do not unduly restrict the parties and, in fact, provide sufficient flexibility to parties to not only reply to the motion but also help to focus on the issues.

Section 42.25: Proposed § 42.25 would provide default times for filing oppositions and replies. The expectation, however, is that the Board would tailor times appropriate to each case as opposed to relying upon the default times set by rule.

Testimony and Production

The proposed rules would provide limitations for discovery and testimony. Unlike in proceedings under the Federal Rules of Civil Procedure, the burden of justifying discovery in Board proceedings would lie with the party seeking discovery.

Proceedings before the Board differ from most civil litigation in that the proponent of an argument before the Board generally has access to relevant evidence that is comparable to its opponent's access. Consequently, the expense and complications associated with much of discovery can be avoided. For instance, since rejections are commonly based on the contents of the specification or on publicly available references, there is no reason to presume that the patent owner has better access to evidence of unpatentability on these grounds than the petitioner. Exceptions occur particularly when the ground of unpatentability arises out of conduct, particularly conduct of a purported inventor. In such cases, discovery may be necessary to prove such conduct, in which case the proponent of the evidence may move for additional discovery. The Board may impose conditions on such discovery to prevent abuse.

Section 42.51: Proposed § 42.51(a) would provide for limited discovery in the trial consistent with the goal of providing trials that are timely, inexpensive, and fair. The proposed rule is consistent with 35 U.S.C. 316(a)(5), as amended, and 326(a)(5), which provide for discovery of relevant evidence but limit the scope of the discovery, and 35 U.S.C. 135(b), as amended, which provides that the Director shall prescribe regulations setting forth standards for the conduct of derivation proceedings.

Proposed § 42.51(b)(1) and (b)(2) would provide for routine discovery of exhibits cited in a paper or testimony and provide for cross examination of affidavit testimony without the need to request authorization from the Board. The proposed rule would eliminate many routine discovery requests and disputes. The rule would not require a party to create materials or to provide materials not cited.

Proposed § 42.51(b)(3) would ensure the timeliness of the proceedings by requiring that parties, and individuals associated with the parties, provide information that is inconsistent with a position advanced by the patent owner or petitioner during the course of the proceeding. The Office recognizes that this requirement may differ from the proposed changes to § 1.56. But, Board experience has shown that the information covered by proposed 42.51(b)(3) is typically sought through additional discovery and that such information leads to the production of relevant evidence. However, this practice of authorizing additional discovery for such information risks significant delay to the proceeding and increased burdens on both the parties and the Office. To avoid these issues, and to reduce costs and insure the integrity and timeliness of the proceeding, the proposed rule makes the production of such information routine. Similarly, while the Office recognizes that some parties may be hesitant to use the new proceedings because of this requirement, the benefit of the requirement outweighs any impact on participation. Lastly this requirement does not override legally-recognized privileges such as attorney-client or attorney work product.

The proposed rule would require that the information be provided as a petition, motion, opposition, reply, preliminary patent owner response, or

patent owner response to petition. The proposed rule would also require that the party submitting the information specify the relevance of the document, where the relevant information appears in the document and, where applicable, how the information is pertinent to the claims. This information aids the Board in rendering decisions in trial proceedings within statutory timeframes. *See* 35 U.S.C. 316(a)(11) and 318(a), as amended, and 35 U.S.C. 326(a)(11) and 328(a). The identification of portions of the document relied upon and the pertinence of the information aids the Board's efficient and effective administration of the proceeding by making the information accessible to the Board as opposed to having the Board play archeologist with the record. *See DeSilva* v. *DiLeonardi,* 181 F.3d at 866–67.

Proposed § 42.51(c) would provide for additional discovery. Additional discovery increases trial costs and increases the expenditures of time by the parties and the Board. To promote effective discovery, the proposed rule would require a showing that the additional discovery sought in a proceeding other than a post-grant review is in the interests of justice, which would place an affirmative burden upon a party seeking the discovery to show how the proposed discovery would be productive. A separate rule (§ 42.224) governs additional discovery in post-grant proceedings. The Board's interference experience, however, is that such showings are often lacking and authorization for additional discovery is expected to be rare.

The proposed interests-of-justice standard for additional discovery is consistent with considerations identified in 35 U.S.C. 316(b), as amended, including the efficient administration of the Board and the Board's ability to complete timely trials. Further, the proposed interests-of-justice standard is consistent with 35 U.S.C. 316(a)(5), as amended, which states that discovery other than depositions of witnesses submitting affidavits and declarations be what is otherwise necessary in the interests of justice.

While the Board will employ an interests-of-justice standard in granting additional discovery in *inter partes* reviews and derivation proceedings, new subpart C will provide that a good cause standard will be employed in post-grant reviews, and by consequence, in covered business method patent reviews. Good cause and interests of justice are closely related standards, but the interests-of-justice standard is slightly higher than good cause. While a good cause standard requires a party to show a specific factual reason to justify the needed discovery, under the interests-of-justice standard, the Board would look at all relevant factors. Specifically, to show good cause, a party would be required to make a particular and specific demonstration of fact. Under the interests-of-justice standard, the moving party would also be required to show that it was fully diligent in seeking discovery and that there is no undue prejudice to the non-moving party. In contrast, the interests-of-justice standard covers considerable ground, and in using such a standard, the Board expects to consider whether the additional discovery is necessary in light of the totality of the relevant circumstances.

Proposed § 42.52 would provide procedures for compelling testimony. Under 35 U.S.C. 23, the Director may establish rules for affidavit and deposition testimony. Under 35 U.S.C. 24, a party in a contested case may apply for a subpoena to compel testimony in the United States, but only for testimony to be used in the contested case. Proposed § 42.52(a) would require the party seeking a subpoena to first obtain authorization from the Board; otherwise, the compelled evidence would not be admitted in the proceeding. Proposed § 42.52(b) would impose additional requirements on a party seeking testimony or production outside the United States because the use of foreign testimony generally increases the cost and complexity of the proceeding for both the parties and the Board. The Board would give weight to foreign deposition testimony to the extent warranted in view of all the circumstances, including the laws of the foreign country governing the testimony.

Section 42.53: Proposed § 42.53 would provide for the taking of testimony. To minimize costs, direct testimony would generally be taken in the form of an affidavit. Cross-examination testimony and redirect testimony would generally come in the form of a deposition transcript. If the nature of the testimony makes direct observation of witness demeanor necessary or desirable, the Board might authorize or even require that the testimony be presented live or be video-recorded in addition to filing of the required transcript. *Cf. Applied Research Sys. ARS Holdings N.V.* v. *Cell Genesys Inc.,* 68 USPQ2d 1863 (B.P.A.I. 2003) (non-precedential). The proponent of the witness would be responsible for the cost of producing the witness for the deposition. The parties would have latitude in choosing the time and place for the deposition, provided the location is in the United States and the time falls within a prescribed testimony period.

Proposed § 42.53(c)(2) would provide for the time period for cross-examination and would set a norm for the conference proposed in § 42.53(c)(1). A party seeking to move the deposition outside this period would need to show good cause.

Proposed § 42.53(d) would require that the party calling the witness initiate a conference with the Board at least five business days before a deposition with an interpreter is taken. Board experience suggests that the complexity of foreign language depositions can be so great that in many cases the resulting testimony is not useful to the fact-finder. To avoid a waste of resources in the production of an unhelpful record, the proposed rules would require that the Board approve of the deposition format in advance. Occasionally the Board will require live testimony where the Board considers the demeanor of a witness critical to assessing credibility.

Proposed § 42.53(e) would provide for the manner of taking testimony.

Proposed § 42.53(e)(1) would require that each witness before giving deposition testimony be duly sworn according to law by the officer before whom the deposition is to be taken. Proposed § 42.53(e)(1) would also require that the officer be authorized to take testimony under 35 U.S.C. 23.

Proposed § 42.53(e)(2) would require that testimony be taken in answer to interrogatories with any questions and answers recorded in their regular order by the officer, or by some other disinterested person in the presence of the officer, unless the presence of the officer is waived on the record by agreement of all parties.

Proposed § 42.53(e)(3) would require that any exhibits used during the deposition be numbered as required by § 42.63(b), and must, if not previously served, be served at the deposition. Proposed § 42.53(e)(3) would also provide that exhibits objected to be accepted pending a decision on the objection.

Proposed § 42.53(e)(4) would require that all objections be made at the time of the deposition to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, the conduct of any party, and that any other objection to the deposition be noted on the record by the officer.

Proposed § 42.53(e)(5) would require the witness to read and sign (in the form of an affidavit) a transcript of the

deposition after the testimony has been transcribed, unless the parties otherwise agree in writing, the parties waive reading and signature by the witness on the record at the deposition, or the witness refuses to read or sign the transcript of the deposition.

The certification of proposed § 42.53(e)(6)(vi) would provide a standard for disqualifying an officer from administering a deposition. The use of financial interest as a disqualification, however, would be broader than the employment interest currently barred. Payment for ordinary services rendered in the ordinary course of administering the deposition and preparing the transcript would not be a disqualifying financial interest. An interest acknowledged by the parties on the record without objection would not be a disqualifying interest.

Proposed § 42.53(e)(7) would require the proponent of the testimony to file the transcript of the testimony. If the original proponent of the testimony declined to file the transcript (for instance, because that party no longer intended to rely on the testimony), but another party wished to rely on the testimony, the party that wishes to file the testimony would become the proponent and would be permitted to file the transcript as its own exhibit.

Section 42.54: Proposed § 42.54 would provide for protective orders. 35 U.S.C. 316(a)(7), as amended, and 35 U.S.C. 326(a)(7) require that the Director prescribe rules that provide for protective orders governing the exchange and submission of confidential information. Proposed § 42.54 would provide such protective orders and follows the procedure set forth in the Federal Rule of Civil Procedure 26(c)(1).

Section 42.55: Proposed § 42.55 would allow a petitioner filing confidential information to file, concurrently with the filing of the petition, a motion to seal as to the confidential information. The petitioner must serve the patent owner the confidential information and may do so under seal. The patent owner may access the confidential information prior to institution of a trial by agreeing to the terms of the proposed protective order contained in the motion to seal. The institution of the trial would constitute a grant of the motion to seal unless otherwise ordered by the Board. The proposed rule seeks to streamline the process of seeking protective orders prior to the institution of the review while balancing the need to protect confidential information against an opponent's need to access information used to challenge the opponent's claims.

Section 42.56: Confidential information that is subject to a protective order ordinarily would become public 45 days after denial of a petition to institute a trial or 45 days after final judgment in a trial. Proposed § 42.56 would allow a party to file a motion to expunge from the record confidential information prior to the information becoming public. Proposed § 42.56 reflects the considerations identified in 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b), which state that the Office is to take into account the integrity of the patent system in promulgating regulations. The proposed rule balances the needs of the parties to submit confidential information with the public interest in maintaining a complete and understandable file history for public notice purposes. Specifically, there is an expectation that information be made public where the existence of the information is referred to in a decision to grant or deny a request to institute a review or identified in a final written decision. As such, the proposed rule would encourage parties to redact sensitive information, where possible, rather than seeking to seal entire documents.

Section 42.61: Proposed § 42.61 would provide for the admissibility of evidence. Proposed § 42.61(a) would make the failure to comply with the rules a basis for challenging admissibility of evidence. Proposed § 42.61(b) would not require certification as a condition for admissibility when the evidence is a record of the Office that is accessible to all parties. This proposed rule would avoid disputes on what otherwise would be technical noncompliance with the rules. Proposed § 42.61(c) would provide that the specification and drawings are admissible only to prove what the specification and drawings describe. This proposed rule would address a recurring problem in which a party mistakenly relies on a specification to prove a fact other than what the specification says. This proposed rule would make clear that a specification of an application or patent involved in a proceeding is admissible as evidence only to prove what the specification or patent describes. If there is data in the specification upon which a party intends to rely to prove the truth of the data, an affidavit by an individual having first-hand knowledge of how the data was generated (*i.e.,* the individual who performed an experiment reported as an example in the specification) must be filed. *Wojciak* v. *Nishiyama,* 61 USPQ2d 1576, 1581 (B.P.A.I. 2001).

Section 42.62: Proposed § 42.62 would adopt a modified version of the Federal Rules of Evidence. The proposed rule would adopt the more formal evidentiary rules used in district courts in view of the adversarial nature of the proceedings before the Board. The Federal Rules of Evidence embrace a well-developed body of case law and are familiar to the courts charged with reviewing Board decisions in contested cases.

Section 42.63: Proposed § 42.63 would provide that all evidence is to be submitted as an exhibit. For instance, the proposed rule would provide that an exhibit filed with the petition must include the petition's name and a unique exhibit number, for example: POE EXHIBIT 1001. For exhibits not filed with the petition, the proposed rule would require the exhibit label to include the party's name followed by a unique exhibit number, the names of the parties, and the trial number, in the format of the following example:

OWENS EXHIBIT 2001, *Poe* v. *Owens* and Trial IPR2011OCT–00001.

Section 42.64: Proposed § 42.64 would provide procedures for challenging the admissibility of evidence. In a district court trial, an opponent may object to evidence, and the proponent may have an opportunity to cure the basis of the objection. The proposed rule offers a similar, albeit limited, process for objecting and curing in a trial at the Board.

Proposed § 42.64(a) would provide that objections to the admissibility of deposition evidence must be made during the deposition. Proposed § 42.64(b) would provide guidance as to objections and supplemental evidence for evidence other than deposition testimony. The default time for serving an objection to evidence other than testimony would be ten business days after service of the evidence for evidence in the petition and five business days for subsequent objections, and the party relying on evidence to which an objection was timely served would have ten business days after service of the objection to cure any defect in the evidence. The Board would not ordinarily address an objection unless the objecting party filed a motion to exclude under proposed § 42.64(c) because the objection might have been cured or might prove unimportant in light of subsequent developments. Proposed § 42.64(d) would permit a party to file a motion in limine to obtain a ruling on admissibility.

Section 42.65: Proposed § 42.65 would provide rules for expert testimony, tests, and data.

Proposed § 42.65(a) would remind parties that unsupported expert testimony may be given little or no weight. *Rohm & Haas Co.* v. *Brotech Corp.,* 127 F.3d 1089, 1092 (Fed. Cir. 1997). United States patent law is not an appropriate topic for expert testimony before the Board, and expert testimony pertaining thereto would not be admitted under the proposed rule.

Proposed § 42.65(b) would provide guidance on how to present tests and data. A party should not presume that the technical competence of the trier-of-fact extends to a detailed knowledge of the test at issue.

Oral Argument, Decision and Settlement

Section 42.70: Proposed § 42.70 would provide guidance on oral arguments.

Proposed § 42.70(a) would provide that a party may request oral argument on an issue raised in a paper. The time for requesting oral argument would be set by the Board.

Proposed § 42.70(b) would provide that a party serve demonstrative exhibits at least five business days before the oral argument. Experience has shown that parties are more effective in communicating their respective positions at oral argument when demonstrative exhibits have been exchanged prior to the hearing. Cumbersome exhibits, however, tend to detract from the user's argument and would be discouraged. The use of a compilation with each demonstrative exhibit separately tabbed would be encouraged, particularly when a court reporter is transcribing the oral argument because the tabs provide a convenient way to record which exhibit is being discussed. It is helpful to provide a copy of the compilation to each member of the panel hearing the argument so that the judges may better follow the line of argument presented.

Section 42.71: Proposed § 42.71 would provide for decisions on petitions and motions.

Proposed § 42.71(a) would provide that a petition or motion may be taken up in any order so that issues may be addressed in a fair and efficient manner. This rule is consistent with 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b), which state that, among other things, that the Director shall consider the efficient administration of the Office in prescribing regulations. Further, such a practice was noted with approval in *Berman* v. *Housey,* 291 F.3d 1345, 1352 (Fed. Cir. 2002).

Proposed § 42.71(b) would provide for interlocutory decisions. The proposed rule would make clear that a decision short of judgment is not final, but a decision by a panel would govern the trial. Experience has shown that the practice of having panel decisions bind further proceedings has eliminated much of the uncertainty and added cost that result from deferring any final decision until the end of the proceeding. In such instances, a party dissatisfied with an interlocutory decision on motions should promptly seek rehearing rather than waiting for a final judgment. A panel could, when the interests of justice require it, reconsider its decision at any time in the proceeding prior to final judgment. A belated request for rehearing would rarely be granted, however, because its untimeliness would detract from the efficiencies that result from making interlocutory decisions binding.

Proposed § 42.71(c) would provide for rehearings and would set times for requesting rehearing. Since 35 U.S.C. 6(b), as amended, requires a panel decision for finality, a party should request rehearing by a panel to preserve an issue for judicial review. The panel would then apply the deferential abuse-of-discretion standard to decisions on rehearing.

Section 42.72: Proposed § 42.72 would provide for termination of a trial pursuant to 35 U.S.C. 317(a), as amended, and 35 U.S.C. 327(a), which provide for termination of a trial with respect to a petitioner upon joint request of the petitioner and the patent owner, unless the Office has decided the merits of the proceeding before the request for termination is filed.

Section 42.73: Proposed § 42.73 would provide for judgment.

Proposed § 42.73(a) would provide that a judgment disposes of all issues that were, or by motion could have been, properly raised and decided.

Proposed § 42.73(b) would provide guidance as to the conditions under which the Board would infer a request for adverse judgment.

Proposed § 42.73(c) would provide for recommendations for further action by an examiner or the Director.

Proposed § 42.73(d) would provide for estoppel.

Proposed § 42.73(d)(1) would apply to non-derivation proceeding trials and is consistent with 35 U.S.C. 315(e)(1), as amended, and 35 U.S.C. 325(e)(1), which provide for estoppel in proceedings before the Office where a final written decision was entered under 35 U.S.C. 318(a), as amended, or 35 U.S.C. 328(a).

Proposed § 42.73(d)(2) would provide estoppel provisions in derivation proceedings. The proposed rule would also be consistent with 35 U.S.C. 135(d), as amended, which provides for the effect of a final decision in a derivation proceeding. Proposed § 42.73(d)(2) differs from proposed § 42.73(d)(1) to take into account the differences in statutory language between 35 U.S.C. 135(d) and 315(e)(1), as amended, and 35 U.S.C. 325(e)(2).

Proposed § 42.73(d)(3) would apply estoppel against a party whose claim was cancelled or who requested an amendment to the specification or drawings that was denied.

Section 42.74: Proposed § 42.74 would provide guidance on settling proceedings before the Board. 35 U.S.C. 135(e) and 317, as amended, and 35 U.S.C. 327 will govern settlement of Board trial proceedings but do not expressly govern pre-institution settlement.

Proposed § 42.74(a) would reflect that the Board is not a party to a settlement agreement and may take any necessary action, including determination of patentability notwithstanding a settlement. This proposed rule is consistent with 35 U.S.C. 135(e), as amended, where the Board is not required to follow the settlement agreement if it is inconsistent with the evidence. The proposed rule is also consistent with 35 U.S.C. 317, as amended, and 35 U.S.C. 327, which provide that the Board may proceed to a final written decision even if no petitioner remains in the proceeding.

Proposed § 42.74(b) would provide that settlement agreements must be in writing and filed with the Board prior to termination of the proceeding. This proposed rule is consistent with 35 U.S.C. 317(b), as amended, and 327(b), which require the agreement to be in writing and filed before termination of the proceeding. The proposed rule is also consistent with 35 U.S.C. 135(e), as amended, which provides that parties may seek to terminate the derivation proceeding by filing a written statement.

Proposed § 42.74(c) would provide that a party to a settlement may request that the settlement be kept separate from an involved patent or application. The proposed rule is consistent with the requirements of 35 U.S.C. 135(e) and 317(b), as amended, and 35 U.S.C. 327(b).

Certificate

Section 42.80: Proposed § 42.80 provides for issuance and publication of a certificate after the Board issues a final decision and the time for appeal has expired or an appeal has terminated. The proposed rule would be consistent with 35 U.S.C. 318, as amended, and 35 U.S.C. 328.

Part 90—Judicial Review of Patent Trial and Appeal Board Decisions

The Leahy-Smith America Invents Act amends chapter 13 of title 35, United States Code, to provide for certain changes to the provisions for judicial review of Board decisions. A new part 90 of title 37, Code of Federal Regulations is proposed to be added to permit consolidation of rules relating to court review of Board decisions and to simplify reference to such practices. The proposed rules in part 90 would also implement the provisions of the Leahy-Smith America Invents Act associated with judicial review of agency actions addressed by the Leahy-Smith America Invents Act.

Current §§ 1.301 through 1.304, which relate to rules of practice in patent cases, would be removed from part 1 and relocated to part 90. Paraphrasing of the statute in those rules would be eliminated in the proposed new rules in favor of directing the reader to the relevant statutory provisions. This change would avoid the need for the Office to amend the rules when statutory amendments are made. It would also avoid undue public reliance on the Office's paraphrase of statutory text. The proposed rules in part 90 would better state the existing practice and are not intended to change the existing practice except as explicitly provided.

Section 90.1: Proposed § 90.1 would clarify the scope of the proposed rules in part 90. The proposed rules in part 90 would be limited to rules governing the procedure by which a party dissatisfied with the final decision in an appeal to the Patent Trial and Appeal Board under 35 U.S.C. 134 may seek judicial review of the Patent Trial and Appeal Board decision pursuant to Chapter 13 of title 35, United States Code. This would include judicial review of the Patent Trial and Appeal Board decisions arising out of *ex parte* prosecution. The proposed rules in part 90 would not apply to other avenues for judicial review of Office decisions that may be available, such as appeals from Trademark Trial and Appeal Board decisions pursuant to § 2.145, civil actions brought pursuant to the Administrative Procedure Act, or mandamus actions. The title of part 90 would indicate that this part would apply only to judicial review of Patent Trial and Appeal Board decisions.

Proposed § 90.1 would clarify that the rules in effect on July 1, 2012, would continue to govern appeals from *inter partes* reexamination proceedings. Section 7(e) of the Leahy-Smith America Invents Act maintains the statutory provisions governing *inter partes* reexaminations requested under 35 U.S.C. 311, and the review provision of 35 U.S.C. 141 for Board decisions arising out of such reexaminations, as they existed at the time the Leahy-Smith America Invents Act was enacted. Accordingly, the Office will continue to apply the regulations as they existed when the Leahy-Smith America Invents Act was enacted (or as subsequently modified prior to July 1, 2012) for those proceedings. Further, § 3(n)(2) of the Leahy-Smith America Invents Act provides that the provisions of 35 U.S.C. 135 ''as in effect on the day before the effective date set forth in paragraph (1) of this subsection'' shall apply to certain applications. Thus, interference proceedings will still be available for a limited period for certain applications under the Leahy-Smith America Invents Act. Regarding judicial review of Board decisions arising out of such interferences, § 7(c) and (e) of the Leahy-Smith America Invents Act makes review by the Federal Circuit available under 35 U.S.C. 141 only for proceedings commenced before September 16, 2012. Similarly, § 3 of the Leahy-Smith America Invents Act makes review of interference decisions by a district court under 35 U.S.C. 146 available only if the provisions of § 3(n)(1) of the Leahy-Smith America Invents Act are not satisfied. That is because if the involved application contains a claim satisfying the terms of § 3(n)(1) of the Leahy-Smith America Invents Act (*e.g.,* a continuation-in-part application), then § 3(j) of the Leahy-Smith America Invents Act—changing 35 U.S.C. 146 from review of ''an interference'' to review of ''a derivation proceeding''—applies, and district court review of a decision arising out an interference proceeding under 35 U.S.C. 135 will not be available. To the extent that an interference proceeding under 35 U.S.C. 135 is available and judicial review of that decision is available, the Office will continue to apply the regulations as they existed when the Leahy-Smith America Invents Act was enacted (or as subsequently modified prior to July 1, 2012) to those proceedings. Lastly, note that certain interferences may be deemed to be eligible for judicial review as though they were derivation proceedings. *See* § 6(f)(3) of the Leahy-Smith America Invents Act.

Section 90.2: Proposed § 90.2 would address notice and service requirements associated with notices of appeal and civil actions seeking judicial review of Board decisions. The proposed rule would combine the notice and service requirements of current §§ 1.301, 1.302, and 1.303 for proceedings addressed by those rules. Paraphrasing of the statute in those rules would be eliminated in proposed § 90.2 in favor of directing the reader to the relevant statutory provisions to streamline the rules and prevent confusion. The proposed rule would also include references to pertinent statutory provisions or court rules that apply in such court proceedings. Proposed § 90.2 would further add provisions associated with judicial review of Board decisions in *inter partes* reviews, post-grant reviews, covered business method patent reviews, and derivation proceedings.

Proposed § 90.2 would require parties filing an appeal under 35 U.S.C. 141, initiating a civil action pursuant to 35 U.S.C. 146, or electing under 35 U.S.C. 141(d) to proceed under 35 U.S.C. 146, to file a copy of the notice of appeal, complaint, or notice of election, respectively, with the Board in the appropriate manner provided in § 41.10(a), 41.10(b), or 42.6(b). The proposed rule would also require that a complaint under 35 U.S.C. 146 be filed with the Board no later than five business days after filing the complaint in district court. These requirements would ensure that the Board is aware of such proceedings and would prevent further action within the Office consistent with the Board decision at issue in the appeal or civil action. Proposed § 90.2 would further require that the complaint be filed with the Office pursuant to § 104.2 within the same five business day time period. That requirement similarly assures that the Office has adequate notice of the pending judicial review proceeding.

Section 90.3: Proposed § 90.3 would address the time for filing a notice of appeal under 35 U.S.C. 142 and a notice of election under 35 U.S.C. 141(d), as amended, and the commencement of a civil action.

Proposed § 90.3(a) would address the time for filing a notice of appeal or a civil action seeking judicial review of a Board decision. The proposed rule would extend the period for filing a notice of appeal or a civil action under § 1.304 to sixty-three (63) days. This proposed change would avoid confusion regarding that period, which was two months except when the two-month period included February 28, in which case the period was two months and one day. The proposed sixty-three (63) day period would result in the deadline for filing a notice of appeal or a civil action falling on the same day of the week as the Board decision. Thus, the proposed rule would minimize calculations regarding extensions of time pursuant to

35 U.S.C. 21(b), which applies when the time period ends on a Saturday, Sunday, or Federal holiday in the District of Columbia, by eliminating the possibility that a Saturday or Sunday would be the final day of the period.

Proposed § 90.3(a) would also remove language regarding the time for cross-appeals from § 1.304. Instead, the proposed rule would refer to the pertinent rules in the Federal Rules of Appellate Procedure and the Rules for the United States Court of Appeals for the Federal Circuit to avoid confusion or inconsistency. The proposed rule would also add a reference to 35 U.S.C. 141(d) for both the relevant time for filing a notice of election under that statute and the relevant time for commencing a civil action pursuant to a notice of election under that statute.

Proposed § 90.3(b) and (c) would incorporate provisions from current § 1.304 addressing computation of time and extensions of time.

Rulemaking Considerations

A. Administrative Procedure Act (APA): This notice proposes rules of practice concerning the procedure for requesting an *inter partes* review, post-grant review, covered business method patent review, or a derivation, and the trial process after initiation of such a review. The notice also proposes changes to the rule of practice to consolidate the procedure for appeal of a decision by the Board and to require that a copy of the notice of appeal, notice of election, and complaint be provided to the Board. The changes being proposed in this notice do not change the substantive criteria of patentability. These proposed changes involve rules of agency practice and procedure and/or interpretive rules. *See Bachow Commc'ns Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are procedural under the Administrative Procedure Act); *Inova Alexandria Hosp.* v. *Shalala,* 244 F.3d 342, 350 (4th Cir. 2001) (rules for handling appeals were procedural where they did not change the substantive standard for reviewing claims); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001) (rule that clarifies interpretation of a statute is interpretive).

Accordingly, prior notice and opportunity for public comment are not required pursuant to 5 U.S.C. 553(b) or (c) (or any other law), and thirty-day advance publication is not required pursuant to 5 U.S.C. 553(d) (or any other law). *See Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), does not require notice and comment rule making for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'') (quoting 5 U.S.C. 553(b)(A)). The Office, however, is publishing these changes and the Initial Regulatory Flexibility Act analysis, below, for comment as it seeks the benefit of the public's views on the Office's proposed implementation of these provisions of the Leahy-Smith America Invents Act.

B. Regulatory Flexibility Act: The Office estimates that 460 petitions for *inter partes* review, 50 petitions for post-grant review and covered business method patent review combined, and 50 petitions for derivation proceedings will be filed in fiscal year 2013. This will be the first fiscal year in which review proceedings will be available for an entire fiscal year, and derivation proceedings will be available for more than 6 months. The estimate for *inter partes* review petitions is partially based on the number of *inter partes* reexamination requests under 37 CFR 1.915 that have been filed in fiscal years 2010 and 2011.

The Office received 281 requests for *inter partes* reexamination in fiscal year 2010. *See* Table 13B of the United States Patent and Trademark Office Performance and Accountability Report for Fiscal Year 2010, available at *http://www.uspto.gov/about/stratplan/ar/2010/USPTOFY2010PAR.pdf.*

The Office received 374 requests for *inter partes* reexamination in fiscal year 2011. *See* Table 14B of the United States Patent and Trademark Office Performance and Accountability Report for Fiscal Year 2011, available at *http://www.uspto.gov/about/stratplan/ar/2011/USPTOFY2011PAR.pdf.*

Additionally, the Office takes into consideration the recent growth rate in the number of requests for *inter partes* reexamination, the projected growth due to an expansion in the number of eligible patents under the *inter partes* review provisions of the Leahy-Smith America Invents Act (*see* § 6(c)), and the more restrictive filing time period in 35 U.S.C. 315(b) as amended by the Leahy-Smith America Invents Act.

In fiscal year 2013, it is expected that no post-grant review petitions will be received, other than those filed under the transitional program for covered business method patents. Thus, the estimated number of post-grant review petitions including covered business method patent review petitions is based on the number of *inter partes* reexamination requests filed in fiscal year 2011 for patents having an original classification in class 705 of the United States Patent Classification System. Class 705 is the classification for patents directed to data processing in the following areas: financial, business practice, management, or cost/price determination. See *http://www.uspto.gov/web/patents/classification/uspc705/sched705.pdf.*

The following is the class definition and description for Class 705:

This is the generic class for apparatus and corresponding methods for performing *data processing* operations, in which there is a significant change in the data or for performing *calculation operations* wherein the apparatus or method is uniquely designed for or utilized in the *practice,* administration, or management of an *enterprise,* or in the processing of financial data.

This class also provides for apparatus and corresponding methods for performing *data processing* or *calculating operations* in which a charge for goods or services is determined.

This class additionally provides for subject matter described in the two paragraphs above in combination with cryptographic apparatus or method.

Subclasses 705/300–348 were established prior to complete reclassification of all project documents. Documents that have not yet been reclassified have been placed in 705/1.1. Until reclassification is finished a complete search of 705/300–348 should include a search of 705/1.1. Once the project documents in 705/1.1 have been reclassified they will be moved to the appropriate subclasses and this note will be removed.

Scope of the Class

1. The *arrangements* in this class are generally used for problems relating to administration of an organization, commodities or financial transactions.

2. Mere designation of an arrangement as a ''business machine'' or a document as a ''business form'' or ''business chart'' without any particular business function will not cause classification in this class or its subclasses.

3. For classification herein, there must be significant claim recitation of the data processing system or calculating computer and only nominal claim recitation of any external art environment. Significantly claimed apparatus external to this class, claimed in combination with apparatus under the class definition, which perform data processing or calculation operations are classified in the class appropriate to the external device unless specifically excluded therefrom.

4. Nominally claimed apparatus external to this class in combination with apparatus under the class definition is classified in this class unless provided for in the appropriate external class.

5. In view of the nature of the subject matter included herein, consideration of the classification schedule for the diverse art or environment is necessary for proper search.

See Classification Definitions (Feb. 2011) available at *http://www.uspto.gov/web/patents/classification/uspc705/defs705.htm.*

Accordingly, patents subject to covered business method patent review are anticipated to be typically classifiable in Class 705. It is anticipated that the number of patents in Class 705 that do not qualified as covered business method patents would approximate the number of patents classified in other classes that do qualify.

The Office received 20 requests for *inter partes* reexamination of patents classified in Class 705 in fiscal year 2011. The Office in estimating the number of petitions for covered business method patent review to be higher than 20 requests due to an expansion of grounds for which review may be requested including subject matter eligibility grounds, the greater coordination with litigation, and the provision that patents will be eligible for the proceeding regardless of filing date of the application which resulted in the patent. It is not anticipated that any post-grant review petitions will be received in fiscal year 2013 as only patents issuing based on certain applications filed on or after March 16, 2013, or certain applications involved in an interference proceeding commenced before September 12, 2012, are eligible for post-grant review. *See* Pub. L. 112–29, § 6(f), 125 Stat. 284, 311 (2011).

The Office expects the number of newly declared interferences to decrease as some parties file *inter partes* review petitions rather than file reissue applications of their own earlier filed patents. Parties filing such reissue applications often seek a review of another party's issued patent in an interference proceeding.

The Office has reviewed the entity status of patents for which *inter partes* reexamination was requested from October 1, 2000, to September 23, 2011. This data only includes filings granted a filing date in the particular year rather than filings in which a request was received in the year. The first *inter partes* reexamination was filed on July 27, 2001. A summary of that review is provided in Table 1 below. As shown by Table 1, patents known to be owned by a small entity represented 32.79% of patents for which *inter partes* reexamination was requested. Based on an assumption that the same percentage of patents owned by small entities will be subject to *inter partes* review, post-grant review, covered business method patent review, and derivation proceedings, it is estimated that 151 petitions for *inter partes* review, 16 petitions for post-grant and covered business method patent review combined, and 16 petitions for derivation proceedings would be filed to seek review of patents owned by a small entity in fiscal year 2013, the first full fiscal year that these proceedings will be available.

TABLE 1—*Inter partes* REEXAMINATION REQUESTS FILED WITH PARENT ENTITY TYPE *

[* Small entity status determined by reviewing preexamination small entity indicator for the parent patent]

Fiscal year	*Inter partes* reexamination requests filed	Number filed where parent patent is small entity type	Percent small entity type of total
2011	329	123	37.39
2010	255	94	36.86
2009	240	62	25.83
2008	155	52	33.55
2007	127	35	27.56
2006	61	17	27.87
2005	59	18	30.51
2004	26	5	19.23
2003	21	12	57.14
2002	4	1	25.00
2001	1	0	0.00
	1,278	419	32.79

Based on the number of patents issued during fiscal years 1995 through 1999 that paid the small entity third stage maintenance fee, the number of patents issued during fiscal years 2000 through 2003 that paid the small entity second stage maintenance fee, the number of patents issued during fiscal years 2004 through 2007 that paid the first stage maintenance fee, and the number of patents issued during fiscal years 2008 through 2011 that paid a small entity issue fee, there are no less than 375,000 patents owned by small entities in force as of October 1, 2011.

Furthermore, the Office recognizes that there would be an offset to this number for patents that expire earlier than 20 years from their filing date due to a benefit claim to an earlier application or due to a filing of a terminal disclaimer. The Office likewise recognizes that there would be an offset in the opposite manner due to the accrual of patent term extension and adjustment. The Office, however, does not maintain data on the date of expiration by operation of a terminal disclaimer. Therefore, the Office has not adjusted the estimate of 375,000 patents owned by small entities in force as of October 1, 2011. While the Office maintains information regarding patent term extension and adjustment accrued by each patent, the Office does not collect data on the expiration date of patents that are subject to a terminal disclaimer. As such, the Office has not adjusted the estimated of 375,000 patents owned by small entities in force as of October 1, 2011, for accrual of patent term extension and adjustment, because in view of the incomplete terminal disclaimer data issue, would be incomplete and any estimate adjustment would be administratively burdensome. Thus, it is estimated that the number of small entity patents in force in fiscal year 2013 will be at least 375,000.

Based on the estimated number of patents in force, the number of small entity owned patents impacted by *inter partes* review in fiscal year 2013 (151 patents) would be less than 0.05% (151/375,000) of all patents in force that are owned by small entities. Moreover, post-grant and covered business method patent review and derivation would have a smaller impact. The USPTO nonetheless has undertaken an Initial Regulatory Flexibility Act Analysis of the proposed rule.

1. Description of the Reasons That Action by the Office Is Being Considered: On September 16, 2011, the Leahy-Smith America Invents Act was

enacted into law (Pub. L. 112–29, 125 Stat. 284 (2011)). Section 6 of the Leahy-Smith America Invents Act amends chapter 31 of title 35, United States Code, to create a new *inter partes* review proceeding which will take effect on September 16, 2012, one year after the date of enactment, and eliminate *inter partes* reexamination (except for requests filed before the effective date of September 16, 2012). Section 6 of the Leahy-Smith America Invents Act further amends title 35, United States Code, by adding chapter 32 to create a new post-grant review proceeding. Section 18 of the Leahy-Smith America Invents Act provides for a transitional program for covered business method patents which will employ the standards and procedures of the post-grant review proceeding with a few exceptions. Additionally, § 3(i) of the Leahy-Smith America Invents Act amends 35 U.S.C. 135 to provide for derivation proceedings and eliminate the interference practice as to applications and patents that have an effective filing date on or after March 16, 2013 (with a few exceptions). For the implementation, §§ 6(c) and 6(f) of the Leahy-Smith America Invents Act requires that the Director issue regulations to carry out chapter 31, as amended, and chapter 32 of title 35, United States Code, within one year after the date of enactment. Public Law 112–29, §§ 6(c) and 6(f), 125 Stat. 284, 304 and 311 (2011). Moreover, 35 U.S.C. 135(b), as amended, requires that the Director prescribe regulations to set forth the standards for conducting derivation proceedings, including requiring parties to provide sufficient evidence to prove and rebut a claim of derivation.

2. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rules: The proposed rules seek to implement *inter partes* review, post-grant review, the transitional program for covered business method patents, and derivation proceedings as authorized by the Leahy-Smith America Invents Act. The Leahy-Smith America Invents Act requires that the Director prescribe rules for the *inter partes,* post-grant, and covered business method patent reviews that result in a final determination not later than one year after the date on which the Director notices the institution of a proceeding. The one-year period may be extended for not more than 6 months if good cause is shown. *See* 35 U.S.C. 316(a)(11), as amended, and 35 U.S.C. 326(a)(11). The Leahy-Smith America Invents Act also requires that the Director, in prescribing rules for the *inter partes,* post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings. *See* 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b). Consistent with the time periods provided in 35 U.S.C. 316(a)(11), as amended, and 35 U.S.C. 326(a)(11), the proposed rules are designed to, except where good cause is shown to exist, result in a final determination by the Patent Trial and Appeal Board within one year of the notice of initiation of the review. This one-year review will enhance the effect on the economy, and improve the integrity of the patent system and the efficient administration of the Office.

3. Description and Estimate of the Number of Affected Small Entities: The Small Business Administration (SBA) small business size standards applicable to most analyses conducted to comply with the Regulatory Flexibility Act are set forth in 13 CFR 121.201. These regulations generally define small businesses as those with fewer than a specified maximum number of employees or less than a specified level of annual receipts for the entity's industrial sector or North American Industry Classification System (NAICS) code. As provided by the Regulatory Flexibility Act, and after consultation with the Small Business Administration, the Office formally adopted an alternate size standard as the size standard for the purpose of conducting an analysis or making a certification under the Regulatory Flexibility Act for patent-related regulations. *See Business Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-Related Regulations,* 71 FR 67109 (Nov. 20, 2006), 1313 *Off. Gaz. Pat. Office* 60 (Dec. 12, 2006). This alternate small business size standard is SBA's previously established size standard that identifies the criteria entities must meet to be entitled to pay reduced patent fees. *See* 13 CFR 121.802. If patent applicants identify themselves on a patent application as qualifying for reduced patent fees, the Office captures this data in the Patent Application Location and Monitoring (PALM) database system, which tracks information on each patent application submitted to the Office.

Unlike the SBA small business size standards set forth in 13 CFR 121.201, the size standard for USPTO is not industry-specific. The Office's definition of a small business concern for Regulatory Flexibility Act purposes is a business or other concern that: (1) Meets the SBA's definition of a ''business concern or concern'' set forth in 13 CFR 121.105; and (2) meets the size standards set forth in 13 CFR 121.802 for the purpose of paying reduced patent fees, namely an entity: (a) Whose number of employees, including affiliates, does not exceed 500 persons; and (b) which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this definition. *See Business Size Standard for Purposes of United States Patent and Trademark Office Regulatory Flexibility Analysis for Patent-Related Regulations,* 71 FR at 67112 (Nov 20, 2006), 1313 *Off. Gaz. Pat. Office* at 63 (Dec. 12, 2006).

As discussed above, it is anticipated that 460 petitions for *inter partes* review, 50 petitions for post-grant review and covered business method patent review combined, and 50 petitions for derivation proceedings will be filed in fiscal year 2013. The Office has reviewed the percentage of patents for which *inter partes* reexamination was requested from October 1, 2000 to September 23, 2011. A summary of that review is provided in Table 1 above. As demonstrated by Table 1, patents known to be owned by a small entity represent 32.79% of patents for which *inter partes* reexamination was requested. Based on an assumption that the same percentage of patents owned by small entities will be subject to the new review proceedings, it is estimated that 151 patents owned by small entities would be affected by *inter partes* review, and that 16 patents owned by small entities would be affected by a post-grant or covered business method patent review.

For derivation proceedings, the Office has reviewed the percentage of applications and patents for which an interference was declared in fiscal year 2011. Applications and patents known to be owned by a small entity represent 19.62% of applications and patents for which interference was declared in FY 2011. Based on the assumption that the same percentage of applications and patents owned by small entities will be involved in a derivation proceeding, 20 small entity owned applications or patents would be affected by derivation proceeding.

The USPTO estimates that 2.5% of patent owners will file a request for adverse judgment prior to a decision to institute and that another 2.5% will file

a request for adverse judgment or fail to participate after initiation. Specifically, an estimated 21 patent owners will file a request for adverse judgment or fail to participate after institution in *inter partes* review, and an estimated 2 patent owners will do so in post-grant and covered business method proceedings combined. Based on the percentage of small entity owned patents that were the subject of *inter partes* reexamination (32.79%) from October 1, 2000 to September 23, 2011, it is estimated that 7 small entities will file such requests or fail to participate in *inter partes* review proceedings, and an estimated 1 small entity will do so in post-grant or covered business method patent review combined.

Under the proposed rules, prior to determining whether to institute a review, the patent owner may file an optional patent owner preliminary response to the petition. Given the new time period requirements to file a petition for review before the Board relative to patent enforcement proceedings and the desire to avoid the cost of a trial and delays to related infringement actions, it is anticipated that 90% of petitions, other than those for which a request for adverse judgment is filed, will result in the filing of a patent owner preliminary response. Where an *inter partes* review petition is filed close to the expiration of the one-year period set forth in 35 U.S.C. 315(b), as amended, a patent owner would likely be advantaged by filing a successful preliminary response. In view of these considerations, it is anticipated that 90% patent owners will file a preliminary response. Specifically, the Office estimates that 406 patent owners will file a preliminary response to an *inter partes* review petition, and an estimated 45 patent owners will file a preliminary response to a post-grant or covered business method petition. Based on the percentage of small entity owned patents that were the subject of *inter partes* reexamination (32.79%), it is estimated that 133 small entities will file a preliminary response to an *inter partes* review petition, and 15 small entities will file a preliminary response to a post-grant or covered business method patent review petition in fiscal year 2013.

Under the proposed rules, the Office will determine whether to institute a trial within three months after the earlier of: (1) The submission of a patent owner preliminary response, (2) the waiver of filing a patent owner preliminary response, or (3) the expiration of the time period for filing a patent owner preliminary response. If the Office decides not to institute a trial, the petitioner may file a request for reconsideration of the Office's decision. In estimating the number of requests for reconsideration, the Office considered the percentage of *inter partes* reexaminations that were denied relative to those that were ordered (24 divided by 342, or 7%) in fiscal year 2011. *See* Reexaminations—FY 2011, *http://www.uspto.gov/patents/Reexamination_operational_statistic_through_FY2011Q4.pdf.* The Office also considered the impact of: (1) Patent owner preliminary responses under newly authorized in 35 U.S.C. 313, as amended, and 35 U.S.C. 323, (2) the enhanced thresholds for instituting reviews set forth in 35 U.S.C. 314(a), as amended, and 35 U.S.C. 324(a), which would tend to increase the likelihood of dismissing a petition for review, and (3) the more restrictive time period for filing a petition for review in 35 U.S.C. 315(b), as amended, and 35 U.S.C. 325(b), which would tend to reduce the likelihood of dismissing a petition. Based on these considerations, it is estimated that 10% of the petitions for review (50 divided by 498) would be dismissed.

The Office predicts that it will institute 10 derivation proceedings based on petitions seeking derivation filed in fiscal year 2013. This estimate is based on the low number of interference proceedings declared, as well as the limited number of eligible applications.

During fiscal year 2011, the Office issued 21 decisions following a request for reconsideration of a decision on appeal in *inter partes* reexamination. The average time from original decision to decision on reconsideration was 4.4 months. Thus, the decisions on reconsideration were based on original decisions issued from July 2010 until June 2011. During this time period, the Office mailed 63 decisions on appeals in *inter partes* reexamination. *See* BPAI Statistics—Receipts and Dispositions by Technology Center, *http://www.uspto.gov/ip/boards/bpai/stats/receipts/index.jsp (monthly data).*

Based on the assumption that the same rate of reconsideration (21 divided by 63 or 33.333%) will occur, the Office estimates that 19 requests for reconsideration will be filed. Based on the percentage of small entity owned patents that were the subject of *inter partes* reexamination (32.79%) and the percentage of small entity owned patent applications or patents that were the subject of an interference declared in fiscal year 2010 (19.62%), it is estimated that 6 small entities will file a request for a reconsideration of a decision dismissing the petition for review or derivation in fiscal year 2013.

The Office reviewed motions, oppositions, and replies in a number of contested trial proceedings before the trial section of the Board. The review included determining whether the motion, opposition, and reply were directed to patentability grounds and non-priority non-patentability grounds. Based on the review, it is anticipated that: (1) *Inter partes* reviews will have an average of 6.92 motions, oppositions, and replies per trial after institution, (2) post-grant and covered business method patent reviews will have an average of 8.89 motions, oppositions, and replies per trial after institution, and (3) derivation proceedings will have an average of 23.4 motions, oppositions, and replies per trial after institution. Settlement is estimated to occur in 20% of instituted trials at various points of the trial. In trials that are settled, it is estimated that only 50% of the noted motions, oppositions, and replies would be filed.

After a trial has been instituted but prior to a final written decision, parties to a review or derivation proceeding may request an oral hearing. It is anticipated that 466 requests for oral hearings will be filed based on the number of requests for oral hearings in *inter partes* reexamination, the stated desirability for oral hearings during the legislative process, and the public input received prior to this notice of proposed rulemaking. Based on the percentage of small entity owned patents that were the subject of *inter partes* reexamination (32.79%), it is estimated that 153 small entities will file a request for oral hearing in the reviews and derivations instituted in fiscal year 2013.

Parties to a review or derivation proceeding may file requests to treat a settlement as business confidential, and requests for adverse judgment. A written request to make a settlement agreement available may also be filed. Parties to derivation proceedings may also file arbitration agreements and awards. Given the short time period set for conducting trials, it is anticipated that the alternative dispute resolution options will be infrequently used. The Office estimates that 20 requests to treat a settlement as business confidential; 103 requests for adverse judgment, default adverse judgment, or settlement notices; and 2 arbitration agreements and awards will be filed. The Office also estimates that 20 requests to make a settlement available will be filed. Based on the percentage of small entity owned patents that were the subject of *inter partes* reexamination (32.79%) and the percentage of small entity owned patent

applications or patents that were the subject of an interference declared in fiscal year 2010 (19.62%), it is estimated that 7 small entities will file a request to treat a settlement as business confidential, 34 small entities will file a request for adverse judgment, default adverse judgment notices, or settlement notices, and 1 small entity will file an arbitration agreement and award in the reviews and derivations instituted in fiscal year 2013.

Parties to a review or derivation proceeding may seek judicial review of the final decision of the Board. Historically, 33% of examiner's decisions in *inter partes* reexamination proceedings have been appealed to the Board. It is anticipated that 16% of final decisions of the Board would be appealed. The reduction in appeal rate is based on the higher threshold for institution, the focused process, and the experience of the Board in conducted contested cases. Therefore, it is estimated that 56 parties would seek judicial review of the final decisions of the Board in reviews and derivations instituted in fiscal year 2013. In addition, appeals in other final decisions of the Board are anticipated to continue at the same rate, but with a higher base rate of final decisions. Based on this expectation, it is estimated that 138 parties would seek judicial review of other final decisions of the Board. Furthermore, based on the percentage of small entity owned patents that were the subject of *inter partes* reexamination (32.79%) and the percentage of small entity owned patent applications or patents that were the subject of an interference declared in fiscal year 2010 (19.62%), it is estimated that 18 small entities would seek judicial review of final decisions of the Board in the reviews and derivations instituted in fiscal year 2013.

4. Description of the Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record: Based on the filing trends of *inter partes* reexamination requests, it is anticipated that petitions for review will be filed across all technologies with approximately 50% being filed in electrical technologies, approximately 30% in mechanical technologies, and the remaining 20% in chemical technologies and design. However, covered business method patent reviews would be limited to business method patents that are not patents for technological inventions. Under the proposed rules, a person who is not the owner of a patent may file a petition to institute a review of the patent, with a few exceptions. Given this, it is anticipated that a petition for review is likely to be filed by an entity practicing in the same or similar field as the patent. Therefore, it is anticipated that 50% of the petitions for review will be filed in the electronic field, 30% in the mechanical field, and 20% in the chemical or design fields.

Based on the trends of declared contested cases in fiscal year 2011, it is anticipated that petitions for derivation will be filed across all technologies with approximately 16% in electrical technologies, approximately 17% in mechanical technologies, and the remaining 67% in chemical technologies and design. A derivation petition is likely to be filed by an entity practicing in the same or similar field as the patent. Therefore, it is anticipated that 16% of the petitions for review will be filed in the electronic field, 17% in the mechanical field, and 67% in the chemical or design fields.

Preparation of the petition would require analyzing the patent claims, locating evidence supporting arguments of unpatentability, and preparing the petition seeking review of the patent. This notice provides the proposed procedural requirements that are common for the new trials. Additional requirements are provided in contemporaneous trial specific proposed rulemaking. The procedures for petitions to institute an *inter partes* review are proposed in §§ 42.5, 42.6, 42.8, 42.11, 42.13, 42.20, 42.21, 42.22, 42.24(a)(1), 42.63, 42.65, and 42.101 through 42.105. The procedures for petitions to institute a post-grant review are proposed in §§ 42.5, 42.6, 42.8, 42.11, 42.13, 42.20, 42.21, 42.22, 42.24(a)(2), 42.63, 42.65, and 42.201 through 42.205. The procedures for petitions to institute a covered business method patent review are proposed in §§ 42.5, 42.6, 42.8, 42.11, 42.13, 42.20, 42.21, 42.22, 42.24(a)(3), 42.63, 42.65, 42.203, 42.205, and 42.302 through 42.304. The procedures for petitions to institute a derivation proceeding are proposed in §§ 42.5, 42.6, 42.8, 42.11, 42.13, 42.20, 42.21, 42.22, 42.24(a)(4),42.63, 42.65, and 42.402 through 42.406.

The skills necessary to prepare a petition for review and to participate in a trial before the Patent Trial and Appeal Board would be similar to those needed to prepare a request for *inter partes* reexamination, to represent a party in an *inter partes* reexamination, and to represent a party in an interference proceeding before the Patent Trial and Appeal Board. The level of skill is typically possessed by a registered patent practitioner having devoted professional time to the particular practice area, typically under the supervision of a practitioner skilled in the particular practice area. Where authorized by the Board, a non-registered practitioner may be admitted *pro hac vice,* on a case-by-case basis based on the facts and circumstances of the trial and party, as well as the skill of the practitioner.

The cost of preparing a petition for *inter partes* review is anticipated to be the same as the cost for preparing a request for *inter partes* reexamination. The American Intellectual Property Law Association's *AIPLA Report of the Economic Survey 2011* reported that the average cost of preparing a request for *inter partes* reexamination was $46,000. Based on the work required to prepare and file such a request, the Office considers the reported cost as a reasonable estimate. Accordingly, the Office estimates that the cost of preparing a petition for *inter partes* review would be $46,000 (including expert costs).

The cost of preparing a petition for post-grant or covered business method patent review is estimated to be 33.333% higher than the cost of preparing a petition for *inter partes* review because the petition for post-grant or covered business method patent review may seek to institute a proceeding on additional grounds such as subject matter eligibility. Therefore, the Office estimates that the cost of preparing a petition for post-grant or covered business method patent review would be $61,333. It is expected that petitions for derivation would have the same complexity and cost as a petition for post-grant review because derivation proceedings raise issues of conception and communication, which have similar complexity to the issues that can be raised in a post-grant review, *i.e.,* public use, sale and written description. Thus, the Office estimates that the cost of preparing a petition for derivation would also be $61,333.

The filing of a petition for review would also require payment by the petitioner of the appropriate petition fee to recover the aggregate cost for providing the review. The appropriate petition fee would be determined by the number of claims for which review is sought and the type of review. The proposed fees for filing a petition for *inter partes* review are: $27,200 for requesting review of 20 or fewer claims, $34,000 to request review of 21 to 30 claims, $40,800 to request review of 31 to 40 claims, $54,400 to request review

of 41 to 50 claims, $68,000 to request review of 51 to 60 claims, and an additional $27,200 to request review of additional groups of 10 claims. The fees for filing a petition for post-grant or covered business method patent review would be: $35,800 to request review of 20 or fewer claims, $44,750 to request review of 21 to 30 claims, $53,700 to request review of 31 to 40 claims, $71,600 to request review of 41 to 50 claims, $89,500 to request review of 51 to 60 claims, and an additional $35,800 to request review of additional groups of 10 claims.

In setting fees, the estimated information technology cost to establish the process and maintain the filing and storage system through 2017 is to be recovered by charging each petition an IT fee that has a base component of $1,705 for requests to review 20 or fewer claims. The IT component fees would be $2,122 for requesting review of 21–30 claims, $2,557 for requesting review of 31–40 claims, $3,409 for requesting review of 41–50 claims, $4,267 for requesting review of 51–60 claims, and an additional $1,705 for requesting review of additional groups of 10 claims. The remainder of the fee is to recover the cost for judges to determine whether to institute a review and conduct the review, together with a proportionate share of indirect costs, *e.g.,* rent, utilities, additional support, and administrative costs. Based on the direct and indirect costs, the fully burdened cost per hour for judges to decide a petition and conduct a review is estimated to be $258.32.

For a petition for *inter partes* review with 20 or fewer challenged claims, it is anticipated that 98.7 hours of judge time would be required. For 21 to 30 challenged claims, an additional 24.7 hours is anticipated for a total of 123.4 hours of judge time. For 31 to 40 challenged claims, an additional 49.3 hours is anticipated for a total of 148 hours of judge time. For 41 to 50 challenged claims, an additional 98.7 hours is anticipated for a total of 197.4 hours of judge time. For 51 to 60 claims, an additional 148 hours is anticipated for a total of 246.7 hours of judge time. The increase in adjustment reflects the added complexity that typically occurs as more claims are in dispute.

For a petition for post-grant or covered business method patent review with 20 or fewer challenged claims, it is anticipated that 132 hours of judge time will be required. For 21 to 30 challenged claims, an additional 33 hours is anticipated for a total of 165 hours of judge time. For 31 to 40 challenged claims, an additional 66 hours is anticipated for a total of 198 hours of judge time. For 41 to 50 challenged claims, an additional 132 hours is anticipated for a total of 264 hours of judge time. For 51 to 60 challenged claims, an additional 198 hours is anticipated for a total of 330 hours of judge time. The increase in adjustment reflects the added complexity that typically occurs as more claims are in dispute.

The proposed rules would permit the patent owner to file a preliminary response to the petition setting forth the reasons why no review should be initiated. The procedures for a patent owner to file a preliminary response as an opposition are proposed in §§ 42.6, 42.8, 42.11, 42.13, 42.21, 42.23, 42.24(b), 42.51, 42.52, 42.53, 42.54, 42.63, 42.64, 42.65, 42.107, 42.120, 42.207, and 42.220. The patent owner is not required to file a preliminary response. The Office estimates that the preparation and filing of a patent owner preliminary response would require 100 hours of professional time and cost $34,000 (including expert costs). The *AIPLA Report of the Economic Survey 2011* reported that the average cost for *inter partes* reexamination including of the request ($46,000), the first patent owner response, and third party comments was $75,000 (*see* I–175) and the median billing rate for professional time of $340 per hour for attorneys in private firms (*see 8).* Thus, the cost of the first patent owner reply and the third party statement is $29,000. The Office finds these costs to be reasonable estimates. The patent owner reply and third party statement, however, occur after the examiner has made an initial threshold determination and made only the appropriate rejections. Accordingly, it is anticipated that filing a patent owner preliminary response to a petition for review would cost more than the initial reply in a reexamination, an estimated $34,000 (including expert costs).

The Office will determine whether to institute a trial within three months after the earlier of: (1) The submission of a patent owner preliminary response, (2) the waiver of filing a patent owner preliminary response, or (3) the expiration of the time period for filing a patent owner preliminary response. If the Office decides not to institute a trial, the petitioner may file a request for reconsideration of the Office's decision. It is anticipated that a request for reconsideration will require 80 hours of professional time to prepare and file, for a cost of $27,200. This estimate is based on the complexity of the issues and desire to avoid time bars imposed by 35 U.S.C. 315(b), as amended, and 35 U.S.C. 325(b).

Following institution of a trial, the parties may be authorized to file various motions, *e.g.,* motions to amend and motions for additional discovery. Where a motion is authorized, an opposition may be authorized, and where an opposition is authorized, a reply may be authorized. The procedures for filing a motion are proposed in §§ 42.6, 42.8, 42.11, 42.13, 42.21, 42.22, 42.24(a)(5), 42.51, 42.52, 42.53, 42.54, 42.63, 42.64, 42.65, 42.121, 42.221, 42.123, and 42.223. The procedures for filing an opposition are proposed in §§ 42.6, 42.8, 42.11, 42.13, 42.21, 42.23, 42.24(b), 42.51, 42.52, 42.53, 42.54, 42.63, 42.64, 42.65, 42.107, 42.120, 42.207, and 42.220. The procedures for filing a reply are proposed in §§ 42.6, 42.8, 42.11, 42.13, 42.21, 42.23, 42.24(c), 42.51, 42.52, 42.53, 42.54, 42.63, and 42.65. As discussed previously, the Office estimates that the average *inter partes* review will have 6.92 motions, oppositions, and replies after institution. The average post-grant or covered business method patent review will have 8.89 motions, oppositions, and replies after institution. The average derivation proceeding is anticipated to have 23.4 motions, oppositions, and replies after institution.

The *AIPLA Report of the Economic Survey 2011* reported that the average cost in contested cases before the trial section of the Board prior to the priority phase was $322,000 per party. Because of the overlap of issues in patentability grounds, it is expected that the cost per motion will decline as more motions are filed in a proceeding. It is estimated that a motion, opposition, or reply in a derivation would cost $34,000 (including expert costs) which is estimated by dividing the total public cost for all motions in current contested cases divided by the estimated number of motions in derivations under 35 U.S.C. 135, as amended. The cost of a motion, opposition, or reply in a post-grant review is estimated at $44,200 (including expert costs), reflecting the reduction in overlap between motions relative to derivation. The cost of a motion, opposition or reply in an *inter partes* review would be $47,600 (including expert costs). Based on the work required to file and prepare such briefs, the Office considers the reported cost as a reasonable estimate.

After a trial has been instituted but prior to a final written decision, parties to a review or derivation proceeding may request an oral hearing. The procedure for filing requests for oral argument is proposed in § 42.70. The *AIPLA Report of the Economic Survey 2011* reported that the third quartile cost of an *ex parte* appeal with an oral

argument is $12,000, while the third quartile cost of an *ex parte* appeal without an oral argument is $6,000. In view of the reported costs, which the Office finds reasonable, and the increased complexity of an oral hearing with multiple parties, it is estimated that the cost per party for oral hearings would be $6,800 or $800 more than the reported third quartile cost for an *ex parte* oral hearing.

Parties to a review or derivation proceeding may file requests to treat a settlement as business confidential, request for adverse judgment, and arbitration agreements and awards. A written request to make a settlement agreement available may also be filed. The procedures to file requests that a settlement be treated as business confidential are proposed in §§ 42.74(c) and 42.409. The procedures to file requests for adverse judgment are proposed in § 42.73(b). The procedures to file arbitration agreements and awards are proposed § 42.410. The procedures to file requests to make a settlement agreement available are proposed in § 42.74(c)(2). It is anticipated that requests to treat a settlement as business confidential will require 2 hours of professional time or $680. It is anticipated that requests for adverse judgment will require 1 hour of professional time or $340. It is anticipated that arbitration agreements and awards will require 4 hours of professional time or $1,360. It is anticipated that requests to make a settlement agreement available will require 1 hour of professional time or $340. The requests to make a settlement agreement available will also require payment of a fee of $400 specified in proposed § 42.15(d). The fee proposed would be the same as currently set forth in § 41.20(a) for petitions to the Chief Administrative Patent Judge.

Parties to a review proceeding may seek judicial review of the judgment of the Board. The procedures to file notices of judicial review of a Board decision, including notices of appeal and notices of election provided for in 35 U.S.C. 141, 142, 145, and 146, are proposed in §§ 90.1 through 90.3. The submission of a copy of a notice of appeal or a notice of election is anticipated to require 6 minutes of professional time at a cost of $34.

5. Description of Any Significant Alternatives to the Proposed Rules Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Rules on Small Entities:

Size of petitions and motions: The Office considered whether to apply a page limit and what an appropriate page limit would be. The Office does not currently have a page limit on *inter partes* reexamination requests. The *inter partes* reexamination requests from October 1, 2010 to June 30, 2011, averaged 246 pages. Based on the experience of processing *inter partes* reexamination requests, the Office finds that the very large size of the requests has created a burden on the Office that hinders the efficiency and timeliness of processing the requests, and creates a burden on patent owners. The quarterly reported average processing time from the filing of a request to the publication of a reexamination certificate ranged from 28.9 months to 41.7 months in fiscal year 2009, from 29.5 months to 37.6 months in fiscal year 2010, and from 31.9 to 38.0 months in fiscal year 2011. *See* Reexaminations—FY 2011, *http://www.uspto.gov/patents/Reexamination_operational_statistic_through_FY2011Q4.pdf*.

By contrast, the Office has a page limit on the motions filed in contested cases, except where parties are specifically authorized to exceed the limitation. The typical contested case proceeding is subject to a standing order that sets a 50 page limit for motions and oppositions on priority, a 15 page limit for miscellaneous motions (§ 41.121(a)(3)) and oppositions (§ 41.122), and a 25 page limit for other motions (§ 41.121(a)(2)) and oppositions to other motions. In typical proceedings, replies are subject to a 15 page limit if directed to priority, 5 page limit for miscellaneous issues, and 10 page limit for other motions. The average contested case was terminated in 10.1 months in fiscal year 2009, in 12 months in fiscal year 2010, and 9 months in fiscal year 2011. The percentage of contested cases terminated within 2 years was 93.7% in fiscal year 2009, 88.0% in fiscal year 2010, and 94.0% in fiscal year 2011. *See* BPAI Statistics—Performance Measures, *http://www.uspto.gov/ip/boards/bpai/stats/perform/index.jsp*.

Comparing the average time period for terminating a contested case, 10.0 to 12.0 months, with the average time period, during fiscal years 2009 through 2011, for completing an *inter partes* reexamination, 28.9 to 41.7 months, indicates that the average interference takes from 24% (10.0/41.7) to 42% (12.0/28.9) of the time of the average *inter partes* reexamination. While several factors contribute to the reduction in time, limiting the size of the requests and motions is considered a significant factor. Proposed § 42.24 would provide page limits for petitions, motions, oppositions, and replies. 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b) provide considerations that are to be taken into account when prescribing regulations including the integrity of the patent system, the efficient administration of the Office, and the ability to complete timely the trials. The page limits proposed in these rules are consistent with these considerations.

Federal courts routinely use page limits in managing motions practice as ''[e]ffective writing is concise writing.'' *Spaziano* v. *Singletary,* 36 F.3d 1028, 1031 n.2 (11th Cir. 1994). Many district courts restrict the number of pages that may be filed in a motion including, for example, the District of Delaware, the District of New Jersey, the Eastern District of Texas, the Northern, Central, and Southern Districts of California, and the Eastern District of Virginia.

Federal courts have found that page limits ease the burden on both the parties and the courts, and patent cases are no exception. *Eolas Techs., Inc.* v. *Adobe Sys., Inc.,* No. 6:09–CV–446, at 1 (E.D. Tex. Sept. 2, 2010) (''The Local Rules' page limits ease the burden of motion practice on both the Court and the parties.''); *Blackboard, Inc.* v. *Desire2Learn, Inc.,* 521 F. Supp. 2d 575, 576 (E.D. Tex. 2007) (The parties ''seem to share the misconception, popular in some circles, that motion practice exists to require federal judges to shovel through steaming mounds of pleonastic arguments in Herculean effort to uncover a hidden gem of logic that will ineluctably compel a favorable ruling. Nothing could be farther from the truth.''); *Broadwater* v. *Heidtman Steel Prods., Inc.,* 182 F. Supp. 2d 705, 710 (S.D. Ill. 2002) (''Counsel are strongly advised, in the future, to not ask this Court for leave to file any memoranda (supporting or opposing dispositive motions) longer than 15 pages. The Court has handled complicated patent cases and employment discrimination cases in which the parties were able to limit their briefs supporting and opposing summary judgment to 10 or 15 pages.'' (Emphasis omitted)).

The Board's contested cases experience with page limits in motions practice is consistent with that of the federal courts. The Board's use of page limits has shown it to be beneficial without being unduly restrictive for the parties. Page limits have encouraged the parties to focus on dispositive issues, easing the burden of motions practice on the parties and on the Board.

The Board's contested cases experience with page limits is informed by its use of different approaches over the years. In the early 1990s, page limits were not routinely used for motions, and the practice suffered from lengthy

and unacceptable delays. To reduce the burden on the parties and on the Board and thereby reduce the time to decision, the Board instituted page limits in the late 1990s for every motion. Page limit practice was found to be effective in reducing the burdens on the parties and improving decision times at the Board. In 2006, the Board revised the page limit practice and allowed unlimited findings of fact and generally limited the number of pages containing argument. Due to abuses of the system, the Board recently reverted back to page limits for the entire motion (both argument and findings of fact).

The Board's current page limits are consistent with the 25 page limits in the Northern, Central, and Southern Districts of California, and the Middle District of Florida and exceed the limits in the District of Delaware (20), the Northern District of Illinois (15), the District of Massachusetts (20), the Eastern District of Michigan (20), the Southern District of Florida (20), and the Southern District of Illinois (20).

In a typical proceeding before the Board, a party may be authorized to file a single motion for unpatentability based on prior art, a single motion for unpatentability based upon failure to comply with 35 U.S.C. 112, lack of written description, and/or enablement, and potentially another motion for lack of compliance with 35 U.S.C. 101, although a 35 U.S.C. 101 motion may be required to be combined with the 35 U.S.C. 112 motion. Each of these motions is currently limited to 25 pages in length, unless good cause is shown that the page limits are unduly restrictive for a particular motion.

A petition requesting the institution of a trial proceeding would be similar to motions currently filed with the Board. Specifically, petitions to institute a trial seek a final written decision that the challenged claims are unpatentable, where derivation is a form of unpatentability. Accordingly, a petition to institute a trial based on prior art would, under current practice, be limited to 25 pages, and by consequence, a petition raising unpatentability based on prior art and unpatentability under 35 U.S.C. 101 and/or 112 would be limited to 50 pages.

Under the proposed rules, an *inter partes* review petition would be based upon any grounds identified in 35 U.S.C. 311(b), as amended, *i.e.,* only a ground that could be raised under 35 U.S.C. 102 or 103 and only on the basis of patents or printed publications. Generally, under current practice, a party is limited to filing a single prior art motion, limited to 25 pages in length. The proposed rule would provide up to 50 pages in length for a motion requesting *inter partes* review. Thus, as the proposed page limit doubles the default page limit currently set for a motion before the Board, a 50 page limit is considered sufficient in all but exceptional cases and is consistent with the considerations provided in 35 U.S.C. 316(b), as amended.

Under the proposed rules, a post-grant review petition would be based upon any grounds identified in 35 U.S.C. 321(b), *e.g.,* failure to comply with 35 U.S.C. 101, 102, 103, and 112 (except best mode). Under current practice, a party would be limited to filing two or three motions, each limited to 25 pages, for a maximum of 75 pages. Where there is more than one motion for unpatentability based upon different statutory grounds, the Board's experience is that the motions contain similar discussions of technology and claim constructions. Such overlap is unnecessary where a single petition for unpatentability is filed. Thus, the proposed 70 page limit is considered sufficient in all but exceptional cases.

Covered business method patent review is similar in scope to that of post-grant review, as there is substantial overlap in the statutory grounds permitted for review. Thus, the proposed page limit for proposed covered business method patent reviews is 70 pages, which is the same as that proposed for post-grant review.

Petitions to institute derivation proceedings raise a subset of issues that are currently raised in interferences in a motion for judgment on priority of invention. Currently, motions for judgment on priority of invention, including issues such as conception, corroboration, and diligence, are generally limited to 50 pages. Thus, the proposed 50 page limit is considered sufficient in all but exceptional cases.

The proposed rule would provide that petitions to institute a trial must comply with the stated page limits but may be accompanied by a motion that seeks to waive the page limits. The petitioner must show in the motion how a waiver of the page limits is in the interests of justice. A copy of the desired non-page limited petition must accompany the motion. Generally, the Board would decide the motion prior to deciding whether to institute the trial.

Current Board practice provides a limit of 25 pages for other motions and 15 pages for miscellaneous motions. The Board's experience is that such page limits are sufficient for the parties filing them and do not unduly burden the opposing party or the Board. Petitions to institute a trial would generally replace the current practice of filing motions for unpatentability, as most motions for relief are expected to be similar to the current interference miscellaneous motion practice. Accordingly, the proposed 15 page limit is considered sufficient for most motions but may be adjusted where the limit is determined to be unduly restrictive for the relief requested.

Proposed § 42.24(b) would provide page limits for oppositions filed in response to motions. Current contested case practice provides an equal number of pages for an opposition as its corresponding motion. This is generally consistent with motions practice in federal courts. The proposed rule would continue the current practice.

Proposed § 42.24(c) would provide page limits for replies. Current contested case practice provides a 15 page limit for priority motion replies, a 5 page limit for miscellaneous (procedural) motion replies, and a 10 page limit for all other motions. The proposed rule is consistent with current contested case practice for procedural motions. The proposed rule would provide a 15 page limit for reply to petitions requesting a trial, which the Office believes is sufficient based on current practice. Current contested case practice has shown that such page limits do not unduly restrict the parties and, in fact, have provided sufficient flexibility to parties to not only reply to the motion but also help to focus on the issues. Thus, it is anticipated that default page limits would minimize the economic impact on small entities by focusing on the issues in the trials.

The Leahy-Smith America Invents Act requires that the Director, in prescribing rules for the *inter partes,* post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings. *See* 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b). In view of the actual results of the duration of proceedings in *inter partes* reexamination (without page limits) and contested cases (with page limits), proposing procedures with reasonable page limits would be consistent with the objectives set forth in the Leahy-Smith America Invents Act. Based on our experience on the time needed to complete a non-page limited proceeding, the option of non-page limited proceedings was not adopted.

Fee Setting: 35 U.S.C. 311(a), as amended, and 35 U.S.C. 321(a) require the Director to establish fees to be paid

by the person requesting the review in such amounts as the Director determines to be reasonable, considering the aggregate costs of the review. In contrast to current 35 U.S.C. 311(b) and 312(c), the Leahy-Smith America Invents Act requires the Director to establish more than one fee for reviews based on the total cost of performing the reviews, and does not provide for refund of any part of the fee when the Director determine that the review should not be initiated.

35 U.S.C. 312(a)(1), as amended, and 35 U.S.C. 322(a)(1) further require that the fee established by the Director under 35 U.S.C. 311(a), as amended, or 35 U.S.C. 321 accompany the petition on filing. Accordingly, in interpreting the fee setting authority in 35 U.S.C. 311(a), as amended, and 35 U.S.C. 321(a), it is reasonable that the Director should set a number of fees for filing a petition based on the anticipated aggregate cost of conducting the review depending on the complexity of the review, and require payment of the fee upon filing of the petition.

Based on experience with contested cases and *inter partes* reexamination proceedings, the following characteristics of requests were considered as potential factors for fee setting as each would likely impact the cost of providing the new services. The Office also considered the relative difficulty in administrating each option in selecting the characteristics for which different fees should be paid for requesting review.

I. *Adopted Option.* Number of claims for which review is requested. The number of claims often impacts the complexity of the request and increases the demands placed on the deciding officials. *Cf. In re Katz Interactive Call Processing Patent Litig.,* 639 F.3d 1303, 1309 (Fed. Cir. 2011) (limiting number of asserted claims is appropriate to manage a patent case efficiently). Moreover, the number of claims for which review is requested can be easily determined and administered, which avoids delays in the Office and the impact on the economy or patent system that would occur if an otherwise meritorious request is refused due to improper fee payment. Any subsequent petition would be time barred in view 35 U.S.C. 315(b), as amended, or 35 U.S.C. 325.

II. *Alternative Option I.* Number of grounds for which review is requested. The Office has experience with large numbers of cumulative grounds being presented in *inter partes* reexaminations which often add little value to the proceedings. Allowing for a large number of grounds to be presented on payment of an additional fee(s) is not favored. Determination of the number of grounds in a request may be contentious and difficult and may result in a large amount of high-level petition work. As such, the option would have a negative impact on small entities. Moreover, interferences instituted in the 1980s and early 1990s suffered from this problem as there was no page limit for motions and the parties had little incentive to focus the issues for decision. The resulting interference records were often a collection of disparate issues and evidence. This led to lengthy and unwarranted delays in deciding interference cases as well as increased costs for parties and the Office. Accordingly, this alternative is inconsistent with objectives of the Leahy-Smith America Invents Act that the Director, in prescribing rules for the *inter partes,* post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings.

III. *Alternative Option II.* Pages of argument. The Office has experience with large requests in *inter partes* reexamination in which the merits of the proceedings could have been resolved in a shorter request. Allowing for unnecessarily large requests on payment of an additional fee(s) is not favored. Moreover, determination of what should be counted as ''argument'' as compared with ''evidence'' has often proven to be contentious and difficult as administered in the current *inter partes* reexamination appeal process.

In addition, the trial section of the Board recently experimented with motions having a fixed page limit for the argument section and an unlimited number of pages for the statement of facts. Unlimited pages for the statement of facts led to a dramatic increase in the number of alleged facts and pages associated with those facts. For example, one party used approximately 10 pages for a single ''fact'' that merely cut and pasted a portion of a declarant's cross-examination. Based upon the trial section's experience with unlimited pages of facts, the Board recently reverted back to a fixed page limit for the entire motion (argument and facts). Accordingly, this alternative is inconsistent with objectives of the Leahy-Smith America Invents Act that the Director, in prescribing rules for the *inter partes,* post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings.

IV. *Alternative Option III.* The Office considered an alternative fee setting regime in which fees would be charged at various steps in the review process, a first fee on filing of the petition, a second fee if instituted, a third fee on filing a motion in opposition to amended claims, etc. The alternative fee setting regime would hamper the ability of the Office to complete timely reviews, would result in dismissal of pending proceedings with patentability in doubt due to non-payment of required fees by third parties, and would be inconsistent with 35 U.S.C. 312, as amended, and 35 U.S.C. 322 that require the fee established by the Director be paid at the time of filing the petition. Accordingly, this alternative is inconsistent with objectives of the Leahy-Smith America Invents Act that the Director, in prescribing rules for the *inter partes,* post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings.

V. *Alternative Option IV.* The Office considered setting reduced fees for small and micro entities and to provide refunds if a review is not instituted. The Office shall set the fee to recover the cost of providing the services under 35 U.S.C. 41(d)(2)(a). Fees set under this authority are not reduced for small entities, *see* 35 U.S.C. 42(h)(1), as amended. Moreover, the Office does not have authority to refund fees that were not paid by mistake or in excess of that owed. *See* 35 U.S.C. 42(d).

Discovery: The Office considered a procedure for discovery similar to the one available during district court litigation. Discovery of that scope has been criticized sharply, particularly when attorneys use discovery tools as tactical weapons, which hinder the ''just, speedy, and inexpensive determination of every action and proceedings.'' *See* Introduction to *An E-Discovery Model Order, available at http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf.* Accordingly, this alternative would have been inconsistent with objectives of the Leahy-Smith America Invents Act that the Director, in prescribing rules for the *inter partes,* post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent

system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings.

Additional discovery increases trial costs and increases the expenditures of time by the parties and the Board. The Board's experience in contested cases, however, is that such showings are often lacking and authorization for additional discovery is expected to be rare. While an interests-of-justice standard would be employed in granting additional discovery in *inter partes* reviews and derivation proceedings, the post-grant review and covered business method patent review would employ a good cause standard in granting additional discovery.

To promote effective discovery, the proposed rule would require a showing that additional requested discovery would be productive in *inter partes* reviews and derivation proceedings. An interests-of-justice standard for additional discovery is proposed for *inter partes* reviews and derivation proceedings. This standard is consistent with the considerations identified in 35 U.S.C. 316(b) and 135(b), as amended, including the efficient administration of the Board and the Board's ability to complete timely trials. Further, the proposed interests-of-justice standard is consistent with 35 U.S.C. 316(a)(5), as amended, which states that discovery other than depositions of witnesses submitting affidavits and declarations be what is otherwise necessary in the interests of justice.

Good cause and interests of justice are closely related standards, but the interests-of-justice standard is slightly higher than good cause. While a good cause standard requires a party to show a specific factual reason to justify the needed discovery, under the interests-of-justice standard, the Board would look at all relevant factors. Specifically, to show good cause, a party would be required to make a particular and specific demonstration of fact. Under the interests-of-justice standard, the moving party would also be required to show that it was fully diligent in seeking discovery and that there is no undue prejudice to the non-moving party. The interests-of-justice standard covers considerable ground, and in using such a standard, the Board expects to consider whether the additional discovery is necessary in light of the totality of the relevant circumstances.

The Office is proposing a default scheduling order to provide limited discovery as a matter of right and provide parties with the ability to seek additional discovery on a case-by-case basis. In weighing the need for additional discovery, should a request be made, the Board would consider the economic impact on the opposing party. This would tend to limit additional discovery where a party is a small entity.

Pro Hac Vice: The Office considered whether to allow counsel to appear *pro hac vice.* In certain cases, highly skilled, but non-registered, attorneys have appeared satisfactorily before the Board in contested cases. The Board may recognize counsel *pro hac vice* during a proceeding upon a showing of good cause. The Board may impose conditions in recognizing counsel pro hac vice, including an agreement that counsel is bound by the Office's Code of Professional Responsibility. Proceedings before the Office can be technically complex. The grant of a motion to appear *pro hac vice* is a discretionary action taking into account the specifics of the proceedings. Similarly, the revocation of *pro hac vice* is a discretionary action taking into account various factors, including incompetence, unwillingness to abide by the Office's Code of Professional Responsibility, prior findings of misconduct before the Office in other proceedings, and incivility.

The Board's past practice has required the filing of a motion by a registered patent practitioner seeking *pro hac vice* representation based upon a showing of: (1) How qualified the unregistered practitioner is to represent the party in the proceeding when measured against a registered practitioner, and, (2) whether the party has a genuine need to have the particular unregistered practitioner represent it during the proceeding. This practice has proven effective in the limited number of contested cases where such requests have been granted. The proposed rule, if adopted, would allow for this practice in the new proceedings authorized by the Leahy-Smith America Invents Act.

The proposed rules would provide a limited delegation to the Board under 35 U.S.C. 2(b)(2) and 32 to regulate the conduct of counsel in Board proceedings. The proposed rule would delegate to the Board the authority to conduct counsel disqualification proceedings while the Board has jurisdiction over a proceeding. The rule would also delegate to the Chief Administrative Patent Judge the authority to make final a decision to disqualify counsel in a proceeding before the Board for the purposes of judicial review. This delegation would not derogate from the Director the prerogative to make such decisions, nor would it prevent the Chief Administrative Patent Judge from further delegating authority to an administrative patent judge.

The Office considered broadly permitting practitioners not registered to practice by the Office to represent parties in trial as well as categorically prohibiting such practice. A prohibition on the practice would be inconsistent with the Board's experience, and more importantly, might result in increased costs particularly where a small entity has selected its district court litigation team for representation before the Board and has a patent review filed after litigation efforts have commenced. Alternatively, broadly making the practice available would create burdens on the Office in administering the trials and in completing the trial within the established time frame, particularly if the selected practitioner does not have the requisite skill. In weighing the desirability of admitting a practitioner *pro hac vice,* the economic impact on the party in interest would be considered which would tend to increase the likelihood that a small entity could be represented by a non-registered practitioner. Accordingly, the alternatives to eliminate *pro hac vice* practice or to permit it more broadly would have been inconsistent with objectives of the Leahy-Smith America Invents Act that the Director, in prescribing rules for the *inter partes,* post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings.

Threshold for Instituting a Review: The Office considered whether the threshold for instituting a review could be set as low as or lower than the threshold for *ex parte* reexamination. This alternative could not be adopted in view of the statutory requirements in 35 U.S.C. 314, as amended, and 35 U.S.C. 324.

Default Electronic Filing: The Office considered a paper filing system and a mandatory electronic filing system (without any exceptions) as alternatives to the proposed requirement that all papers are to be electronically filed, unless otherwise authorized.

Based on the Office's experience, a paper based filing system increases delay in processing papers, delay in public availability, and the chance that a paper may be misplaced or made available to an improper party if confidential. Accordingly, the alternative of a paper based filing system would have been inconsistent with objectives of the Leahy-Smith

America Invents Act that the Director, in prescribing rules for the *inter partes,* post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings.

An electronic filing system (without any exceptions) that is rigidly applied would result in unnecessary cost and burdens, particularly where a party lacks the ability to file electronically. By contrast, if the proposed option is adopted, it is expected that the entity size and sophistication would be considered in determining whether alternative filing methods would be authorized.

6. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rules:

37 CFR 1.99 provides for the submission of information after publication of a patent application during examination by third parties.

37 CFR 1.171–1.179 provide for applications to reissue a patent to correct errors, including where a claim in a patent is overly broad.

37 CFR 1.291 provides for the protest against the issuance of a patent during examination.

37 CFR 1.321 provides for the disclaimer of a claim by a patentee.

37 CFR 1.501 and 1.502 provide for *ex parte* reexamination of patents. Under these rules, a person may submit to the Office prior art consisting of patents or printed publications that are pertinent to the patentability of any claim of a patent, and request reexamination of any claim in the patent on the basis of the cited prior art patents or printed publications. Consistent with 35 U.S.C. 302–307, *ex parte* reexamination rules provide a different threshold for initiation, require the proceeding to be conducted by an examiner with a right of appeal to the Patent Trial and Appeal Board, and allow for limited participation by third parties.

37 CFR 1.902–1.997 provide for *inter partes* reexamination of patents. Similar to *ex parte* reexamination, *inter partes* reexamination provides a procedure in which a third party may request reexamination of any claim in a patent on the basis of the cited prior art patents and printed publication. The *inter partes* reexamination practice will be eliminated, except for requests filed before the effective date, September 16, 2012. *See* § 6(c)(3)(C) of the Leahy-Smith America Invents Act.

Other countries have their own patent laws, and an entity desiring a patent in a particular country must make an application for patent in that country, in accordance with the applicable law. Although the potential for overlap exists internationally, this cannot be avoided except by treaty (such as the Paris Convention for the Protection of Industrial Property, or the Patent Cooperation Treaty (PCT)). Nevertheless, the Office believes that there are no other duplicative or overlapping foreign rules.

The notice also proposes changes to the rule of practice to consolidate the procedure for notifying the Office and other parties in the proceeding when a party seeks judicial review of a Board decision. In fiscal year 2010, the Board issued 7,312 decisions, and only 61 notices of appeal were filed with the Office and no civil action was commenced. In fiscal year 2011, the Board issued 7,551 decisions, and only 100 notices of appeal were filed with the Office and 7 civil actions were commenced. As such, the average rate for fiscal years 2010 and 2011 was 1.13% $((61/7{,}312 + 107/7{,}551)/2 \times 100)$. Based on current projections with additional resources, it is anticipated that the Board will issue 10,500 decisions in fiscal year 2013. Thus, it is estimated that 137 notices of appeal (and notices of election) would be filed with the Office. Historically, one third of *inter partes* reexamination proceedings have been appealed to the Board. Based on an assumption that the appeal rate from the Board for the new proceedings will be 50% of the historic rate, 57 additional notices of appeal will be filed based on the new trials sought in fiscal year 2013. Based on the percentage of small entity owned patents that were the subject of *inter partes* reexamination (32.79%) and the percentage of small entity owned patent applications or patents that were the subject of an interference declared in fiscal year 2010 (19.62%), it is estimated that 63 small entities will be required to file notices of appeal and notices of elections.

The proposed rule also requires that a copy of the notice of appeal or notice of election and complaint be provided to the Board, thus an additional 194 (137 + 57) copies would be required.

C. Executive Order 12866 (Regulatory Planning and Review): This rulemaking has been determined to be significant for purposes of Executive Order 12866 (Sept. 30, 1993), as amended by Executive Order 13258 (Feb. 26, 2002) and Executive Order 13422 (Jan. 18, 2007).

The Office estimates that the aggregate burden of the proposed rules for implementing the new review procedures is approximately $80.6 million for fiscal year 2013. The USPTO considered several factors in making this estimate.

Based on the petition and other filing requirements for initiating a review proceeding, the USPTO initially estimated the burden of the proposed rules on the public to be $209,131,529 in fiscal year 2013, which represents the sum of the estimated total annual (hour) respondent cost burden ($190,280,456) plus the estimated total annual non-hour respondent cost burden ($18,851,073) provided in Item (O)(II) of the Rulemaking Considerations section of this notice, *infra.* However, since the Leahy-Smith America Invents Act also eliminates *inter partes* reexamination practice (except for requests filed before the effective date of September 16, 2012) and interference practice as to applications and patents that have an effective filing date on or after March 16, 2013, (with a few exceptions), the burden of the proposed rules should be offset by the eliminations of these proceedings and their associated burdens.

It is estimated that 460 new requests for *inter partes* reexamination would have been filed in FY 2012 if the Leahy-Smith America Invents Act had not been enacted. This estimate is based on the number of proceedings filed in fiscal years 2011 (374), 2010 (280), and 2009 (258). Elimination of 460 proceedings reduces the public's burden to pay filing fees by $4,048,000 (460 filings with an $8,800 filing fee due) and the public's burden to prepare requests by $21,160,000 (460 filings with $46,000 average cost to prepare). Based on the assumption that 93% of the requests would be ordered (consistent with the fiscal year 2011 grant rate), the burden to conduct the proceeding until close of prosecution will reduce the public's burden by $89,880,000 (428 proceedings that would be estimated to be granted reexamination multiplied by $210,000 which is average cost cited in the *AIPLA Report of the Economic Survey 2011* per party cost until close of prosecution reduced by the $46,000 request preparation cost). Additionally, the burden on the public to appeal to the Board would be reduced by $5,358,000 (based on an estimate that 141 proceedings would be appealed to the Board which is estimated based on the number of granted proceedings (428) and the historical rate of appeal to the Board (⅓) and an average public cost of $38,000). Thus, $120,446,000 in public burden will be eliminated by the elimination of new filings of *inter partes* reexamination (the sum of $4,048,000 (the filing fees), $21,160,000 (the cost of

preparing requests), $89,880,000 (the prosecution costs), plus $5,358,000 (the burden to appeal to the Board)).

The public burden due to a reduction in the number of interferences declared, from 64 to 51, is estimated at $9,484,400 based on the assumption that the current percentage of interferences decided in the preliminary phase (80%) would continue on the lower number of proceedings instituted and based on cost to the public. To calculate this public burden due to a reduction in the number of interferences declared ($9,484,400), the following information was used. The average public burden for a two party interference decided in the preliminary phase reported in the *AIPLA Report of the Economic Survey 2011* is $644,000 (if decided in the preliminary phase) and $1,262,000 (if decided after the preliminary phase). It is estimated that had the Leahy-Smith America Invents Act not been enacted, 52 interferences would have been decided in the preliminary phase, and 12 would have been decided after the preliminary phase, equating to a public burden of $48,632,000 ((52 multiplied by $644,000 equals $33,488,000), plus (12 multiplied by $1,262,000 equals $15,144,000) for a total of $48,632,000). It is estimated that 51 interferences will be instituted in fiscal year 2013, at an average public burden of $767,600 (80% of $644,000 plus 20% of $ 1,262,000) per interference, or a total of $39,147,600 (51 multiplied by $767,600). Accordingly, it is estimated that burden to the public due to the reduction of interferences would be the total public burden for interferences of $48,632,000 minus total public burden for estimated interferences for fiscal year 2013 of $39,147,600, or $9,484,400.

Thus, a total of $129,930,400 in public burden will be eliminated by the reduction in the number of interferences that would be declared and by eliminating new filings of *inter partes* reexamination (this total is a sum of the following identified above: Elimination of filing fees ($4,048,000), cost of preparing requests ($21,160,000), prosecution costs until close of prosecution ($89,880,000), burden to appeal to the Board ($5,358,000) in new *inter partes* reexamination proceedings, and the reduction in interference burden ($9,484,400)). Therefore, the estimated aggregate burden of the proposed rules for implementing the new review proceedings would be $79,201,129 ($209,131,529 minus $129,930,400) in fiscal year 2013.

The USPTO expect several benefits to flow from the Leahy-Smith America Invents Act and these proposed rules. It is anticipated that the proposed rules will reduce the time for reviewing patents at the USPTO. Specifically, 35 U.S.C. 316(a), as amended, and 35 U.S.C. 326(a) provide that the Director prescribe regulations requiring a final determination by the Board within one year of initiation, which may be extended for up to six months for good cause. In contrast, currently for *inter partes* reexamination, the average time from the filing to the publication of a certificate ranged from 28.9 to 41.7 months during fiscal years 2009–2011. *See* Reexaminations—FY 2011, *http://www.uspto.gov/patents/Reexamination_operational_statistic_through_FY2011Q4.pdf*.

Likewise, it is anticipated that the proposed rules will minimize duplication of efforts. In particular, the Leahy-Smith America Invents Act provides more coordination between district court infringement litigation and *inter partes* review to reduce duplication of efforts and costs. For instance, 35 U.S.C. 315(b), as amended, will require that a petition for *inter partes* review be filed within one year of the date of service of a complaint alleging infringement of a patent. By requiring the filing of an *inter partes* review petition earlier than a request for *inter partes* reexamination, and by providing shorter timelines for *inter partes* review compared with reexamination, it is anticipated that the current high level of duplication between litigation and reexamination will be reduced.

The *AIPLA Report of the Economic Survey 2011* reports that the total cost of patent litigation where the damages at risk are less than $1,000,000 average $916,000, where the damages at risk are between $1,000,000 and $25,000,000 average $2,769,000, and where the damages at risk exceed $25,000,000 average $6,018,000. There may be a significant reduction in overall burden if, as intended, the Leahy-Smith America Invents Act and the proposed rules reduce the overlap between review at the USPTO of issued patents and validity determination during patent infringement actions. Data from the United States district courts reveals that 2,830 patent cases were filed in 2006, 2,896 in 2007, 2,909 in 2008, 2,792 in 2009, and 3,301 in 2010. *See* U.S. Courts, Judicial Business of the United States Courts, *www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02ASep10.pdf* (last visited Nov. 11, 2011) (hosting annual reports for 1997 through 2010). Thus, the Office estimates that no more than 3,300 patent cases (the highest number of yearly filings between 2006 and 2010 rounded to the nearest 100) are likely to be filed annually. The aggregate burden estimate above ($79,201,056) was not offset by a reduction in burden based on improved coordination between district court patent litigation and the new *inter partes* review proceedings.

D. Executive Order 13563 (Improving Regulation and Regulatory Review): The Office has complied with Executive Order 13563. Specifically, the Office has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, and provided online access to the rule making docket; (7) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13132 (Federalism): This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

F. Executive Order 13175 (Tribal Consultation): This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

G. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections

3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996). This rulemaking carries out a statute designed to lessen litigation. *See* H.R. Rep. No. 112–98, at 45–48.

I. Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property): This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

K. Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801–808), prior to issuing any final rule, the United States Patent and Trademark Office will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this notice are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets. Therefore, this notice is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995: The changes proposed in this notice do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501–1571.

M. National Environmental Policy Act: This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321–4370h.

N. National Technology Transfer and Advancement Act: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions which involve the use of technical standards.

O. Paperwork Reduction Act: The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3549) requires that the USPTO consider the impact of paperwork and other information collection burdens imposed on the public. This proposed rulemaking involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3549). The collection of information involved in this notice has been submitted to OMB under OMB control number 0651–00xx. The proposed collection will be available at the OMB's Information Collection Review Web site at: *www.reginfo.gov/public/do/PRAMain*.

The USPTO is submitting the information collection to OMB for its review and approval because this notice of proposed rulemaking will add the following to a collection of information:

(1) Petitions to institute an *inter partes* review (§§ 42.5, 42.6, 42.8, 42.11, 42.13, 42.20, 42.21, 42.22, 42.24(a)(1), 42.63, 42.65, and 42.101 through 42.105);

(2) Petitions to institute a post-grant review (§§ 42.5, 42.6, 42.8, 42.11, 42.13, 42.20, 42.21, 42.22, 42.24(a)(2), 42.63, 42.65, and 42.201 through 42.205);

(3) Petitions to institute a covered business method patent review (§§ 42.5, 42.6, 42.8, 42.11, 42.13, 42.20, 42.21, 42.22, 42.24(a)(3), 42.63, 42.65, 42.203, 42.205, and 42.302 through 42.304);

(4) Petitions to institute a derivation proceeding (§§ 42.5, 42.6, 42.8, 42.11, 42.13, 42.20, 42.21, 42.22, 42.24(a)(4),42.63, 42.65, and 42.402 through 42.406);

(5) Motions (§§ 42.6, 42.8, 42.11, 42.13, 42.21, 42.22, 42.24(a)(5), 42.51, through 42.54, 42.63, 42.64, 42.65, 42.121, 42.221, 42.123, and 42.223);

(6) Oppositions (§§ 42.6, 42.8, 42.11, 42.13, 42.21, 42.23, 42.24(b), 42.51, 42.52, 42.53, 42.54, 42.63, 42.64, 42.65, 42.107, 42.120, 42.207, and 42.220);

(7) Replies provided for in 35 U.S.C. 135 and 311–318, as amended, and new 35 U.S.C. 319 and 321–329 (§§ 42.6, 42.8, 42.11, 42.13, 42.21, 42.23, 42.24(c), 42.51, 42.52, 42.53, 42.54, 42.63, and 42.65); and

(8) Notices of judicial review of a Board decision, including notices of appeal and notices of election provided for 35 U.S.C. 141, 142, 145 and 146 (§§ 90.1 through 90.3).

The proposed rules also permit filing requests for oral argument (§ 42.70) provided for in 35 U.S.C. 316(a)(10), as amended, and 35 U.S.C. 326(a)(10), requests for rehearing (§ 42.71(c)), requests for adverse judgment (§ 42.73(b)), requests that a settlement be treated as business confidential (§ 42.74(b) and 42.409) provided for in 35 U.S.C. 317, as amended, and 35 U.S.C. 327, and arbitration agreements and awards (§ 42.410) to a collection of information.

I. Abstract: The USPTO is required by 35 U.S.C. 131 and 151 to examine applications and, when appropriate, issue applications as patents.

Chapter 31 of title 35, United States Code, in effect on September 16, 2012, provides for *inter partes* review proceedings allowing third parties to petition the USPTO to review the patentability of an issued patent under 35 U.S.C. 102 and 103 based on patents and printed publications. If a trial is initiated by the USPTO based on the petition, as authorized by the USPTO, additional motions may be filed by the petitioner. A patent owner may file a response to the petition and if a trial is instituted, as authorized by the USPTO, may file additional motions.

Chapter 32 of title 35 U.S.C. in effect on September 16, 2012, provides for post-grant review proceeding allowing third parties to petition the USPTO to review the patentability of an issued patent under any ground authorized under 35 U.S.C. 282(b)(2). If a trial is initiated by the USPTO based on the petition, as authorized by the USPTO, additional motions may be filed by the petitioner. A patent owner may file a response to the petition and if a trial is instituted, as authorized by the USPTO, may file additional motions.

Section 18 of the Leahy-Smith America Invents Act provides for a transitional program for covered business method patents, which will employ the standards and procedures of the post-grant review proceeding with a few exceptions. 35 U.S.C. 135 in effect on March 16, 2013, provides for petitions to institute a derivation proceeding at the USPTO for certain applications. The new rules for initiating and conducting these proceedings are proposed in this notice as new part 42 of title 37 of the Code of Federal Regulations.

In estimating the number of hours necessary for preparing a petition to institute an *inter partes* review, the USPTO considered the estimated cost of preparing a request for *inter partes* reexamination ($46,000), the median billing rate ($340/hour), and the observation that the cost of *inter partes*

reexamination has risen the fastest of all litigation costs since 2009 in the *AIPLA Report of the Economic Survey 2011.* It was estimated that a petition for an *inter partes* review and an *inter partes* reexamination request would cost the same to the preparing party ($46,000). Since additional grounds are provided in post-grant review or covered business method patent review, the Office estimates the cost of preparing a petition to institute a review will be 33.333% more than the estimated cost of preparing a request for *inter partes* reexamination, or $61,333.

In estimating the number of hours necessary for preparing motions after instituting and participating in the review, the USPTO considered in the *AIPLA Report of the Economic Survey 2011* which reported the average cost of a party to a two-party interference to the end of the preliminary motion phase ($322,000) and inclusive of all costs ($631,000). The Office considered that the preliminary motion phase is a good proxy for patentability reviews since that is the period of current contested cases before the trial section of the Board where most patentability motions are currently filed.

The USPTO also reviewed recent contested cases before the trial section of the Board to make estimates on the average number of motions for any matter including priority, the subset of those motions directed to non-priority issues, the subset of those motions directed to non-priority patentability issues, and the subset of those motions directed to patentability issues based on a patent or printed publication on the basis of 35 U.S.C. 102 or 103. The review of current contested cases before the trial section of the Board indicated that approximately 15% of motions were directed to prior art grounds, 18% of motions were directed to other patentability grounds, 27% were directed to miscellaneous issues, and 40% were directed to priority issues. It was estimated that the cost per motion to a party in current contested cases before the trial section of the Board declines because of overlap in subject matter, expert overlap, and familiarity with the technical subject matter. Given the overlap of subject matter, a proceeding with fewer motions will have a somewhat less than proportional decrease in costs since the overlapping costs will be spread over fewer motions.

It is estimated that the cost of an *inter partes* review would be 60% of the cost of current contested cases before the trial section of the Board to the end of the preliminary motion period. An *inter partes* review should have many fewer motions since only one party will have a patent that is the subject of the proceeding (compared with each party having at least a patent or an application in current contested cases before the trial section of the Board). Moreover, fewer issues can be raised since *inter partes* review will not have priority-related issues that must be addressed in current contested cases before the trial section of the Board. Consequently, a 60% weighting factor should capture the typical costs of an *inter partes* review.

It is estimated that the cost of a post-grant review or covered business method patent review would be 75% of the cost of current contested cases before the trial section of the Board to the end of the preliminary motion period. The basis for this estimate is similar to the basis for the *inter partes* review estimate. Since more patentability issues may be raised in the petition, the cost for these trials is expected to be somewhat higher. Again, a 75% weighting factor should capture the typical costs of a post-grant review or a covered business method patent review.

Derivations will be more like current contested cases before the trial section of the Board inasmuch as they may have a period which sets the stage for determining derivation and a derivation period. One half of derivations are anticipated to end in the preliminary motion period, while the other half are anticipated to proceed to decision on derivation. While it is recognized that fewer than half of all current contested cases before the trial section of the Board proceed to a priority decision, derivation contests are often more protracted than other current contested cases before the trial section of the Board. The costs associated with derivations through the preliminary motion period and through the derivation period should be comparable to the corresponding costs of current contested cases before the trial section of the Board.

The title, description, and respondent description of the information collection are shown below with an estimate of the annual reporting burdens. Included in this estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. The principal impact of the proposed changes in this notice of proposed rulemaking is to implement the changes to Office practice necessitated by §§ 3(i), 6, and 18 of the Leahy-Smith America Invents Act.

The public uses this information collection to request review and derivation proceedings and to ensure that the associated fees and documentation are submitted to the USPTO.

II. Data

Needs and Uses: The information supplied to the USPTO by a petition to institute a review or derivation as well as the motions authorized following the institution is used by the USPTO to determine whether to initiate a review under 35 U.S.C. 314, as amended, or 35 U.S.C. 324 or derivation proceeding under 35 U.S.C. 135, as amended, and to prepare a final decision under 35 U.S.C. 135 or 318, as amended, or 35 U.S.C. 328.

OMB Number: 0651–00xx.

Title: Patent Review and Derivation Proceedings.

Form Numbers: None.

Type of Review: New Collection.

Likely Respondents/Affected Public: Individuals or households, businesses or other for profit, not-for-profit institutions, farms, Federal Government, and state, local, or tribal governments.

Estimated Number of Respondents/Frequency of Collection: 1120 respondents and 4,967 responses per year.

Estimated Time per Response: The USPTO estimates that it will take the public from 0.1 to 180.4 hours to gather the necessary information, prepare the documents, and submit the information to the USPTO.

Estimated Total Annual Respondent Burden Hours: 559,648.4 hours per year.

Estimated Total Annual (Hour) Respondent Cost Burden: $190,280,456 per year. The USPTO expects that the information in this collection will be prepared by attorneys. Using the professional rate of $340 per hour for attorneys in private firms, the USPTO estimates that the respondent cost burden for this collection will be approximately $190,280,456 per year (559,648.4 hours per year multiplied by $340 per hour).

Estimated Total Annual Non-Hour Respondent Cost Burden: $18,851,073 per year. There are no capital start-up or maintenance costs associated with this information collection. However, this collection does have annual (non-hour) costs in the form of filing fees and postage costs where filing via mail is authorized. It is estimated that filing via mail will be authorized in one *inter partes* review petition filing and 3 subsequent papers. There are filing fees associated with petitions for *inter partes* review, post-grant review, and covered business method patent review and for requests to treat a settlement as business confidential. The total filing fees for this collection are calculated in the

accompanying table. The USPTO estimates that filings authorized to be filed via mail will be mailed to the USPTO by Express Mail using the U.S. Postal Service's flat rate envelope, which can accommodate varying submission weights, estimated in this case to be 16 ounces for the petitions and two ounces for the other papers. The cost of the flat rate envelope is $18.30. The USPTO estimates that the total postage cost associated with this collection will be approximately $73 per year. The USPTO estimates that the total fees associated with this collection will be approximately $18,851,073 per year.

Therefore, the total cost burden in fiscal year 2013 is estimated to be $209,131,529 (the sum of the estimated total annual (hour) respondent cost burden ($190,280,456) plus the estimated total annual non-hour respondent cost burden ($18,851,073)).

Item	Estimated time for response (in hours)	Estimated annual responses	Estimated annual burden hours
Petition for *inter partes* review	135.3	460	62,238
Petition for post-grant review or covered business method patent review	180.4	50	9,020
Petition for derivation	180.4	50	9,020
Reply to initial *inter partes* review petition	100	406	40,600
Reply to initial post-grant review or covered business method patent review	100	45	4,500
Request for Reconsideration	80	146	11,680
Motions, replies and oppositions after institution in *inter partes* review	140	2,453	343,420
Motions, replies and oppositions after institution in post-grant review or covered business method patent review	130	342	44,460
Motions, replies and oppositions in derivation proceeding	120	210	25,200
Request for oral hearing	20	466	9,320
Request to treat a settlement as business confidential	2	20	40
Request for adverse judgment, default adverse judgment or settlement	1	103	103
Arbitration agreement and award	4	2	8
Request to make a settlement agreement available	1	20	20
Notice of judicial review of a Board decision (*e.g.,* notice of appeal under 35 U.S.C. 142) hour	0.1	194	19.4
Totals		4,967	559,648.4

Item	Estimated annual responses	Fee amount	Estimated annual filing costs
Petition for *inter partes* review	460	$35,800	$16,468,000
Petition for post-grant review or covered business method patent review	50	47,100	2,355,000
Petition for derivation	50	400	20,000
Reply to *inter partes* review petition	406	0	0
Reply to post-grant review or covered business method patent review petition	45	0	0
Request for Reconsideration	146	0	0
Motions, replies and oppositions after initiation in *inter partes* review	2,453	0	0
Motions, replies and oppositions after initiation in post-grant review or covered business method patent review	342	0	0
Motions, replies and oppositions in derivation proceeding	210	0	0
Request for oral hearing	466	0	0
Request to treat a settlement as business confidential	20	0	0
Request for adverse judgment, default adverse judgment or settlement	103	0	0
Arbitration agreement and awards	2	0	0
Request to make a settlement agreement available	20	400	8,000
Notice of judicial review of a Board decision (*e.g.,* notice of appeal under 35 U.S.C. 142)	194	0	0
Totals	4,967		18,851,000

III. Solicitation

The agency is soliciting comments to: (1) Evaluate whether the proposed information requirement 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; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of collecting the information on those who are to respond, including by using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Interested persons are requested to send comments regarding this information collection by April 9, 2012, to: (1) The Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street NW., Washington, DC 20503, Attention: Nicholas A. Fraser, the Desk Officer for the United States Patent and Trademark Office, and via email at *nfraser@omb.eop.gov;* and (2) The Board of Patent Appeals and Interferences by electronic mail message over the Internet addressed to *patent_trial_rules@uspto.gov,* or by mail addressed to: Mail Stop Patent Board, Director of the United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of ''Lead Judge Michael Tierney, Patent Trial Proposed Rules.''

Notwithstanding any other provision of law, no person is required to respond

to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 42

Administrative practice and procedure, Inventions and patents, Lawyers.

37 CFR Part 90

Administrative practice and procedure, Inventions and patents, Lawyers.

Proposed Amendments to the Regulatory Text

For the reasons stated in the preamble, the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office proposes to amend 37 CFR chapter I as follows:

1. Add part 42 to read as follows:

PART 42—TRIAL PRACTICE BEFORE THE PATENT TRIAL AND APPEAL BOARD

Sec.

Subpart A—Trial Practice and Procedure

General

42.1 Policy.
42.2 Definitions.
42.3 Jurisdiction.
42.4 Notice of trial.
42.5 Conduct of the proceeding.
42.6 Filing of documents, including exhibits; service.
42.7 Management of the record.
42.8 Mandatory notices.
42.9 Action by patent owner.
42.10 Counsel.
42.11 Duty of candor.
42.12 Sanctions.
42.13 Citation of authority.
42.14 Public availability.

Fees

42.15 Fees.

Petition and Motion Practice

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Subpart B—[Reserved]

Authority: 35 U.S.C. 2(b)(2), 6, 21, 23, 41, 135, 311, 312, 316, 321–326 and Leahy-Smith America Invents Act, Pub. L. 112–29, sections 6(c), 6(f) and 18, 125 Stat. 284, 304, 311, and 329 (2011).

Subpart A—Trial Practice and Procedure

General

§ 42.1 Policy.

(a) *Scope.* Part 42 governs proceedings before the Patent Trial and Appeal Board. Sections 1.4, 1.7, 1.14, 1.16, 1.22, 1.23, 1.25, 1.26, 1.32, 1.34, and 1.36 of this chapter also apply to proceedings before the Board, as do other sections of part 1 of this chapter that are incorporated by reference into this part.

(b) *Construction.* This part shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding.

(c) *Decorum.* Every party must act with courtesy and decorum in all proceedings before the Board, including in interactions with other parties.

(d) *Evidentiary standard.* The default evidentiary standard is a preponderance of the evidence.

§ 42.2 Definitions.

The following definitions apply to this part:

Affidavit means affidavit or declaration under § 1.68 of this chapter. A transcript of an *ex parte* deposition or a declaration under 28 U.S.C. 1746 may be used as an affidavit.

Board means the Patent Trial and Appeal Board. Board means a panel of the Board or a member or employee acting with the authority of the Board.

Business day means a day other than a Saturday, Sunday, or Federal holiday within the District of Columbia.

Confidential information means trade secret or other confidential research, development or commercial information.

Final means final for the purpose of judicial review. A decision is final only if it disposes of all necessary issues with regard to the party seeking judicial review, and does not indicate that further action is required.

Hearing means consideration of the trial.

Involved means an application, patent, or claim that is the subject of the proceeding.

Judgment means a final written decision by the Board.

Motion means a request for relief other than by petition.

Office means the United States Patent and Trademark Office.

Panel means at least three members of the Board.

Party means at least the petitioner and the patent owner and, in a derivation proceeding, any applicant.

Petition is a request that a trial be instituted.

Petitioner means the party filing a petition requesting that a trial be instituted.

Preliminary Proceeding begins with the filing of a petition for instituting a trial and ends with a written decision as to whether a trial will be instituted.

Proceeding means a trial or preliminary proceeding.

Rehearing means reconsideration.

Trial means a contested case instituted by the Board based upon a petition. A trial begins with a written decision notifying the petitioner and patent owner of the institution of the trial. The term trial specifically includes a derivation proceeding under 35 U.S.C. 135; an *inter partes* review under Chapter 31 of title 35, United States Code; a post-grant review under Chapter 32 of title 35, United States Code; and a transitional business-method review under section 18 of the Leahy-Smith America Invents Act. Patent interferences are administered under part 41 and not under part 42 of this title, and therefore are not trials.

§ 42.3 Jurisdiction.

(a) The Board may exercise exclusive jurisdiction within the Office over every involved application and patent during the proceeding, as the Board may order.

(b) A petition to institute a trial must be filed with the Board in a timely manner.

§ 42.4 Notice of trial.

(a) Institution of trial. The Board institutes the trial on behalf of the Director.

(b) Notice of a trial will be sent to every party to the proceeding. The entry of the notice institutes the trial.

(c) The Board may authorize additional modes of notice, including:

(1) Sending notice to another address associated with the party, or

(2) Publishing the notice in the Official Gazette of the United States Patent and Trademark Office or the **Federal Register**.

§ 42.5 Conduct of the proceeding.

(a) The Board may determine a proper course of conduct in a proceeding for any situation not specifically covered by this part and may enter non-final orders to administer the proceeding.

(b) The Board may waive or suspend a requirement of parts 1, 41, and 42 and may place conditions on the waiver or suspension.

(c) *Times*—(1) *Setting times.* The Board may set times by order. Times set by rule are default and may be modified by order. Any modification of times will take any applicable statutory pendency goal into account.

(2) *Extension of time.* A request for an extension of time must be supported by a showing of good cause.

(3) *Late action.* A late action will be excused on a showing of good cause or upon a Board decision that consideration on the merits would be in the interests of justice.

(d) *Ex parte communications.* Communication regarding a specific proceeding with a Board member defined in 35 U.S.C. 6(a) is not permitted unless both parties have an opportunity to be involved in the communication.

§ 42.6 Filing of documents, including exhibits; service.

(a) *General format requirements.* (1) Page size must be 8½ inch x 11 inch except in the case of exhibits that require a larger size in order to preserve details of the original.

(2) In documents, including affidavits, created for the proceeding:

(i) Markings must be in black or must otherwise provide an equivalent dark, high-contrast image;

(ii) Either a proportional or monospaced font may be used:

(A) The proportional font must be 14-point or larger, and

(B) The monospaced font must not contain more than 4 characters per centimeter (10 characters per inch);

(iii) Double spacing must be used except in headings, tables of contents, tables of authorities, indices, signature blocks, and certificates of service. Block quotations may be 1.5 spaced, but must be indented from both the left and the right margins; and

(iv) Margins must be at least 2.5 centimeters (1 inch) on all sides.

(3) *Incorporation by reference; combined documents.* Arguments must not be incorporated by reference from one document into another document. Combined motions, oppositions, replies, or other combined documents are not permitted.

(4) *Signature; identification.* Documents must be signed in accordance with §§ 1.33 and 11.18(a) of this title, and should be identified by the trial number (where known).

(b) *Modes of filing*—(1) *Electronic filing.* Unless otherwise authorized, submissions are to be made to the Board electronically via the Internet according to the parameters established by the Board and published on the Web site of the Office.

(2)(i) *Filing by means other than electronic filing.* A document filed by means other than electronic filing must:

(A) Be accompanied by a motion requesting acceptance of the submission; and

(B) Identify a date of transmission where a party seeks a filing date other than the date of receipt at the Board.

(ii) Mailed correspondence shall be sent to: Mail Stop PATENT BOARD, Patent Trial and Appeal Board, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450.

(c) *Exhibits.* Each exhibit must be filed with the first document in which it is cited except as the Board may otherwise order.

(d) *Previously filed paper.* A document already in the record of the proceeding must not be filed again, not even as an exhibit or an appendix, without express Board authorization.

(e) *Service*—(1) *Simultaneous with filing.* Each document filed with the Board, if not previously served, must be served simultaneously on each opposing party.

(2) *Counsel of record.* If a party is represented by counsel of record in the proceeding, service must be on counsel.

(3) *Certificate of service.* (i) Each document, other than an exhibit, must include a certificate of service at the end of that document. Any exhibit filed with the document may be included in the certification for the document.

(ii) For an exhibit filed separately, a transmittal letter incorporating the certificate of service must be filed. If more than one exhibit is filed at one time, a single letter should be used for all of the exhibits filed together. The letter must state the name and exhibit number for every exhibit filed with the letter.

(iii) The certificate of service must state:

(A) The date and manner of service; and

(B) The name and address of every person served.

§ 42.7 Management of the record.

(a) The Board may expunge any paper directed to a proceeding or filed while an application or patent is under the jurisdiction of the Board that is not authorized under this part or in a Board order or that is filed contrary to a Board order.

(b) The Board may vacate or hold in abeyance any non-Board action directed to a proceeding while an application or patent is under the jurisdiction of the Board unless the action was authorized by the Board.

§ 42.8 Mandatory notices.

(a) Each notice listed in paragraph (b) of this section must be filed with the Board:

(1) By the petitioner, as part of the petition;

(2) By the patent owner, or applicant in the case of derivation, within 21 days of service of the petition; or

(3) By either party, within 21 days of a change of the information listed in paragraph (b) of this section stated in an earlier paper.

(b) Each of the following notices must be filed as a separate paper with a caption identical to the title of the paragraph:

(1) *Real party-in-interest.* Identify each real party-in-interest for the party.

(2) *Related matters.* Identify any other judicial or administrative matter that would affect, or be affected by, a decision in the proceeding.

(3) *Lead and back-up counsel.* If the party is represented by counsel, then counsel must be identified.

(4) *Service information.* Identify (if applicable):

(i) An electronic mail address;

(ii) A postal mailing address;

(iii) A hand-delivery address, if different than the postal mailing address;

(iv) A telephone number; and

(v) A facsimile number.

§ 42.9 Action by patent owner.

(a) *Entire interest.* An owner of the entire interest in an involved application or patent may act to the exclusion of the inventor (*see* § 3.73(b) of this title).

(b) *Part interest.* An owner of a part interest in the subject patent may move to act to the exclusion of an inventor or a co-owner. The motion must show the inability or refusal of an inventor or co-owner to prosecute the proceeding or other cause why it is in the interests of justice to permit the owner of a part interest to act in the trial. In granting the

motion, the Board may set conditions on the actions of the parties.

§ 42.10 Counsel.

(a) If a party is represented by counsel, the party should designate a lead counsel and a back-up counsel who can conduct business on behalf of the lead counsel.

(b) A power of attorney must be filed with the designation of counsel, except the patent owner should not file an additional power of attorney if the designated counsel is already counsel of record in the subject patent or application.

(c) The Board may recognize counsel *pro hac vice* during a proceeding upon a showing of good cause, subject to such conditions as the Board may impose.

(d) A panel of the Board may disqualify counsel for cause after notice and opportunity for hearing. A decision to disqualify is not final for the purposes of judicial review until certified by the Chief Administrative Patent Judge.

(e) Counsel may not withdraw from a proceeding before the Board unless the Board authorizes such withdrawal.

§ 42.11 Duty of candor.

Parties and individuals associated with the parties have a duty of candor and good faith to the Office during the course of a proceeding.

§ 42.12 Sanctions.

(a) The Board may impose a sanction against a party for misconduct, including:

(1) Failure to comply with an applicable rule or order in the proceeding;

(2) Advancing a misleading or frivolous argument or request for relief;

(3) Misrepresentation of a fact;

(4) Engaging in dilatory tactics;

(5) Abuse of discovery;

(6) Abuse of process; or

(7) Any other improper use of the proceeding, including actions that harass or cause unnecessary delay or an unnecessary increase in the cost of the proceeding.

(b) Sanctions include entry of:

(1) An order holding facts to have been established in the proceeding;

(2) An order expunging, or precluding a party from filing a paper;

(3) An order precluding a party from presenting or contesting a particular issue;

(4) An order precluding a party from requesting, obtaining, or opposing discovery;

(5) An order excluding evidence;

(6) An order providing for compensatory expenses, including attorney fees;

(7) An order requiring terminal disclaimer of patent term; or

(8) Judgment in the trial or dismissal of the petition.

§ 42.13 Citation of authority.

(a) For any United States Supreme Court decision, citation must be to the United States Reports.

(b) For any decision other than a United States Supreme Court decision, citation must be to the West Reporter System.

(c) Citations to authority must include pinpoint citations whenever a specific holding or portion of an authority is invoked.

(d) Non-binding authority should be used sparingly. If the authority is not an authority of the Office and is not reproduced in the United States Reports or the West Reporter System, a copy of the authority should be provided.

§ 42.14 Public availability.

The record of a proceeding, including documents and things, shall be made available to the public, except as otherwise ordered. A party intending a document or thing to be sealed shall file a motion to seal concurrent with the filing of the document or thing to be sealed. The document or thing shall be provisionally sealed on receipt of the motion and remain so pending the outcome of the decision on the motion.

Fees

§ 42.15 Fees.

(a) On filing a petition for *inter partes* review of a patent, payment of the following fee is due based upon the number of challenged claims:

(1) 1 to 20 claims—$27,200.00.

(2) 21 to 30 claims—$34,000.00.

(3) 31 to 40 claims— $40,800.00.

(4) 41 to 50 claims— $54,400.00.

(5) 51 to 60 claims— $68,000.00.

(6) Additional fee for each additional 10 claims or portion thereof—$27,200.00.

(b) On filing a petition for post-grant review or covered business method patent review of a patent, payment of the following fee is due based upon the number of challenged claims:

(1) 1 to 20 claims—$35,800.00.

(2) 21 to 30 claims—$44,750.00.

(3) 31 to 40 claims—$53,700.00.

(4) 41 to 50 claims—$71,600.00.

(5) 51 to 60 claims—$89,500.00.

(6) Additional fee for each additional 10 claims or portion thereof—$35,800.00.

(c) On the filing of a petition for a derivation proceeding a fee of:—$400.00.

(d) Any request requiring payment of a fee under this part, including a written request to make a settlement agreement available:—$400.00.

Petition and Motion Practice

§ 42.20 Generally.

(a) *Relief.* Relief, other than a petition requesting the institution of a trial, must be requested in the form of a motion.

(b) *Prior authorization.* A motion will not be entered without Board authorization. Authorization may be provided in an order of general applicability or during the proceeding.

(c) *Burden of proof.* The moving party has the burden of proof to establish that it is entitled to the requested relief.

(d) *Briefing.* The Board may order briefing on any issue involved in the trial.

§ 42.21 Notice of basis for relief.

(a) *Notice of request for relief.* The Board may require a party to file a notice stating the relief it requests and the basis for its entitlement to relief. A notice must include sufficient detail to place the Board and each opponent on notice of the precise relief requested. A notice is not evidence except as an admission by a party-opponent.

(b) *Filing and service.* The Board may set the times and conditions for filing and serving notices required under this section. The Board may provide for the notice filed with the Board to be maintained in confidence for a limited time.

(c) *Effect.* If a notice under paragraph (a) of this section is required:

(1) A failure to state a sufficient basis for relief may result in a denial of the relief requested;

(2) A party will be limited to filing motions consistent with the notice; and

(3) Ambiguities in the notice will be construed against the party.

(d) *Correction.* A party may move to correct its notice. The motion should be filed promptly after the party becomes aware of the basis for the correction. A correction filed after the time set for filing notices will only be entered if entry would serve the interests of justice.

§ 42.22 Content of petitions and motions.

(a) Each petition or motion must be filed as a separate paper and must include:

(1) A statement of the precise relief requested;

(2) A statement of material facts (*see* paragraph (c) of this section); and

(3) A full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence including material facts, and the governing law, rules, and precedent.

(b) *Relief requested.* Where a rule in part 1 of this title ordinarily governs the

relief sought, the petition or motion must make any showings required under that rule in addition to any showings required in this part.

(c) *Statement of material facts.* Each material fact shall be set forth as a separately numbered sentence with specific citations to the portions of the record that support the fact.

(d) The Board may order additional showings or explanations as a condition for authorizing a motion (*see* § 42.20(b)).

§ 42.23 Oppositions and replies.

(a) Oppositions and replies must comply with the content requirements for motions and must include a statement identifying material facts in dispute. Any material fact not specifically denied may be considered admitted.

(b) All arguments for the relief requested in a motion must be made in the motion. A reply may only respond to arguments raised in the corresponding opposition.

§ 42.24 Page limits for petitions, motions, oppositions, and replies.

(a) *Petitions and motions.* (1) The following page limits for petitions and motions apply and include the required statement of facts in support of the petition or motion. The page limit does not include a table of contents, a table of authorities, a certificate of service, or appendix of exhibits.

(i) Petition requesting *inter partes* review: 50 pages

(ii) Petition requesting post-grant review: 70 pages

(iii) Petition requesting covered business method patent review: 70 pages

(iv) Petition requesting derivation proceeding: 50 pages

(v) Motions: 15 pages.

(2) Petitions to institute a trial must comply with the stated page limits but may be accompanied by a motion to waive the page limits. The petitioner must show in the motion how a waiver of the page limits is in the interests of justice and must append a copy of proposed petition exceeding the page limit to the motion. If the motion is not granted, the proposed petition exceeding the page limit may be expunged or returned. Any other motion to waive page limits must be granted in advance of filing a motion, opposition or reply for which the waiver is necessary.

(b) *Oppositions.* The page limits for oppositions are the same as those for corresponding petitions or motions. The page limits do not include a listing of facts which are admitted, denied, or cannot be admitted or denied.

(c) *Replies.* The following page limits for replies apply and include the required statement of facts in support of the reply. The page limits do not include a table of contents, a table of authorities, a listing of facts which are admitted, denied, or cannot be admitted or denied, a certificate of service, or appendix of exhibits.

(1) Replies to patent owner responses to petitions: 15 pages

(2) Replies to motions: 5 pages.

§ 42.25 Default filing times.

(a) A motion may only be filed according to a schedule set by the Board. The default times for acting are:

(1) An opposition is due one month after service of the motion; and

(2) A reply is due one month after service of the opposition.

(b) A party should seek relief promptly after the need for relief is identified. Delay in seeking relief may justify a denial of relief sought.

Testimony and Production

§ 42.51 Discovery.

(a) *Limited discovery.* A party is not entitled to discovery except as authorized in this subpart. The parties may agree to discovery between themselves at any time.

(b) *Routine discovery.* Except as the Board may otherwise order:

(1) Unless previously served, any exhibit cited in a paper or in testimony must be served with the citing paper or testimony.

(2) Cross examination of affidavit testimony is authorized within such time period as the Board may set.

(3) Unless previously served, noncumulative information that is inconsistent with a position advanced by the patent owner or petitioner during the proceeding. The information is to be filed as soon as practicable in a motion identifying supplemental information or as part of a petition, motion, opposition, reply, preliminary patent owner response to petition, or patent owner response to petition. The party submitting the information must specify the relevance of the information, including where the information is presented in a document and, where applicable, how the information is pertinent to the claims.

(c) *Additional discovery.* (1) A party may move for additional discovery. Except in post-grant reviews, the moving party must show that such additional discovery is in the interests of justice. The Board may specify conditions for such additional discovery.

(2) When appropriate, a party may obtain production of documents and things during cross examination of an opponent's witness or during authorized compelled testimony under § 42.52.

§ 42.52 Compelling testimony and production.

(a) *Authorization required.* A party seeking to compel testimony or production of documents or things must file a motion for authorization. The motion must describe the general relevance of the testimony, document, or thing, and must:

(1) In the case of testimony, identify the witness by name or title; and

(2) In the case of a document or thing, the general nature of the document or thing.

(b) *Outside the United States.* For testimony or production sought outside the United States, the motion must also:

(1) *In the case of testimony.* (i) Identify the foreign country and explain why the party believes the witness can be compelled to testify in the foreign country, including a description of the procedures that will be used to compel the testimony in the foreign country and an estimate of the time it is expected to take to obtain the testimony; and

(ii) Demonstrate that the party has made reasonable efforts to secure the agreement of the witness to testify in the United States but has been unsuccessful in obtaining the agreement, even though the party has offered to pay the travel expenses of the witness to testify in the United States.

(2) *In the case of production of a document or thing.* (i) Identify the foreign country and explain why the party believes production of the document or thing can be compelled in the foreign country, including a description of the procedures that will be used to compel production of the document or thing in the foreign country and an estimate of the time it is expected to take to obtain production of the document or thing; and

(ii) Demonstrate that the party has made reasonable efforts to obtain the agreement of the individual or entity having possession, custody, or control of the document or thing to produce the document or thing in the United States but has been unsuccessful in obtaining that agreement, even though the party has offered to pay the expenses of producing the document or thing in the United States.

§ 42.53 Taking testimony.

(a) *Form.* Uncompelled direct testimony must be submitted in the form of an affidavit. All other testimony, including testimony compelled under 35 U.S.C. 24, must be in the form of a deposition transcript. In addition, the

Board may authorize or require live or video-recorded testimony.

(b) *Time and location.* (1) Uncompelled direct testimony may be taken at any time to support a petition, motion, opposition, or reply; otherwise, testimony may only be taken during a testimony period set by the Board.

(2) Except as the Board otherwise orders, during the testimony period, deposition testimony may be taken at any reasonable time and location within the United States before any disinterested official authorized to administer oaths at that location.

(3) Deposition testimony outside the United States may only be taken as the Board specifically directs.

(c) *Notice of deposition.* (1) Prior to the taking of deposition testimony, all parties to the proceeding must agree on the time and place for taking testimony. If the parties cannot agree, the party seeking the testimony must initiate a conference with the Board to set a time and place.

(2) Cross-examination should ordinarily take place after any supplemental evidence relating to the direct testimony has been filed and more than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. A party requesting cross-examination testimony of more than one witness may choose the order in which the witnesses are to be cross-examined.

(3) In the case of direct deposition testimony, at least 3 business days prior to the conference in paragraph (c)(1) of this section, the party seeking the direct testimony must serve:

(i) A list and copy of each document under the party's control and on which the party intends to rely; and

(ii) A list of, and proffer of reasonable access to, anything other than a document under the party's control and on which the party intends to rely.

(4) The party seeking the deposition must file a notice of the deposition at least 2 business days before a deposition.

(5) Scope and content—(i) For direct deposition testimony, the notice limits the scope of the testimony and must list:

(A) The time and place of the deposition;

(B) The name and address of the witness;

(C) A list of the exhibits to be relied upon during the deposition; and

(D) A general description of the scope and nature of the testimony to be elicited.

(ii) For cross-examination testimony, the scope of the examination is limited to the scope of the direct testimony.

(iii) The notice must list the time and place of the deposition.

(6) Motion to quash—Objection to a defect in the notice is waived unless the objecting party promptly seeks authorization to file a motion to quash.

(d) *Deposition in a foreign language.* If an interpreter will be used during the deposition, the party calling the witness must initiate a conference with the Board at least 5 business days before the deposition.

(e) *Manner of taking deposition testimony.* (1) Before giving deposition testimony, each witness shall be duly sworn according to law by the officer before whom the deposition is to be taken. The officer must be authorized to take testimony under 35 U.S.C. 23.

(2) The testimony shall be taken in answer to interrogatories with any questions and answers recorded in their regular order by the officer, or by some other disinterested person in the presence of the officer, unless the presence of the officer is waived on the record by agreement of all parties.

(3) Any exhibits used during the deposition must be numbered as required by § 42.63(b), and must, if not previously served, be served at the deposition. Exhibits objected to shall be accepted pending a decision on the objection.

(4) All objections made at the time of the deposition to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, the conduct of any party, and any other objection to the deposition shall be noted on the record by the officer.

(5) When the testimony has been transcribed, the witness shall read and sign (in the form of an affidavit) a transcript of the deposition unless:

(i) The parties otherwise agree in writing;

(ii) The parties waive reading and signature by the witness on the record at the deposition; or

(iii) The witness refuses to read or sign the transcript of the deposition.

(6) The officer shall prepare a certified transcript by attaching a certificate in the form of an affidavit signed and sealed by the officer to the transcript of the deposition. Unless the parties waive any of the following requirements, in which case the certificate shall so state, the certificate must state:

(i) The witness was duly sworn by the officer before commencement of testimony by the witness;

(ii) The transcript is a true record of the testimony given by the witness;

(iii) The name of the person who recorded the testimony and, if the officer did not record it, whether the testimony was recorded in the presence of the officer;

(iv) The presence or absence of any opponent;

(v) The place where the deposition was taken and the day and hour when the deposition began and ended;

(vi) The officer has no disqualifying interest, personal or financial, in a party; and

(vii) If a witness refuses to read or sign the transcript, the circumstances under which the witness refused.

(7) The officer must promptly provide a copy of the transcript to all parties. The testimony must be filed by proponent as an exhibit.

(8) Any objection to the content, form, or manner of taking the deposition, including the qualifications of the officer, is waived unless made on the record during the deposition and preserved in a timely filed motion to exclude.

(f) *Costs.* Except as the Board may order or the parties may agree in writing, the proponent of the direct testimony shall bear all costs associated with the testimony, including the reasonable costs associated with making the witness available for the cross-examination.

§ 42.54 Protective order.

(a) A party or any person from whom discovery of confidential information is sought may file a motion to seal where the motion to seal contains a proposed protective order. The motion must include a certification that the moving party has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute. The Board may, for good cause, issue an order to protect a party or person from disclosing confidential information, including, but not limited to, one or more of the following:

(1) Forbidding the disclosure or discovery;

(2) Specifying terms, including time and place, for the disclosure or discovery;

(3) Prescribing a discovery method other than the one selected by the party seeking discovery;

(4) Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(5) Designating the persons who may be present while the discovery is conducted;

(6) Requiring that a deposition be sealed and opened only by order of the Board;

(7) Requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(8) Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the Board directs.

(b) [Reserved].

§ 42.55 Confidential information in a petition.

A petitioner filing confidential information with a petition may, concurrent with the filing of the petition, file a motion to seal with a proposed protective order as to the confidential information. The petitioner may serve the confidential information under seal. The patent owner may only access the sealed confidential information prior to the institution of the trial by agreeing to the terms of the proposed protective order. The institution of the requested trial will constitute a grant of the motion to seal unless otherwise ordered by the Board.

§ 42.56 Expungement of confidential information.

After denial of a petition to institute a trial or after final judgment in a trial, a party may file a motion to expunge confidential information from the record.

§ 42.61 Admissibility.

(a) Evidence that is not taken, sought, or filed in accordance with this subpart is not admissible.

(b) *Records of the Office.* Certification is not necessary as a condition to admissibility when the evidence to be submitted is a record of the Office to which all parties have access.

(c) *Specification and drawings.* A specification or drawing of a United States patent application or patent is admissible as evidence only to prove what the specification or drawing describes. If there is data in the specification or a drawing upon which a party intends to rely to prove the truth of the data, an affidavit by an individual having first-hand knowledge of how the data was generated must be filed.

§ 42.62 Applicability of the Federal Rules of Evidence.

(a) *Generally.* Except as otherwise provided in this subpart, the Federal Rules of Evidence shall apply to a proceeding.

(b) *Exclusions.* Those portions of the Federal Rules of Evidence relating to criminal proceedings, juries, and other matters not relevant to proceedings under this subpart shall not apply.

(c) *Modifications in terminology.* Unless otherwise clear from context, the following terms of the Federal Rules of Evidence shall be construed as indicated:

Appellate court means United States Court of Appeals for the Federal Circuit.

Civil action, civil proceeding, and *action* mean trial.

Courts of the United States, U.S. Magistrate, court, trial court, trier of fact, and *judge* mean Board.

Hearing means as defined in Federal Rule of Evidence 804(a)(5), the time for taking testimony.

Judicial notice means official notice.

Trial or *hearing* in Federal Rule of Evidence 807 means the time for taking testimony.

(d) In determining foreign law, the Board may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.

§ 42.63 Form of evidence.

(a) *Exhibits required.* Evidence consists of affidavits, transcripts of depositions, documents, and things. All evidence must be filed in the form of an exhibit.

(b) *Translation required.* When a party relies on a document or is required to produce a document in a language other than English, a translation of the document into English and an affidavit attesting to the accuracy of the translation must be filed with the document.

(c) *Exhibit numbering.* Each party's exhibits must be uniquely numbered sequentially in a range the Board specifies. For the petitioner, the range is 1001–1999, and for the patent owner, the range is 2000–2999.

(d) *Exhibit format.* An exhibit must conform with the requirements for papers in § 42.6 and the requirements of this paragraph.

(1) Each exhibit must have an exhibit label.

(i) An exhibit filed with the petition must include the petitioner's name followed by a unique exhibit number.

(ii) For exhibits not filed with the petition, the exhibit label must include the party's name followed by a unique exhibit number, the names of the parties, and the trial number.

(2) When the exhibit is a paper:

(i) Each page must be uniquely numbered in sequence; and

(ii) The exhibit label must be affixed to the lower right corner of the first page of the exhibit without obscuring information on the first page or, if obscuring is unavoidable, affixed to a duplicate first page.

(e) *Exhibit list.* Each party must maintain an exhibit list with the exhibit number and a brief description of each exhibit. If the exhibit is not filed, the exhibit list should note that fact.

§ 42.64 Objection; motion to exclude; motion in limine.

(a) *Cross-examination deposition.* An objection to the admissibility of deposition evidence must be made during the deposition. Evidence to cure the objection must be provided during the deposition, unless the parties to the deposition stipulate otherwise on the deposition record.

(b) *Other than cross-examination deposition.* For evidence other than cross-examination deposition evidence:

(1) *Objection.* Any objection to evidence submitted during a preliminary proceeding must be served within 10 business days of the institution of the trial. Once a trial has been instituted, any objection must be served within 5 business days of service of evidence to which the objection is directed. The objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence.

(2) *Supplemental evidence.* The party relying on evidence to which an objection is timely served may respond to the objection by serving supplemental evidence within ten business days of service of the objection.

(c) *Motion to exclude.* A motion to exclude evidence must be filed to preserve any objection. The motion must identify the objections in the record in order and must explain the objections.

(d) *Motion in limine.* A party may file a motion in limine for a decision on the admissibility of evidence.

§ 42.65 Expert testimony; tests and data.

(a) Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight. Testimony on United States patent law or patent examination practice will not be admitted.

(b) If a party relies on a technical test or data from such a test, the party must provide an affidavit explaining:

(1) Why the test or data is being used;

(2) How the test was performed and the data was generated;

(3) How the data is used to determine a value;

(4) How the test is regarded in the relevant art; and

(5) Any other information necessary for the Board to evaluate the test and data.

Oral Argument, Decision, and Settlement

§ 42.70 Oral argument.

(a) *Request for oral argument.* A party may request oral argument on an issue raised in a paper at a time set by the

Board. The request must be filed as a separate paper and must specify the issues to be argued.

(b) Demonstrative exhibits must be served at least 5 business days before the oral argument and filed no later than the time of the oral argument.

§ 42.71 Decision on petitions or motions.

(a) *Order of consideration.* The Board may take up petitions or motions for decisions in any order, may grant, deny, or dismiss any petition or motion, and may enter any appropriate order.

(b) *Interlocutory decisions.* A decision on a motion without a judgment is not final for the purposes of judicial review. A panel decision on an issue will govern the trial. If a decision is not a panel decision, the party may request that a panel rehear the decision. When rehearing a non-panel decision, a panel will review the decision for an abuse of discretion.

(c) *Rehearing.* A party dissatisfied with a decision may file a request for rehearing. The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply. A request for rehearing does not toll times for taking action. Any request must be filed:

(1) Within 14 days of the entry of non-final decision; or

(2) Within 30 days of the entry of a final decision.

§ 42.72 Termination of trial.

The Board may terminate a trial without rendering judgment, where appropriate, including where the trial is consolidated with another proceeding or pursuant to a joint request under 35 U.S.C. 317(a) or 327(a).

§ 42.73 Judgment.

(a) A judgment disposes of all issues that were, or by motion could have properly been, raised and decided.

(b) *Request for adverse judgment.* A party may request judgment against itself at any time during a proceeding. Actions construed to be a request for adverse judgment include:

(1) Disclaimer of the involved application or patent;

(2) Cancellation or disclaimer of a claim such that the party has no remaining claim in the trial;

(3) Concession of unpatentability or derivation of the contested subject matter; and

(4) Abandonment of the contest.

(c) *Recommendation.* The judgment may include a recommendation for further action by an examiner or by the Director.

(d) *Estoppel*—(1) *Petitioner other than in derivation proceeding.* A petitioner, or the real party in interest or privy of the petitioner, is estopped in the Office from taking an action that is inconsistent with a judgment as to any ground that the petitioner raised or reasonably could have raised during the trial, except that estoppel shall not apply to a petitioner, or to the real party in interest or privy of the petitioner who has settled under 35 U.S.C. 317 or 327.

(2) *In a derivation,* the losing party who could have properly moved for relief on an issue, but did not so move, may not take action in the Office after the judgment that is inconsistent with that party's failure to move, except that a losing party shall not be estopped with respect to any contested subject matter for which that party was awarded a favorable judgment.

(3) *Patent applicant or owner.* A patent applicant or owner whose claim is canceled is precluded from taking action inconsistent with the adverse judgment, including obtaining in any patent:

(i) A claim to substantially the same invention as the finally refused or cancelled claim;

(ii) A claim that could have been filed in response to any properly raised ground of unpatentability for a finally refused or cancelled claim; or

(iii) An amendment of a specification or of a drawing that was denied during the trial proceeding.

§ 42.74 Settlement.

(a) *Board role.* The parties may agree to settle any issue in a proceeding, but the Board is not a party to the settlement and may independently determine any question of jurisdiction, patentability, or Office practice.

(b) *Agreements in writing.* Any agreement or understanding between the parties made in connection with, or in contemplation of, the termination of a proceeding shall be in writing and a true copy shall be filed with the Board before the termination of the trial.

(c) *Request to keep separate.* A party to a settlement may request that the settlement be treated as business confidential information and be kept separate from the files of an involved patent or application. The request must be filed with the settlement. If a timely request is filed, the settlement shall only be available:

(1) To a Government agency on written request to the Board; or

(2) To any other person upon written request to the Board to make the settlement agreement available, along with the fee specified in § 42.15(d) and on a showing of good cause.

Certificate

§ 42.80 Certificate.

After the Board issues a final written decision in an *inter partes* review, post-grant review, or covered business method patent review and the time for appeal has expired or any appeal has terminated, the Office will issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent any new or amended claim determined to be patentable by operation of the certificate.

2. Part 90 is added to read as follows:

PART 90—JUDICIAL REVIEW OF PATENT TRIAL AND APPEAL BOARD DECISIONS

Sec.
90.1 Scope.
90.2 Notice; service.
90.3 Time for appeal or civil action.

Authority: 35 U.S.C. 2(b)(2).

§ 90.1 Scope.

The provisions herein govern judicial review for Patent Trial and Appeal Board decisions under chapter 13 of title 35, United States Code. Judicial review of decisions arising out of *inter partes* reexamination proceedings that are requested under 35 U.S.C. 311, and where available, judicial review of decisions arising out of interferences declared pursuant to 35 U.S.C. 135 continue to be governed by the pertinent regulations in effect on July 1, 2012.

§ 90.2 Notice; service.

(a) *For an appeal under 35 U.S.C. 141.* (1) In all appeals, the notice of appeal required by 35 U.S.C. 142 must be filed with the Director of the United States Patent and Trademark Office as provided in § 104.2 of this title. A copy of the notice of appeal must also be filed with the Patent Trial and Appeal Board in the appropriate manner provided in § 41.10(a), 41.10(b), or 42.6(b).

(2) In all appeals, the party initiating the appeal must comply with the requirements of the Federal Rules of Appellate Procedure and Rules for the United States Court of Appeals for the Federal Circuit, including:

(i) Serving the requisite number of copies on the Court; and

(ii) Paying the requisite fee for the appeal.

(3) *Additional requirements.* (i) In appeals arising out of an *ex parte* reexamination proceeding ordered

pursuant to § 1.525, notice of the appeal must be served as provided in § 1.550(f) of this title.

(ii) In appeals arising out of an *inter partes* review, a post-grant review, a covered business method patent review, or a derivation proceeding, notice of the appeal must be served as provided in § 42.6(e) of this title.

(b) *For a notice of election under 35 U.S.C. 141(d) to proceed under 35 U.S.C. 146.* (1) Pursuant to 35 U.S.C. 141(d), if an adverse party elects to have all further review proceedings conducted under 35 U.S.C. 146 instead of under 35 U.S.C. 141, that party must file a notice of election with the United States Patent and Trademark Office as provided in § 104.2.

(2) A copy of the notice of election must also be filed with the Patent Trial and Appeal Board in the manner provided in § 42.6(b).

(3) A copy of the notice of election must also be served where necessary pursuant to § 42.6(e).

(c) *For a civil action under 35 U.S.C. 146.* The party initiating an action under 35 U.S.C. 146 must file a copy of the complaint no later than five business days after filing the complaint in district court with the Patent Trial and Appeal Board in the manner provided in § 42.6(b), and the Office of the Solicitor pursuant to § 104.2. Failure to comply with this requirement can result in further action within the United States Patent and Trademark Office consistent with the final Board decision.

§ 90.3 Time for appeal or civil action.

(a) *Filing deadline*—(1) *For an appeal under 35 U.S.C. 141.* The notice of appeal filed pursuant to 35 U.S.C. 142 must be filed with the Director of the United States Patent and Trademark Office no later than sixty-three (63) days after the date of the final Board decision. Any notice of cross-appeal is controlled by Rule 4(a)(3) of the Federal Rules of Appellate Procedure, and any other requirement imposed by the Rules of the United States Court of Appeals for the Federal Circuit.

(2) *For a notice of election under 35 U.S.C. 141(d).* The time for filing a notice of election under 35 U.S.C. 141(d) is governed by 35 U.S.C. 141(d).

(3) *For a civil action under 35 U.S.C. 145 or 146.* (i) A civil action must be commenced no later than sixty-three (63) days after the date of the final Board decision.

(ii) The time for commencing a civil action pursuant to a notice of election under 35 U.S.C. 141(d) is governed by 35 U.S.C. 141(d).

(b) *Time computation*—(1) *Rehearing.* A timely request for rehearing will reset the time for appeal or civil action to no later than sixty-three (63) days after action on the request. Any subsequent request for rehearing from the same party in the same proceeding will not reset the time for seeking judicial review, unless the additional request is permitted by order of the Board.

(2) *Holidays.* If the last day for filing an appeal or civil action falls on a Federal holiday in the District of Columbia, the time is extended pursuant to 35 U.S.C. 21(b).

(c) *Extension of time.* (1) The Director, or his designee, may extend the time for filing an appeal, or commencing a civil action, upon written request if:

(i) Requested before the expiration of the period for filing an appeal or commencing a civil action, and upon a showing of good cause; or

(ii) Requested after the expiration of the period for filing an appeal of commencing a civil action, and upon a showing that the failure to act was the result of excusable neglect.

(2) The request must be filed as provided in § 104.2 of this title.

Dated: January 31, 2012.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2012–2525 Filed 2–8–12; 8:45 am]

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Part III

Architectural and Transportation Barriers Compliance Board

36 CFR Part 1195

Medical Diagnostic Equipment Accessibility Standards; Proposed Rule

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1195

[Docket No. ATBCB–2012–0003]

RIN 3014–AA40

Medical Diagnostic Equipment Accessibility Standards

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) is proposing accessibility standards for medical diagnostic equipment. The proposed standards contain minimum technical criteria to ensure that medical diagnostic equipment, including examination tables, examination chairs, weight scales, mammography equipment, and other imaging equipment used by health care providers for diagnostic purposes are accessible to and usable by individuals with disabilities. The standards will allow independent entry to, use of, and exit from the equipment by individuals with disabilities to the maximum extent possible. The standards do not impose any mandatory requirements on health care providers or medical device manufacturers. However, other agencies, referred to as an enforcing authority in the standards, may issue regulations or adopt policies that require health care providers subject to their jurisdiction to acquire accessible medical diagnostic equipment that conforms to the standards.

DATES: Submit comments by June 8, 2012. Hearings will be held on the proposed standards on the following dates:

1. March 14, 2012, 9:30 a.m. to 12 p.m., Washington, DC.
2. May 8, 2012, 9:30 a.m. to 12 p.m., Atlanta, GA.

ADDRESSES: Submit comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Regulations.gov ID for this docket is ATBCB–2012–0003.
- *Email: docket@access-board.gov.* Include docket number ATBCB–2012–0003 in the subject line of the message.
- *Fax:* 202–272–0081.
- *Mail or Hand Delivery/Courier:* Office of Technical and Informational Services, Access Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111.

All comments, including any personal information provided, will be posted without change to *http://www.regulations.gov* and are available for public viewing.

The hearing locations are:

1. *Washington, DC:* Access Board Conference Room, 1331 F Street NW., Suite 800, Washington, DC 2004.
2. *Atlanta, GA:* Hilton Atlanta (Meeting Rooms 309–311), 255 Courtland Street NE., Atlanta, GA 30303.

FOR FURTHER INFORMATION CONTACT: Earlene Sesker, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance Board, 1331 F Street NW., Suite 1000, Washington, DC 20004–1111. Telephone: (202) 272–0022 (voice) or (202) 272–0091 (TTY). Email address *sesker@access-board.gov.*

SUPPLEMENTARY INFORMATION:

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1. Public Participation and Request for Comments

The preamble includes questions that request comments on issues that the Access Board is particularly interested in receiving information from the public. The Access Board encourages all persons interested in the rulemaking to submit comments on the proposed standards and the questions in the preamble. Instructions for submitting and viewing comments are provided above under Addresses. The Access Board will consider all the comments and may change the proposed standards based on the comments.

2. Establishment of Advisory Committee

The Access Board has used advisory committees consisting of representatives of interest groups that are affected by its guidelines and standards to assist in developing the guidelines and standards. Advisory committees provide significant expertise on issues and an opportunity for interest groups to reach consensus on issues. The Access Board plans to convene an advisory committee when the comment period on the rulemaking closes to assist the Board in reviewing the comments and make recommendations on issues addressed in the rulemaking. The Access Board will issue a separate notice in the **Federal Register** announcing the establishment of the advisory committee and seeking nominations for membership on the advisory committee to represent the interests of individuals with disabilities, medical device manufacturers, health care providers, standards setting organizations, and other interested parties. Advisory committee meetings will be announced in advance in the **Federal Register** and will be open to the public.

3. Background

A. Access Board

The Access Board is an independent Federal agency established by Section 502 of the Rehabilitation Act (29 U.S.C. 792).[1] The Access Board is responsible for developing accessibility guidelines and standards under various laws to ensure that individuals with disabilities have access to and use of buildings and facilities, transportation vehicles, and information and communication technology.[2] Pursuant to these laws, other Federal agencies have adopted the Access Board's guidelines and standards as mandatory requirements for entities subject to their jurisdiction.[3]

[1] The Access Board consists of 13 members appointed by the President from the public, a majority of which are individuals with disabilities, and the heads of 12 Federal agencies or their designees whose positions are Executive Level IV or above. The Federal agencies are: The Departments of Commerce, Defense, Education, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, Transportation, and Veterans Affairs; General Services Administration; and United States Postal Service.

[2] The Access Board has issued accessibility guidelines and standards under the following laws: Section 504 of the Americans with Disabilities Act (42 U.S.C. 12204) for buildings and facilities, and transportation vehicles; Section 502 of the Rehabilitation Act (29 U.S.C. 792) for buildings and facilities; Section 508 of the Rehabilitation Act (29 U.S.C. 794d) for electronic and information technology; and Section 255 of the Telecommunications Act (47 U.S.C. 255) for telecommunications equipment and customer premises equipment. Additional information on the guidelines and standards is available at: *http://www.access-board.gov.*

[3] The following Federal agencies have adopted the Access Board's guidelines and standards as mandatory requirements for entities subject to their

B. Patient Protection and Affordable Care Act and Section 510 of the Rehabilitation Act

Section 4203 of the Patient Protection and Affordable Care Act (Pub. L. 111–148, 124 Stat. 570) amended Title V of the Rehabilitation Act, which establishes rights and protections for individuals with disabilities, by adding Section 510. Section 510 of the Rehabilitation Act (29 U.S.C. 794f) requires the Access Board, in consultation with the Commissioner of the Food and Drug Administration, to issue standards that contain minimum technical criteria to ensure that medical diagnostic equipment used in or in conjunction with medical settings such as physicians' offices, clinics, emergency rooms, and hospitals is accessible to and usable by individuals with disabilities. The statute provides that the standards must allow for independent access to and use of the equipment by individuals with disabilities to the maximum extent possible. The statute lists examination tables, examination chairs, weight scales, mammography equipment, and other imaging equipment as examples of equipment to which the standards will apply. However, this list is not exclusive and the statute covers any equipment used by health care providers for diagnostic purposes. The statute does not cover medical devices used for monitoring or treating medical conditions such as glucometers and infusion pumps.

Section 510 of the Rehabilitation Act requires the standards to be issued not later than 24 months after the enactment of the Patient Protection and Affordable Care Act. The Patient Protection and Affordable Care Act was enacted on March 23, 2010. Accordingly, the statutory deadline for issuing the standards is March 23, 2012. The statute also requires the Access Board, in consultation with the Commissioner of the Food and Drug Administration, to periodically review and amend the standards, as appropriate.

Section 510 of the Rehabilitation Act does not require any entity to comply with the standards that the Access Board issues under this law. Compliance with the standards becomes mandatory only when an enforcing authority adopts the standards as mandatory requirements for entities subject to its jurisdiction. As discussed below, the Department of Justice (DOJ) may adopt the standards as mandatory requirements for health care providers pursuant to its authority under Titles II and III of the Americans with Disabilities Act. Other Federal agencies may adopt the standards as mandatory requirements for health care providers pursuant to their authority under Section 504 of the Rehabilitation Act.

C. Americans With Disabilities Act and Section 504 of the Rehabilitation Act

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act are civil rights laws that prohibit discrimination on the basis of disability. Title II of the ADA (42 U.S.C. 12131 to 12165) applies to state and local governments, and Title III of the ADA (42 U.S.C. 12189 to 12189) applies to private entities that are public accommodations such as health care providers. Section 504 of the Rehabilitation Act (29 U.S.C. 792) applies to recipients of Federal financial assistance such as Medicaid and federally conducted programs. DOJ is responsible for issuing regulations to implement Titles II and III of the ADA.[4] Federal agencies that provide Federal financial assistance are responsible for issuing regulations to implement Section 504 of the Rehabilitation Act for recipients of such assistance. Federal agencies also are responsible for issuing regulations to implement Section 504 of the Rehabilitation Act for their federally conducted programs. DOJ is responsible for overall enforcement of Titles II and III of the ADA, and Section 504 of the Rehabilitation Act as it applies to recipients of Federal financial assistance from DOJ and Federal financial assistance from other Federal agencies when those agencies refer complaints to DOJ for enforcement purposes.[5]

D. Department of Justice Activities Related to Health Care Providers and Medical Equipment

Pursuant to the ADA and Section 504 of the Rehabilitation Act, health care providers must provide individuals with disabilities full and equal access to their health care services and facilities. DOJ has entered into settlement agreements with health care providers to enforce the ADA and Section 504 of the Rehabilitation Act.[6]

In July 2010, DOJ and the Department of Health and Human Services issued a guidance document for health care providers regarding their responsibilities to make their services and facilities accessible to individuals with mobility disabilities under the ADA and Section 504 of the Rehabilitation Act. See Access to Medical Care for Individuals with Mobility Disabilities available at: *http://www.ada.gov/medcare_ta.htm.* The guidance document includes information on accessible examination rooms and the clear floor space needed adjacent to medical equipment for individuals who use mobility devices to approach the equipment for transfer; accessible medical equipment (e.g., examination tables and chairs, mammography equipment, weight scales); patient lifts and other methods for transferring individuals from their mobility devices to medical equipment; and training health care personnel.

In July 2010, DOJ also issued an advance notice of proposed rulemaking (ANPRM) announcing that, pursuant to the obligation that has always existed

jurisdiction: Department of Justice (see 28 CFR 35.104 and 35.151; and 28 CFR 36.104 and 36.401 to 36.406); Department of Transportation (see 49 CFR 37.9 and Appendix A to 49 CFR part 37; and 49 CFR part 38); Federal Acquisition Regulatory Council (see 48 CFR 39.203); Federal Communications Commission (see 47 CFR part 6); General Services Administration (see 41 CFR 102–77.65); and United States Postal Service (see 39 CFR 254.1). See also Deputy Secretary of Defense Memorandum on Access for People with Disabilities, October 31, 2008 at: *http://www.access-board.gov/ada-aba/dod-memorandum.htm.* Some agencies have adopted the guidelines and standards with additions and modifications.

[4] The Department of Transportation is responsible for issuing regulations to implement certain sections of Titles II and III of the ADA relating to transportation.

[5] In its regulations implementing Title II of the ADA, DOJ has delegated responsibility for investigating complaints and conducting compliance reviews in specific subject matter areas to other Federal agencies, but at its discretion DOJ may retain complaints for investigation and appropriate disposition. See 28 CFR 35.190. DOJ has delegated responsibility for investigating complaints and conducting compliance reviews relating to the provision of health care services by state and local governments to the Department of Health and Human Services. Federal agencies that provide Federal financial assistance also investigate complaints and conduct compliance reviews regarding compliance with Section 504 of the Rehabilitation Act by recipients of such assistance. See Appendix A to 28 CFR part 41. The Federal agencies can refer matters that are not resolved successfully to DOJ for enforcement.

[6] The settlement agreements by DOJ with health care providers and matters addressed in the agreements include: *United States of America* v. *Inova Health System* (March 30, 2011) auxiliary aids and services, including sign language interpreters; *HCA Health Services of New Hampshire (Portsmouth Regional Hospital)* (November 23, 2010) auxiliary aids and services, including sign language interpreters; *Beth Israel Deaconess Medical Center* (October 22, 2009) accessible facilities and accessible medical equipment; *Gillespie* v. *Dimensions Health Corporation* (July 12, 2006) auxiliary aids and services, including sign language interpreters; *Washington Hospital Center* (November 2, 2005) accessible facilities and accessible medical equipment; *Valley Radiologists Medical Group, Inc.* (November 2, 2005) accessible imaging equipment; *Exodus Women's Center* (March 26, 2005) accessible examination tables; *Dr. Robila Ashfaq* (January 12, 2005) accessible examination table; and *Georgetown University Hospital* (October 31, 2001) providing assistance for transferring from a wheelchair to an examination table The settlement agreements are available at: *http://www.ada.gov/settlemt.htm.*

under the ADA for covered entities to provide accessible equipment and furniture, it was considering amending its regulations implementing Titles II and III of the ADA to include specific standards for the design and use of accessible equipment and furniture that is not fixed or built into a facility in order to ensure that programs and services provided by state and local governments and by public accommodations are accessible to individuals with disabilities.[7] See 75 FR 43452 (July 26, 2010). Among other things, the ANPRM stated that DOJ was considering amending its ADA regulations to specifically require health care providers to acquire accessible medical equipment and that it would consider adopting the standards issued by the Access Board. DOJ also indicated its intention to include in its ADA regulations scoping requirements that specify the minimum number of types of accessible medical equipment required in different types of health care facilities. If DOJ proposes to amend its ADA regulations as announced in the ANPRM, it will publish a notice of proposed rulemaking (NPRM) requesting public comment.

E. Private Enforcement Efforts

Private parties, including individuals with disabilities, have also entered into settlement agreements with health care providers to enforce the ADA and Section 504 of the Rehabilitation Act.[8]

F. Consultation With Food and Drug Administration

The Commissioner of the Food and Drug Administration has designated the Director of the Center for Devices and Radiological Health (FDA–CDRH) to consult with the Access Board on the development of standards for accessible medical diagnostic equipment. The Access Board has worked closely with the FDA–CDRH in developing the proposed standards. The FDA–CDRH may develop a guidance document to inform manufacturers how it intends to apply its regulatory authority to clearance or approval of medical devices addressed in the Access Board's standards. If the FDA–CDRH develops such a guidance document, it will provide the public notice and opportunity to comment on a draft of the guidance document in accordance with its procedures for issuing guidance documents. See 21 CFR 10.115.

G. ANSI/AAMI HE 75

In 2009, the Association for the Advancement of Medical Instrumentation issued ANSI/AAMI HE 75, a recommended practice on human factors design principles for medical devices. Chapter 16 of ANSI/AAMI HE 75 contains recommended practices regarding accessibility for patients and health care personnel with disabilities. Chapter 16 of ANSI/AAMI HE 75 is available at: *http://www.aami.org/he75/.*

The Access Board is committed to using voluntary consensus standards where practical and consistent with the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note). The Access Board has considered the recommended practices in Chapter 16 of ANSI/AAMI HE 75 in developing the technical criteria for the proposed standards. The technical criteria are generally consistent with and supplement the recommended practices in Chapter 16 of ANSI/AAMI HE 75. The Access Board seeks to promote harmonization of its guidelines and standards with voluntary consensus standards and plans to participate in future revisions to ANSI/AAMI HE 75.

Question 1. Are there other voluntary consensus standards for medical diagnostic equipment that address accessibility for patients with disabilities, or are considering addressing accessibility for patients with disabilities in future revisions to the standards?

H. Barriers Affecting Accessibility and Usability of Medical Diagnostic Equipment

The Rehabilitation Engineering Research Center on Accessible Medical Instrumentation conducted a national survey in 2004 to collect information on the types of medical equipment that is most difficult for individuals with disabilities to access and use.[9] The survey was completed by a diverse sample of individuals with a wide range of disabilities, including mobility disabilities and sensory disabilities. Survey respondents who had experience with specific medical equipment rated their degree of difficulty when attempting to access or use the equipment as follows:

- 75 percent rated examination tables as moderately difficult to impossible to use;
- 68 percent rated radiology equipment as moderately difficult to impossible to use;
- 53 percent rated weight scales as moderately difficult to impossible to use; and
- 50 percent rated examination chairs as moderately difficult to impossible to use.

Survey respondents reported difficulties with getting on and off the equipment, positioning their bodies on the equipment, physical comfort and safety, and communication issues.

A subsequent study that involved focus group sessions of individuals with diverse disabilities provided additional information on barriers that affect the accessibility and usability of examination tables, examination chairs, imaging equipment, and weight scales.[10] The equipment characteristics that the focus group participants identified as affecting their ability to access and use the equipment included the dimensions of the equipment (e.g., height, width, length), contact surfaces (e.g., stiffness, comfort, color contrast), supports for transferring onto and off of equipment and positioning their bodies on the equipment (e.g., handholds,

[7] The ANPRM requested public comment on several categories of equipment and furniture, including medical equipment (e.g., medical examination and treatment tables and chairs, scales, radiological diagnostic equipment, lifts, infusion pumps, rehabilitation equipment, hospital beds and gurneys, ancillary equipment such as positioning straps or cushions, protective padding, leg supports for gynecological examinations, rails and bars for patient safety and comfort, and call buttons); exercise equipment and furniture; accessible golf cars; beds in accessible guest rooms and sleeping rooms; beds in nursing homes and other care facilities; and electronic and information technology such as kiosks (i.e., interactive computer terminals that provide services), interactive transaction machines, point of sale devices, and automated teller machines.

[8] The settlement agreements by private parties and matters addressed in the agreements include: *Massachusetts General Hospital and Brigham and Women's Hospital* (June 26, 2009) accessible facilities, accessible medical equipment, and auxiliary aids and services; *Thompson* v. *Sutter Health* (July 11, 2008) accessible facilities, accessible medical equipment, and auxiliary aids and services; *University of Southern California Medical Center* (May 15, 2008) accessible facilities, accessible medical equipment, and auxiliary aids and services; and *Metzler* v. *Kaiser Permanente* (March 2001) accessible facilities and accessible medical equipment. The settlement agreements are available at: *http://thebarrierfreehealthcareinitiative.org/?page_id=16.*

[9] The results of the survey are reported in Jill M. Winters, Molly Follette Story, Kris Barnekow, June Isaacson Kailes, Brenda Premo, Erin Schier, Sarma Danturthi, and Jack M. Winters, ''Results of a National Survey on Accessibility of Medical Instrumentation for Consumers,'' in ''Medical Instrumentation Accessibility and Usability Considerations,'' edited by Jack M. Winters and Molly Follette Story (Boca Raton, CRC Press, 2007), 13–27.

[10] The results of the focus group sessions are reported in Molly Follette Story, Erin Schwier, and June Isaacson Kailes, ''Perspectives of Patients with Disabilities on the Accessibility of Medical Equipment: Examination Tables, Imaging Equipment, Medical Chairs, and Weight Scales,'' Disability and Health Journal 2 (2009), 169–179.

armrests, side rails), controls (e.g., ease of operation), and displays and devices (e.g., legibility, understandability).

The Access Board held a public meeting in July 2010 that featured panel discussions and presentations by experts and researchers on medical equipment accessibility, health care providers, medical device manufacturers, and other interested parties to provide information for developing the proposed standards. The transcript of the meeting is available at: *http://www.access-board.gov/medical-equipment.htm.*

The technical criteria in the proposed standards address most of the barriers that have been identified as affecting the accessibility and usability of medical diagnostic equipment. However, it is not possible to address every barrier in the proposed standards, especially given the statutory deadline for issuing the standards. Research may be needed on some equipment characteristics that affect the accessibility and usability of equipment such as stiffness, comfort, and color contrast of contact surfaces. Section 510 of the Rehabilitation Act requires the Access Board to periodically review and amend the standards, as appropriate. The Access Board will address other barriers in future updates to the standards.

Question 2. What other barriers that affect the accessibility and usability of medical diagnostic equipment should be addressed in future updates to the standards? Comments should include information on sources to support the development of technical criteria to address the barriers, where possible.

4. Organization of Technical Criteria

Medical diagnostic equipment is typically designed to support patients in certain positions. For example, imaging equipment can be designed for use by patients lying on a platform bed, in a standing or seated position, or seated in a wheelchair. Examination chairs can be designed to recline and be used as examination tables. The technical criteria for providing patients with disabilities access to and use of each of these equipment types would differ based on the patient positions that the equipment is designed to support. Therefore, the technical criteria in the proposed standards are organized functionally by the patient positions that the equipment is designed to support instead of by types of equipment. Where equipment is designed to support more than one patient position, the equipment would have to meet the technical criteria for each position supported.

The table below shows the four basic patient positions that medical diagnostic equipment can be designed to support; the equipment features that are addressed in the technical criteria for each of the patient positions; and the types of equipment to which the technical criteria apply for each of the patient positions. For example, X-ray equipment that is designed for use in a standing position for certain procedures would have to meet the technical criteria for slip resistant standing surface and standing supports for patients who use mobility aids such as canes or crutches, or who have limited stamina or other conditions that affect their ability to maintain balance. Mammography equipment that is designed for use by patients seated in a wheelchair would have to meet the technical criteria for wheelchair spaces, changes in level at entry to the wheelchair space, and height of the breast platform. The types of equipment listed in the last column of the table are meant to be illustrative. The technical criteria apply to any type of medical diagnostic equipment that is designed to support the patient positions indicated.

Patient positions equipment designed to support	Equipment features addressed in technical criteria	Types of equipment to which technical criteria applies
Supine, prone, or side-lying position (M301)	Transfer surface, including height, size, and transfer sides.	Examination tables.
	Transfer supports, stirrups, and head and back support.	Imaging equipment designed for use with platform beds.
	Lift compatibility	Examination chairs designed to recline and be used as examination tables.
Seated position (M302)	Transfer surface, including height, size, and transfer sides.	Examination chairs.
	Transfer supports, armrests, and head and back support.	Imaging equipment designed for use with a seat.
	Lift compatibility	Weight scales designed for use with a seat.
Seated in a wheelchair (M303)	Wheelchair space, including orientation, width, depth, knee and toe clearance, and surface slope.	Imaging equipment designed for wheelchair use.
	Changes in level at entry to wheelchair space, including ramps.	Weight scales designed for wheelchair use.
	Components capable of examining body parts of patients seated in a wheelchair, including height of breast platforms.	
Standing position (M304)	Slip resistant standing surface	Imaging equipment designed for use in standing position.
	Standing supports	Weight scales designed for use in standing position.

The proposed standards also include technical criteria for supports (see M305), for instructions or other information communicated to patients through the equipment (see M306), and for operable parts used by patients (see M307).

Question 3. In organizing the technical criteria functionally by the patient positions that medical diagnostic equipment is designed to support, is it clear which technical criteria apply to different types of equipment? If not, how should the technical criteria be organized so it is clear which technical criteria apply to different types of equipment?

5. Discussion of Proposed Standards

The proposed standards consist of three chapters. Chapter M1 addresses the application and administration of the proposed standards. Chapter M2

addresses scoping. Chapter M3 contains the technical criteria. The sections in each chapter are discussed below. Although the standards do not impose any mandatory requirements on health care providers or medical device manufacturers, the standards use mandatory language (i.e., shall) because other agencies, referred to as an enforcing authority in the standards, may issue regulations or adopt policies that require health care providers subject to their jurisdiction to acquire accessible medical diagnostic equipment that conforms to the standards. Sections marked as advisory provide guidance on the standards and are not mandatory.

The Access Board is committed to writing standards that are clear, concise, and easy to understand so that persons who use the standards know what is required.

Question 4. Is there language in the proposed standards that is ambiguous or not clear? Comments should identify specific language in the proposed standards that is ambiguous or not clear and, where possible, recommend alternate language that is clear.

Chapter M1 Application and Administration

M101.1 Purpose

The proposed standards contain technical criteria for medical diagnostic equipment that is accessible to and usable by patients with disabilities. The standards provide for independent access to and use of diagnostic equipment by patients with disabilities to the maximum extent possible.

M101.2 Application

As discussed above under Organization of Technical Criteria, the technical criteria are to be applied to medical diagnostic equipment based on the following patient positions that the equipment is designed to support:

- Equipment used by patients in a supine, prone, or side-lying position (see M301);
- Equipment used by patients in a seated position (see M302);
- Equipment used by patients seated in a wheelchair (see M303); and
- Equipment used by patients in a standing position (see M304).

The diagnostic equipment's labeling, instructions, and promotional material usually identify the patient positions that the equipment is designed to support. Where diagnostic equipment is designed to support more than one patient position, the technical criteria for each patient position supported are to be applied to the equipment. Advisory M101.2 includes examples of diagnostic equipment designed to support more than one patient position and the technical criteria that apply to the equipment.

M101.3 Equivalent Facilitation

The use of alternative designs and technologies that result in substantially equivalent or greater accessibility than specified in the proposed standards is permitted. Generally, alternative designs or technologies that rely on assisted transfer only (e.g., use of a patient lift) are not permitted because they do not provide for independent access to and use of diagnostic equipment by patients with disabilities to the maximum extent possible. However, the standards include technical criteria for clearance in or around the base of the equipment for lift compatibility to allow the use of a patient lift by patients with disabilities for whom independent transfer may not be possible, and the use of alternative designs or technologies for lift compatibility is permitted.

M101.4 Dimensions

The standards are based on adult dimensions and anthropometrics. Dimensions that are not stated as ''maximum'' or ''minimum'' are absolute.

M101.5 Dimensional Tolerances

Dimensions are subject to conventional industry tolerances for manufacturing processes, material properties, and field conditions.

Question 5. What information or resources are available concerning conventional industry tolerances for manufactured equipment such as medical diagnostic equipment?

M102.1 Defined Terms

The following terms are defined in the proposed standards: Enforcing authority, medical diagnostic equipment, operable parts, and transfer surface.

The definition of medical diagnostic equipment is based on Section 510 of the Rehabilitation Act and means equipment used in or in conjunction with medical settings by health care providers for diagnostic purposes. For convenience purposes, the shorter term diagnostic equipment is used in place of medical diagnostic equipment after that term is first used in the standards. Examination tables, examination chairs, weight scales, mammography equipment, and other imaging equipment are examples of diagnostic equipment to which the standards apply.

The definitions of enforcing authority, transfer surface, and operable parts are discussed respectively under M201.1; M301.2 and M302.2; and M307.

Question 6. Should other terms in the proposed standards be defined? Comments should identify specific terms in the proposed standards that should be defined and, where possible, recommend definitions.

M102.2 Undefined Terms

Collegiate dictionaries are used to define terms that are not defined in the proposed standards or in regulations or policies issued by the enforcing authority.

M102.3 Interchangeability

Singular and plural words, terms, and phrases are used interchangeably.

Chapter M2 Scoping

M201.1 Enforcing Authority

The proposed standards do not include scoping requirements that specify the minimum number of types of accessible diagnostic equipment required in different types of health care facilities because Section 510 of the Rehabilitation Act authorizes the Access Board to issue only technical criteria. Other agencies, referred to as an enforcing authority in the standards (see defined terms in M102.1), may adopt the standards as mandatory requirements for entities subject to their jurisdiction. An enforcing authority can be a Federal, State, or local government agency that enforces laws prohibiting discrimination on the basis of disability, or regulates health care facilities. As discussed above under Department of Justice Activities Related to Health Care Providers and Medical Equipment, DOJ issued an ANPRM in July 2010 announcing that it was considering amending its regulations implementing Titles II and III of the ADA to specifically require health care providers to acquire accessible medical equipment and that it would consider adopting the standards issued by the Access Board. DOJ also indicated its intention to include in its ADA regulations scoping requirements that specify the minimum number of types of accessible medical equipment required in different types of health care facilities.

Chapter M3 Technical Criteria

Chapter M3 provides technical criteria for accessible diagnostic equipment based on the patient positions that the equipment is designed to support, including equipment used by patients in a supine, prone, or side-lying position (see M301); equipment

used by patients in a seated position (see M302); equipment used by patients seated in a wheelchair (see M303); and equipment used by patients in a standing position (see M304). Chapter M3 also provides technical criteria for supports (see M301.3, M302.3, M304.3, and M305); instructions and information communicated to patients through diagnostic equipment (see M306); and operable parts used by patients (see M307). The technical criteria specify measurements in inches and millimeters. The values stated in each system may not be exact equivalents, and each system should be used independently of the other. When discussing the technical criteria below, the measurements are stated in inches only.

Figures showing example applications of the technical criteria to diagnostic equipment are available on the Access Board's Web site at: *http://www.access-board.gov/medical-equipment.htm.* The figures are provided to help readers understand how the technical criteria apply to diagnostic equipment.

Question 7. Comments are requested on whether the figures can be improved to help readers better understand how the technical criteria apply to diagnostic equipment.

Sources for Technical Criteria

The sources discussed below were used to develop the technical criteria.

2004 ADA and ABA Accessibility Guidelines

The Access Board has developed and updated accessibility guidelines for buildings and facilities for over 30 years. The Access Board's current guidelines for buildings and facilities were issued in 2004 and are known as the Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines (hereinafter referred to as the ''2004 ADA and ABA Accessibility Guidelines''). The 2004 ADA and ABA Accessibility Guidelines are codified at 36 CFR part 1191 and are available at: *http://www.access-board.gov/ada-aba/final.cfm.*

The following technical criteria in the proposed standards are based on the 2004 ADA and ABA Accessibility Guidelines:

- Height of transfer surfaces on diagnostic equipment used by patients in a supine, prone, or side-lying position and diagnostic equipment used by patients in a seated position (see M301.2.1 and M302.2.1);
- Wheelchair spaces, including knee and toe clearance, and change in level at entry to the wheelchair spaces at diagnostic equipment used by patients seated in a wheelchair (see M303.2 and M303.3);
- Structural strength of transfer supports (see M305.2.2); and
- Operable parts (see M307).

The Access Board is also considering additional technical criteria based on the 2004 ADA and ABA Accessibility Guidelines for cross section dimensions and clearances around gripping surfaces on transfer and standing supports, and for reach ranges for operable parts on diagnostic equipment that are used by patients. Questions are included under the applicable sections requesting comments on whether the additional technical criteria under consideration would be appropriate for the equipment features or whether alternative technical criteria would be appropriate.

Wheeled Mobility Anthropometry Project

There have been dramatic changes in mobility devices and the characteristics of people who use these devices. The Access Board and the National Institute on Disability and Rehabilitation Research sponsored a Wheeled Mobility Anthropometry Project to collect measurements of approximately 500 people using a variety of mobility devices, including manual wheelchairs, power wheelchairs, and scooters. The Wheeled Mobility Anthropometry Project was conducted by the Center for Inclusive Design and Environmental Access. The final report on the Wheeled Mobility Anthropometry Project was issued in 2010 and is available at: *http://www.udeworld.com/anthropometrics.html.*

Data from the Wheeled Mobility Anthropometry Project showed that the seat heights of many mobility devices are above the range specified in the 2004 ADA and ABA Accessibility Guidelines for certain architectural features that involve transfers and that the dimensions for wheelchair spaces, including knee and toe clearance, do not accommodate many people in the sample. Data from the Wheeled Mobility Anthropometry Project also showed that many people in the sample needed a lower operating force to activate certain operable parts. The Wheeled Mobility Anthropometry Project included recommendations for specifications that would accommodate a broader range of people who use mobility devices. The data and recommendations from the Wheeled Mobility Anthropometry Project are discussed in connection with the following technical criteria:

- Height of transfer surfaces on diagnostic equipment used by patients in a supine, prone, or side-lying position and diagnostic equipment used by patients in a seated position (see M301.2.1 and M302.2.1);
- Wheelchair spaces, including knee and toe clearance, at diagnostic equipment used by patients while seated in a wheelchair (see M303.2); and
- Operating force required to activate operable parts used by patients (see M307.4).

The Access Board is considering specifying alternative technical criteria in the final standards based on the Wheeled Mobility Anthropometry Project. Questions are included under the applicable sections requesting comments on the alternative technical criteria.

ANSI/AAMI HE 75

As discussed in the relevant sections below, the Access Board considered the recommended practices regarding accessibility in Chapter 16 of ANSI/AAMI HE 75 in developing the technical criteria. The technical criteria are generally consistent with and supplement the recommended practices in ANSI/AAMI HE 75.

Other Sources

The Access Board used anthropometric data and other standards for the width of transfer surfaces on diagnostic equipment used by patients in a seated position (see M302.2.2), height of breast platforms on mammography equipment used by patients seated in a wheelchair (see M303.4.1), and standing supports in a vertical position for diagnostic equipment used by patients in a standing position (see M305.3.2). The sources are referenced in the relevant sections below.

The Access Board also considered information provided at the July 2010 public meeting that featured panel discussions and presentations by experts and researchers on medical equipment accessibility, health care providers, medical device manufacturers, and other interested parties. The transcript of the meeting is available at: *http://www.access-board.gov/medical-equipment.htm.* In addition, the Access Board considered public comments relating to medical equipment that were submitted in response to DOJ's ANPRM on equipment and furniture. The public comments on DOJ's ANPRM on equipment and furniture are available at *http://www.regulations.gov* (Docket ID: DOJ–CRT–2010–0008).

Economic and Technical Impacts

The technical criteria in Chapter 3 address the features that make diagnostic equipment accessible to and

usable by patients with disabilities. Comments are requested on the economic and technical impacts of the technical criteria in questions that follow the discussion of the technical criteria. Comments are welcomed from all sources. Manufacturers that currently incorporate accessible features in some of their products or plan to do so in the future are encouraged to comment particularly on Questions 8, 9, and 10. The Access Board will use the information provided in response to the questions to evaluate the economic and technical impacts of the technical criteria.

Question 8. To what extent does diagnostic equipment currently incorporate features that conform to the technical criteria proposed in Chapter M3? If equipment conforms to some but not all of the technical criteria proposed in Chapter M3, the comments should identify which features conform to the technical criteria proposed in Chapter M3.

Question 9. If diagnostic equipment does not currently incorporate features that conform to all the technical criteria proposed in Chapter M3, which technical criteria can be easily incorporated into the design or redesign and manufacture of equipment with little difficulty or expense? Which technical criteria would have the greatest incremental costs on the design or redesign and manufacture of equipment? Comments should include estimates of the incremental costs, where possible.

Question 10. How often is diagnostic equipment redesigned? Would incorporating features that conform to the technical criteria proposed in Chapter M3 in the planned redesign of equipment lessen the economic and technical impacts?

Question 11. Are there types of diagnostic equipment that cannot conform to certain technical criteria proposed in Chapter M3 because of the structural or operational characteristics of the equipment? Comments should identify the specific technical criteria which the equipment cannot conform to and discuss alternative methods for making the equipment accessible to patients with disabilities.

Question 12. Do the technical criteria proposed in Chapter M3 have any positive or negative unintended consequences?

M301 Diagnostic Equipment Used by Patients in Supine, Prone, or Side-Lying Position

M302 Diagnostic Equipment Used by Patients in Seated Position

M301 provides technical criteria for diagnostic equipment used by patients in a supine, prone, or side-lying position, and M302 provides technical criteria for diagnostic equipment used by patients in a seated position. The purpose of these sections is to facilitate independent transfer onto and off of diagnostic equipment by patients with disabilities, including those who use mobility devices or aids, and to provide supports for patients with disabilities when positioning their bodies on the equipment. The sections also include provisions for clearance in and around the base of the equipment for lift compatibility to allow the use of a patient lift by patients with disabilities for whom independent transfer may not be possible. Except for the size of the transfer surface (see M301.2.2 and M302.2.2) and certain supports (see M301.3.2 for stirrups, and M302.3.2 for armrests), the technical criteria in these sections are the same and are discussed together below. The technical criteria for transfer surface size and for stirrups and armrests are discussed separately for diagnostic equipment used by patients in a supine, prone, or side-lying position and for diagnostic equipment used by patients in a seated position.

Transfer Surface (M301.2 and M302.2)

The technical criteria in M301.2 and M302.2 address the height and size of the transfer surface, and the transfer sides. The transfer surface is the part of the diagnostic equipment onto which patients who use mobility devices or aids transfer when moving onto and off of the equipment (see defined terms in M102.1). Depending on the configuration of the equipment, the transfer surface may coincide with the seat area of an examination chair, or occupy only a portion of an examination table or imaging bed platform. The technical criteria do not address the overall width and depth of patient support surfaces because of the diverse shape and size of these surfaces.

Transfer Surface Height (M301.2.1 and M302.2.1)

For many patients who use mobility devices, independent transfer is possible only if the height of the transfer surface is at or near the seat height of their mobility device. The transfer surface height is also critical for patients who use mobility aids such as walkers and canes and may find it difficult to get up onto or down from an examination chair or table or imaging bed platform, and for facilitating assisted transfers.

M301.2.1 and M302.2.1 would require the height of the transfer surface during patient transfer to be 17 inches minimum and 19 inches maximum measured from the floor to the top of the transfer surface. This height range is based on provisions in the 2004 ADA and ABA Accessibility Guidelines for architectural features that involve transfers (e.g., toilet seats, shower seats, dressing benches). Patient support surfaces can be adjusted to heights outside the specified dimensions when not needed for patient transfer such as when performing diagnostic procedures.

Where patient support surfaces are contoured or upholstered for patient comfort or to support patient positioning during diagnostic procedures, the height of the transfer surface measured from the floor may vary across the transfer surface. The highest and lowest points of the transfer surface on such equipment would have to be within the specified dimensions.

Where patient support surfaces are cushioned (e.g., polyurethane on top of cell foam), the upholstery may compress or deflect during use. If the height of the transfer surface is measured from the floor to the rigid platform under the cushion, the top of the upholstery may be outside the specified dimensions. Measuring the height of the transfer surface from the floor to the top of the upholstery under static conditions, without compression or deflection in the transfer surface, would provide a consistent method of measurement given the variety of materials used to cushion patient support surfaces and the differences in how the materials compress or deflect during use.

Question 13. Should the technical criteria specify that the height of the transfer surface from the floor be measured to the top of the upholstery under static conditions, without compression or deflection in the transfer surface? Or should the technical criteria allow for more dynamic conditions and limit the amount of deflection permitted when a specific load is applied to the transfer surface?

Adjustable Height Range Considered

The technical criteria allow the height of transfer surfaces to be either fixed or adjustable within the 17 inches minimum and 19 inches maximum range. Based on the information discussed below, the Access Board is considering requiring in the final standards that the height of transfer surfaces be adjustable from 17 inches minimum to 25 inches maximum during

patient transfer. Patient support surfaces can be adjusted outside this range when not needed for patient transfer such as when performing diagnostic procedures.

Many types of diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position currently provide adjustable height patient support surfaces. ANSI/AAMI HE75 recommends that the height of patient support surfaces ''should be easy to adjust (ideally, powered) to suit the needs of health care professionals and patients.'' ANSI/AAMI HE75 further recommends that the height of patient support surfaces ''should be adjustable to a position high enough to accommodate tall health care providers and the range of medical procedures that could occur * * * [and] to a position low enough [19 inches maximum] to allow for the comfort of providers who choose to work in a seated position, to enable patients to keep their feet on the floor while seated, and to accommodate patients who need to transfer laterally between the platform and a chair or wheelchair alongside.'' See *ANSI/AAMI HE 75,* section 16.4.4.

Transfer surfaces that are adjustable to the same heights as the seat heights of mobility devices reduce the effort needed to transfer since patients do not have to lift their body weight to make up the difference between the two surfaces, in one direction or the other. The Wheeled Mobility Anthropometry Project shows the occupied seat heights for people who use mobility devices vary considerably. See Analysis of Seat Heights for Wheeled Mobility Devices at: *http://udeworld.com/analysis-of-seat-height-for-wheeled-mobility-devices*. The seat heights ranged from 16.3 inches to 23.9 inches for manual wheelchair users; 16.2 inches to 28.9 inches for power wheelchair users; and 18.8 inches to 25.3 inches for scooter users. Seat heights for males were typically higher than for females. Thirty (30) percent of male manual wheelchair users and 6 percent of male power wheelchair users had seat heights equal to or less than 19 inches. All the male manual wheelchair users and 92 percent of the male power wheelchair users had seat heights equal to or less than 25 inches. Thus, transfer surfaces that are adjustable from 17 inches minimum to 25 inches maximum during patient transfer accommodate significantly more patients who use mobility devices.

Ideally, transfer surfaces should be adjustable to any height within the 17 inches minimum and 25 inches maximum range. However, intermediate heights may need to be established within the range because of different methods for providing adjustability (e.g., power, mechanical) or other equipment limitations. The distance between the intermediate heights should be small.

Question 14. Comments are requested on the following questions regarding the adjustable height range (17 inches minimum to 25 inches maximum during patient transfer) that the Access Board is considering requiring in the final standards for transfer surfaces on diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position:

(a) What types of equipment currently provide patient support surfaces that are height adjustable? If there are several models of the same type of equipment, does at least one model provide patient support surfaces that are height adjustable? What is the range of adjustable heights? If the range of adjustable heights does not include 17 inches to 25 inches, what would be the incremental costs to achieve this range?

(b) What types of equipment do not currently provide patient support surfaces that are height adjustable? What would be the incremental costs for the design or redesign and manufacture of the equipment to provide patient support surfaces that are height adjustable within the above range?

(c) Are there types of equipment that cannot provide patient support surfaces that are height adjustable within the above range because of the structural or operational characteristics of the equipment? Comments should discuss alternative methods for making the equipment accessible to patients with disabilities.

(d) Should intermediate heights be established within the above range? What intermediate heights within the above range would be appropriate to facilitate independent transfer by patients who use mobility devices and aids?

Transfer Surface Size: Equipment Used by Patients in Supine, Prone, or Side-Lying Position (M301.2.2)

As noted earlier, the technical criteria do not address the overall width and depth of patient support surfaces because of the diverse shape and size of these surfaces. ANSI/AAMI HE75 recommends that patient support surfaces ''should allow patients to transfer themselves on and off safely and easily and to assume and maintain positions safely and comfortably.'' For surfaces on which patients lie down, ANSI/AAMI HE75 recommends that ''patients should be able to roll to a side or prone position with minimal need to lift or shift their center of gravity.'' ANSI/AAMI HE75 notes that a standard examination table is 27 inches wide and a bariatric table is approximately 30 to 32 inches wide and recommends wider surfaces to make repositioning easier. See ANSI/AAMI HE 75, section 16.4.7.

On diagnostic equipment used by patients in a supine, prone, or side-lying position, M301.2.2 would require the size of the transfer surface (i.e., part of the diagnostic equipment onto which patients who use mobility devices or aids transfer when moving onto and off of the equipment) to be 30 inches wide minimum and 15 inches deep minimum. The 30 inches minimum width is based on comments submitted by the Disability Rights Education and Defense Fund (DREDF) regarding medical equipment dimensions in response to DOJ's ANPRM on equipment and furniture. The 30 inches minimum width and 15 inches minimum depth also are generally consistent with the dimensions specified in the 2004 ADA and ABA Accessibility Guidelines for rectangular seats in roll-in showers.

The transfer surface dimensions do not include headrests, footrests, or similar supports for body extremities that do not support the patient's overall body position. A transfer surface is permitted to be contoured; however, the minimum dimensions would have to fit within the contoured surface and cannot be reduced to accommodate an asymmetrical shape.

As discussed under the technical criteria for transfer sides (see M301.2.3 and M302.2.3), the transfer surface would be located at a corner of the diagnostic equipment (e.g., foot of an examination table) to allow different approaches to the surface and a variety of transfers. The Access Board is considering requiring in the final standards that transfer surfaces be provided at more than one location on diagnostic equipment used by patients in a supine, prone, or side-lying position to accommodate the different ways patients with disabilities may transfer and reposition their bodies from a sitting to a lying position on such equipment.

Question 15. Comments are requested on the following questions regarding the minimum dimensions (30 inches wide and 15 inches deep) proposed for the transfer surface on diagnostic equipment used by patients in a supine, prone, or side-lying position and whether transfer surfaces should be provided at more than one location on such equipment:

(a) Do the above dimensions provide sufficient space for patients with disabilities to safely and easily transfer to the equipment?

(b) Should the width of the patient support surface be at least as wide as the width of the transfer surface (30 inches minimum) to allow patients with disabilities to reposition their bodies to a lying down position and maintain positions safely and comfortably? What would be the incremental costs for the design or redesign and manufacture of the equipment to make the patient support surface at least as wide as the width of the transfer surface?

(c) Would alternative dimensions be appropriate for transfer surfaces? Comments should include information on sources to support alternative dimensions, where possible.

(d) Should an adjustable feature (e.g., extendable platform) be permitted to meet the transfer surface dimensions?

(e) If transfer surfaces are required to be provided at more than one location on the equipment, where should the transfer surfaces be located?

Transfer Surface Size: Equipment Used by Patients in a Seated Position (M302.2.2)

Seats on diagnostic equipment used by patients in a seated position typically provide back and arm support for patient comfort and stability. The space available for transfer on diagnostic equipment used by patients in a seated position is smaller than the space available on diagnostic equipment used by patients in a supine, prone, or side-lying position.

On diagnostic equipment used by patients in a seated position, M302.2.2 would require the size of the transfer surface to be 21 inches wide minimum and 15 inches deep minimum. The 21 inches minimum width is based on the ideal chair width recommended in Architectural Graphic Standards for auditorium seating. See The American Institute of Architects, Architectural Graphic Standards (10th edition, 2000), page 919. The 15 inches minimum depth is generally consistent with the dimension specified in the 2004 ADA and ABA Accessibility Guidelines for rectangular seats in roll-in showers.

The transfer surface dimensions do not include headrests, footrests, or similar supports for body extremities that do not support the patient's overall body position. A transfer surface is permitted to be contoured; however, the minimum dimensions would have to fit within the contoured surface and cannot be reduced to accommodate an asymmetrical shape.

Question 16. Comments are requested on the following questions regarding the minimum dimensions (21 inches wide and 15 inches deep) proposed for the transfer surface on diagnostic equipment used by patients in a seated position:

(a) Do the above dimensions provide sufficient space for patients with disabilities to safely and easily transfer to the equipment?

(b) Would alternative dimensions be appropriate for transfer surfaces? Comments should include information on sources to support alternative dimensions, where possible.

Transfer Sides (M301.2.3 and M302.2.3)

M301.2.3 and M302.2.3 would require the transfer surface to be located so as to provide patients who use mobility devices the option to transfer onto the short side and the long side of the surface, and that each transfer side provide unobstructed access to the transfer surface. These sections would result in the transfer surface being located at a corner of the equipment and the two transfer sides adjoining at the edges of the equipment (e.g., foot of an examination table). Patients who use mobility devices would have the choice to approach parallel to the deep dimension of the transfer surface, parallel to the wide dimension of the transfer surface, or at an angle to the corner of the transfer surface and be able to perform a variety of transfers. Locating the transfer surface at a corner of the equipment and providing unobstructed access to the two transfer sides also would facilitate assisted transfers. Enforcing authorities may specify the clear floor space to be provided adjacent to the transfer sides of equipment in health care facilities.

The transfer sides are permitted to be obstructed temporarily by features such as armrests, side rails, footrests, and stirrups provided they can be repositioned (e.g., folding armrests, removable side rails, retractable footrests and stirrups) to permit transfer. This is consistent with ANSI/AAMI HE 75 which recommends that ''side rails, arm rests, leg supports * * * should be positioned, or able to be moved out of the way, so as not to interfere with the ability of users to transfer.'' See *ANSI/AAMI HE 75,* section 16.4.5. Otherwise, no part of the equipment can project beyond the edge of the transfer sides and obstruct access to the transfer surface. This is consistent with ANSI/AAMI HE 75 which recommends that the ''base of any patient-support platform should not extend horizontally beyond the edge of the support surface * * * [and] should not impede a patient's ability to orient a wheelchair next to the support surface.'' See *ANSI/AAMI HE 75,* section 16.4.2.

The Access Board is considering whether the final standards should permit equipment parts to extend horizontally 3 inches maximum beyond the edge of the transfer sides provided they do not extend above the top of the transfer surface. This would allow handholds and other features which may facilitate transfer to be located on the transfer sides. The 2004 ADA and ABA Accessibility Guidelines provide a gap of 3 inches between the edge of a shower seat and the shower compartment entry, and the gap does not appear to interfere with transferring onto and off of the shower seat.

Question 17. Comments are requested on the following questions regarding obstructions on the transfer sides:

(a) Should equipment parts be permitted to extend horizontally 3 inches maximum beyond the edge of the transfer sides provided they do not extend above the top of the transfer surface?

(b) If equipment parts are not permitted to extend horizontally 3 inches maximum beyond the edge of the transfer sides, would any diagnostic equipment need to be redesigned?

Supports (M301.3, M302.3, and M305.2)

ANSI/AAMI HE 75 recommends that handholds be ''integrated into the device * * * [to] increase safety and assist patients in transferring on and off, positioning or repositioning their bodies, and maintaining static position.'' See *ANSI/AAMI HE 75,* section 16.4.6. M301.3, M302.3, and M305.2 provide technical criteria for transfer and positioning supports on diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position. Some supports such as armrests and side rails can be used for transferring and positioning. As discussed under M301.2.3 and M302.2.3, transfer and positioning supports on the transfer sides of transfer surfaces would have to be capable of being repositioned (e.g., folding armrests, removable side rails, retractable footrests and stirrups) to permit transfer.

Transfer Supports (M301.3.1, M302.3.1, and M305.2)

M301.3.1 and M302.3.1 would require transfer supports to be provided for use with the transfer sides. M305.2.1 would require the transfer supports to be located within reach of the transfer surface and not obstruct transfer onto the surface when in position. M305.2.2

would require the transfer supports and their connections to be capable of resisting vertical and horizontal forces of 250 pounds applied to all points of the transfer support. M305.2.3 would require the transfer supports to not rotate within their fittings. These technical criteria are based on provisions in the 2004 ADA and ABA Accessibility Guidelines for grab bars.

Question 18. Comments are requested on the following questions regarding the structural strength of transfer supports:

(a) Are transfer supports that can be repositioned (e.g., folding armrests, removable side rails) currently capable of resisting vertical and horizontal forces of 250 pounds applied to all points of the transfer support? If the transfer supports are not currently capable of resisting these forces, what would be the incremental costs for the design or redesign and manufacture of the equipment to provide transfer supports that are capable of resisting these forces?

(b) Would alternative technical criteria be appropriate for the structural strength of transfer supports? Comments should include information on sources to support the alternative technical criteria, where possible.

Additional Technical Criteria Considered for Transfer Supports

As discussed below, the Access Board is considering whether additional technical criteria would be appropriate for transfer supports.

Location and Size

Midmark Corporation provided information based on input from accessibility experts regarding side rails on examination tables in comments submitted in response to the DOJ's ANPRM on equipment and furniture. The side rails are similar in shape to grab bars and are located on each of the long sides of the table. Each side rail can be removed to permit patients to transfer onto and off of the table, and to permit health care personnel to perform diagnostic procedures. The side rails can also be relocated along the table surface (from foot-end to head-end) for patients to position or reposition their bodies, and to maintain static positions. The side rails are 20 inches minimum in length, 6 inches minimum in height above the table surface, and 1 inch measured horizontally from the adjacent edge of the table surface.

The Access Board is considering whether the following technical criteria would be appropriate for the location and size of transfer supports on diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position:

- At least one transfer support would be provided on the side of the transfer surface that is 15 inches deep minimum. The transfer support would be located on the side of the transfer surface that is opposite the transfer side (see M301.2.3 and M302.2.3) similar to the provisions in the 2004 ADA and ABA Accessibility Guidelines for grab bars provided at bathtubs and shower compartments with seats. This would be a minimum requirement. Where possible, it is recommended that supports be provided on each side of the transfer surface that is 15 inches deep minimum for patients to maintain position after they have transferred onto the equipment, and that the supports be repositionable to permit transfer.
- The transfer support would extend horizontally the entire depth of the transfer surface and would be 15 inches minimum in length.
- The gripping surface of the transfer support would be located 1½ inches maximum measured horizontally from the adjacent edge of the transfer surface. This would ensure that the transfer support is within reach and can be effectively used during transfers.

The above technical criteria would likely result in the transfer surface being located at the foot end of examination tables and allow the use of transfer supports similar to the side rails described in the information provided by Midmark Corporation.

Question 19. Comments are requested on the following questions regarding the above technical criteria for the location and size of transfer supports on diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position:

(a) Are the above technical criteria for the location and size of transfer supports sufficient to facilitate transfer and maintain position on the equipment?

(b) Can transfer supports on different types of equipment meet the above technical criteria for the location and size of the supports?

(c) What would be the incremental costs for the design or redesign and manufacture of transfer supports that meet the above criteria?

(d) Would alternative technical criteria be appropriate for the location and size of transfer supports? Comments should include information on sources to support the alternative technical criteria, where possible.

(e) Should angled or vertical transfer supports be permitted?

Height

The Access Board is considering whether 6 inches minimum and 19 inches maximum above the transfer surface would be an appropriate height for transfer supports on diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position. The minimum height is consistent with the information provided by Midmark Corporation on examination table side rails, and the maximum height is generally consistent with the height of grab bars above shower seats in the 2004 ADA and ABA Accessibility Guidelines.

Question 20. Comments are requested on the following questions regarding the above height range (6 inches minimum and 19 inches maximum above the transfer surface) for transfer supports on diagnostic equipment used by patients in a supine, prone or side-lying position, and diagnostic equipment used by patients in a seated position:

(a) Are transfer supports within the above height range usable by patients with disabilities?

(b) Can transfer supports on different types of equipment meet the above height range?

(c) Would alternative technical criteria be appropriate for the height of transfer supports? Comments should include information on sources to support the alternative technical criteria, where possible.

Cross Section of Gripping Surfaces

The 2004 ADA and ABA Accessibility Guidelines specify the following dimensions for grab bars to enable individuals with disabilities to firmly grasp the grab bars and support themselves during transfers:

- Grab bars with circular cross sections must have an outside diameter of 1¼ inches minimum and 2 inches maximum.
- Grab bars with non-circular cross sections must have a cross section dimension of 2 inches maximum and a perimeter dimension of 4 inches minimum and 4.8 inches maximum.

The Access Board is considering whether the above cross section dimensions would be appropriate for the gripping surfaces of transfer supports on diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position.

Question 21. Comments are requested on the following questions regarding the above cross section dimensions for the gripping surfaces of transfer supports on

diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position:

(a) Can the gripping surfaces of transfer supports on different types of equipment meet the above cross section dimensions?

(b) Can handholds that meet the above cross section dimensions be integrated into the design of armrests that are cushioned to support arms and elbows?

(c) Are there alternative designs for the gripping surfaces of transfer supports that enable patients with disabilities to firmly grasp the supports and support themselves during transfer?

Clearances Around Gripping Surfaces

The 2004 ADA and ABA Accessibility Guidelines specify the following clearances around grab bars to ensure sufficient space for a person to grasp the grab bar: 1½ inches absolute clearance between grab bars and the adjacent wall surfaces; 1½ inches minimum clearance between grab bars and projecting objects below and at the ends of grab bars; and 12 inches minimum clearance between grab bars and projecting objects above grab bars.

The Access Board is considering whether 1½ inches minimum clearance around the gripping surface would be appropriate for transfer supports on diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position.

Question 22. Can transfer supports on different types of equipment provide 1½ inches minimum clearance around the gripping surface?

Stirrups (M301.3.2)

Where stirrups are provided on diagnostic equipment used by patients in a supine, prone, or side-lying position, M301.3.2 would require the stirrups to provide a method of supporting, positioning, and securing the patient's legs. This is consistent with ANSI/AAMI HE75 which recommends that ''[f]or patients with limited leg strength and control, instead of stirrups that support only the foot and require active user leg strength, leg supports that support both the foot and the leg should be used to assist patients in keeping their legs in an appropriate position.'' See *ANSI/AAMI HE 75*, section 16.4.7(g).

Question 23. Comments are requested on the following questions regarding stirrups:

(a) What would be the incremental costs for the design or redesign and manufacture of stirrups that provide a method of supporting, positioning, and securing the patient's legs?

(b) Should diagnostic equipment used by patients in a seated position that provide stirrups such as urodynamics study chairs be required to provide a method of supporting, positioning, and securing the patient's legs?

Armrests (M302.3.2)

M302.3.2 would require armrests to be provided on diagnostic equipment used by patients in a seated position. This is consistent with ANSI/AAMI HE75 which recommends that ''[f]or support surfaces that require the patient to assume a seated position, armrests should be provided to enhance patient comfort, stability, and ease of transfer.'' See *ANSI/AAMI HE 75*, section 16.4.7(e). Where armrests serve as transfer supports, the armrests would be required to meet the technical criteria in M305.2 for the location and structural strength of transfer supports. Otherwise, there are no technical criteria for armrests.

Head and Back Support (M301.3.3 and M302.3.3)

Where diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position can be adjusted to reclined positions, M301.3.3 and M302.3.3 would require head and back support to be provided throughout the entire range of the incline. This is consistent with ANSI/AAMI HE75 which recommends that the ''support surface needs to be adjustable or have adjustable support features (e.g., for the head, neck, back, lumbar region, leg, knee, and foot, as appropriate) to support patients in various postures and body positions in a manner that optimizes their comfort.'' See *ANSI/AAMI HE 75*, section 16.4.7(h). Although not required by the proposed standards, examination tables that can be adjusted to a sitting position and then reclined to a horizontal position may be easier for patients with disabilities to transfer onto and off of than examination tables that are horizontal only.

Positioning Supports Considered

The Board is considering requiring in the final standards positioning supports such as rails, bars, or panels with handholds to be provided along the sides of diagnostic equipment used by patients in a supine, prone or side-lying position, and diagnostic equipment used by patients in a seated position that can be adjusted to a reclined position. As noted above, ANSI/AAMI recommends that handholds be ''integrated into the device * * * [to] increase safety and assist patients in transferring on and off, positioning or repositioning their bodies, and maintaining static position.'' See *ANSI/AAMI HE 75*, section 16.4.6. Pillows, wedges, and other padding can be used to stabilize and position patients on diagnostic equipment, but are not addressed in the proposed standards because they are not part of the diagnostic equipment.

Question 24. Comments are requested on the following questions regarding positioning supports along the sides of diagnostic equipment used by patients in a supine, prone or side-lying position, and diagnostic equipment used by patients in a seated position that can be adjusted to a reclined position:

(a) Should the technical criteria address the configuration of positioning supports (e.g., length, height above the patient support surface, location) to ensure their effectiveness? Or should the technical criteria require that positioning supports be provided within reach and provide flexibility for designing the supports based on the intended use of the equipment?

(b) What would be the incremental costs for the design or redesign and manufacture of positioning supports?

(c) Are there types of equipment that cannot provide positioning supports along the sides of the equipment because of the structural or operational characteristics of the equipment? Comments should discuss alternative methods to assist patients with disabilities safely position or reposition their bodies, and maintain a static position.

Lift Compatibility (M301.4 and M302.4)

M301.4 and M302.4 would require diagnostic equipment used by patients in a supine, prone, or side-lying position, and diagnostic equipment used by patients in a seated position to be usable with a patient lift for patients with disabilities for whom independent transfer may not be possible. A patient lift may be the only means of providing access to certain equipment that cannot meet the technical criteria for transfer surface height (see M301.2.1 and M302.2.1) because of the structural or operational characteristics of the equipment. For example, full body bone densitometers usually have components that move beneath the length of the patient support surface and may prevent the equipment from meeting the technical criteria for transfer surface height. Requiring the equipment to be usable with a patient lift is critical for ensuring the safety of both patients with

disabilities and health care personnel assisting with transfers.

ANSI/AAMI HE 75 recommends that the ''base of the device needs to have space underneath or along both sides (if the equipment is narrow) to accommodate the legs of portable mechanical lift equipment so that the patient can be suspended over the support surface before being lowered onto it.'' See *ANSI/AAMI HE 75*, section 16.4.3. Portable floor lifts have legs with wheels that need to fit under or around the base of the diagnostic equipment. Lifts can vary in width along their length, and are usually the widest at the front casters and narrower at the patient sling location. Manufacturers of portable floor lifts usually recommend that the lifts be used with the legs extended in the widest position to maintain stability when lifting and lowering patients.

As discussed below, the technical criteria provide two options for accommodating portable floor lifts consistent with ANSI/AAMI HE75: clearance in the base or clearance around the base. The clearances would be required at the side of the equipment where the portable floor lift is deployed so that the boom of the lift can maneuver far enough over the equipment and safely lower and raise the patient onto and off of the examination surface. The clearances do not restrict the overall size of the equipment base.

Clearance in Base (M301.4.1 and M302.4.1)

Clearance in the base of the equipment allows the legs of a portable floor lift to fit under the base of the equipment. The clearance can be an open area between the supporting posts beneath the equipment, or the equipment can be configured with a wide slot that is recessed into the base enclosure. M301.4.1 and M302.4.1 would require the clearance in the base to be 44 inches wide minimum, 6 inches high minimum measured from the floor, and 36 inches deep minimum measured from the edge of the examination surface. Where the width of the examination surface is less than 36 inches, the clearance depth would be required to extend the full width of the equipment. Equipment components are permitted to be located within 8 inches maximum of the centerline of the clearance width.

Question 25. Comments are requested on the following questions regarding the proposed dimensions for clearance in the base of the equipment to allow the use of portable floor lifts:

(a) Are the proposed dimensions for clearance in the base sufficient to accommodate the various portable floor lifts used in health care facilities?

(b) Do the proposed dimensions exclude certain types of lifts?

(c) Should the clearance in the base be configured differently to allow additional flexibility for the use of portable floor lifts and, if so, how should it be configured?

Clearance Around Base (M301.4.2 and M302.4.2)

Clearance around the base of the equipment allows the legs of a portable floor lift to straddle the base. This option accommodates equipment with solid base enclosures that sit on or close to a floor. M301.4.2 and M302.4.2 would require the base of the equipment to provide a clearance 6 inches high minimum measured from the floor and 36 inches deep minimum measured from the edge of the examination surface. The width of the base permitted within this clearance would be 26 inches wide maximum at the edge of the examination surface and is permitted to increase at a rate of 1 inch in width for each 3 inches in depth. The permitted rate of increase in width can be distributed to each side of the base.

Question 26. Comments are requested on the following questions regarding the proposed dimensions for clearance around the base of the equipment to allow the use of portable floor lifts:

(a) Are the proposed dimensions sufficient to accommodate the various portable floor lifts used in health care facilities?

(b) Do the proposed dimensions exclude certain types of lifts?

(c) Should the clearance around the base be configured differently to allow additional flexibility for the use of portable floor lifts and, if so, how should it be configured?

Overhead Lifts

The technical criteria do not address overhead lifts that are usually mounted on the ceiling and operate on tracks suspended over the diagnostic equipment because the configuration of the equipment does not affect the operation of overhead lifts. Overhead lifts and portable floor lifts are used in health care facilities, and the technical criteria should not be viewed as preferring portable floor lifts. Overhead lifts may be the only option for certain diagnostic equipment because the structural or operational characteristics of the equipment prevent sufficient clearance in or around the base of the equipment for a portable floor lift.

Question 27. If diagnostic equipment is designed for use with overhead lifts, should the equipment be exempted from providing clearance in or around the base for portable floor lifts?

Folding Seats on Equipment Used by Patients Seated in a Wheelchair (M302.4 Exception)

M302.4 includes an exception for diagnostic equipment that is designed for use by patients seated in a wheelchair and provides a folding seat. The exception does not require the equipment to comply with the technical criteria for lift compatibility because patients can use the equipment seated in a wheelchair. However, the folding seat would be required to meet the other technical criteria in M302 for transfer surfaces and supports.

Question 28. Where diagnostic equipment is designed for use by patients seated in a wheelchair and provides a folding seat, should the folding seat be required to comply with the technical criteria in M302 for transfer surfaces and supports?

M303 Diagnostic Equipment Used by Patients Seated in Wheelchair

M303 provides technical criteria for diagnostic equipment used by patients seated in a wheelchair. M303 allows patients who use wheelchairs to position their wheelchairs at equipment typically used in a standing position such as mammography equipment, and also applies to equipment specifically designed for patients seated in a wheelchair such as weight scales and examination chairs.

Wheelchair Spaces (M303.2)

M303.2 would require a wheelchair space to be provided at diagnostic equipment used by patients seated in a wheelchair. M303.2 includes technical criteria for orientation, width, depth, and knee and toe clearance at wheelchair spaces.

M303.2.1 would require wheelchair spaces to be designed so that patients seated in a wheelchair orient in the same direction that patients not seated in a wheelchair orient when using the equipment. For example, if an equipment component used to make images of body parts can be placed at different angles when used by patients who stand and by patients seated in a wheelchair, and patients who stand orient facing the component when it is in place for them, then the wheelchair space would be designed so that patients seated in a wheelchair orient facing the component when it is place for them. If the equipment is designed so that patients not seated in a wheelchair can orient their bodies in various directions when using the equipment, the wheelchair space would

be designed so that patients seated in a wheelchair can orient their bodies in the same directions. For example, if patients who stand can orient their bodies facing forwards or sideways in relation to the equipment when in use, the wheelchair space would be designed so that patients seated in a wheelchair can orient their bodies facing forwards or sideways in relation to the equipment when in use (i.e., wheelchair space can be entered from both the front or rear and from the side).

M303.2.2 would require wheelchair spaces to be 36 inches (915 mm) wide minimum. This dimension is based on provisions in the 2004 ADA and ABA Accessibility Guidelines for maneuvering clearance where a clear floor or ground space is confined on all or part of three sides.

M303.2.3 would require wheelchair spaces that can be entered from the front or rear to be 48 inches deep minimum, and wheelchair spaces that can be entered only from the side to be 60 inches deep minimum. These dimensions are based on provisions in the 2004 ADA and ABA Accessibility Guidelines. The Wheeled Mobility Anthropometry Project showed that the 48 inches deep dimension for wheelchair spaces entered from the front or rear does not accommodate many people in the sample, and that increasing the depth of wheelchair spaces entered from the front or rear to 58 inches minimum would accommodate 95 percent of the people in the sample. See *Final Report of the Wheeled Mobility Anthropometry Project*, pages 86–88. The Access Board is considering requiring in the final standards wheelchair spaces that can be entered from the front or rear to be 58 inches deep minimum.

Question 29. Comments are requested on the following questions regarding the depth dimension (58 inches minimum) that the Access Board is considering requiring in the final standards for wheelchair spaces that can be entered from the front or rear:

(a) What would be the incremental costs for the design or redesign and manufacture of the equipment to provide a wheelchair space that is 58 inches deep minimum?

(b) Are there types of equipment that cannot provide a wheelchair space that is 58 inches deep minimum because of the structural or operational characteristics of the equipment?

Diagnostic equipment with wheelchair spaces on raised platforms such as weight scales typically provide low barriers or curbs on the sides of the platform that are not used for entering and exiting the equipment to prevent wheelchairs from slipping off the platform (i.e., edge protection). The Access Board is considering requiring edge protection at wheelchair spaces on raised platforms in the final standards.

Question 30. Is there diagnostic equipment with wheelchair spaces on raised platforms that does not currently provide edge protection? If so, what would be the incremental costs to provide edge protection on such equipment?

Exceptions Considered for Wheelchair Spaces on Raised Platforms

The Access Board is considering adding exceptions in the final standards to the minimum width in M303.2.2 and the minimum depth in M303.2.3 for diagnostic equipment with wheelchair spaces on raised platforms.

The exception to the minimum width in M303.2.2 would apply where ramped surfaces are provided on the opposite sides of the raised platform so that patients using wheelchairs can enter and exit the platform facing the same direction. The exception would permit the width of the wheelchair space between the edge protection to be reduced to 32 inches wide minimum at the platform level. This dimension is based on provisions in the 2004 ADA and ABA Accessibility Guidelines that allow accessible routes, which normally must be 36 inches wide minimum, to be 32 inches wide minimum for short distances such as at door openings. The exception would require a space 36 inches wide minimum to be provided outside the perimeter of the raised platform and above any edge protection so that patients using a manual wheelchair can extend their arms and elbows when they push on the wheel rims to maneuver onto and off of the platforms.

The exception to the minimum depth in M303.2.3 for wheelchair spaces entered from the front or rear would permit a portion of the 48 inch minimum depth of the wheelchair space that accommodates the wheelchair footrests to extend beyond the raised platform and over any edge protection. For example, the wheelchair footrests would be allowed to extend beyond the depth of the raised platform and over any edge protection on wheelchair weight scales used by patients seated in a wheelchair.

If exceptions are permitted to the minimum width and depth of wheelchair spaces on raised platforms, the technical criteria would specify the minimum and maximum height for any edge protection to prevent wheelchairs from slipping off the platform, but also allow the wheelchair footrests to extend over the edge protection where the wheelchair space extends beyond the depth of the platform.

Question 31. Comments are requested on the following questions regarding adding exceptions in the final standards to the minimum width in M303.2.2 and the minimum depth in M303.2.3 for diagnostic equipment with wheelchair spaces on raised platforms:

(a) What is the typical distance between the front caster wheels of manual and power wheelchairs and the tips of the toes of the wheelchair user? How much of the 48 inch minimum depth of a wheelchair space that can be entered from the front or rear should be permitted to extend beyond the raised platform and over any edge protection? Comments should include information on sources to support the dimensions, where possible.

(b) What should be the maximum height for any edge protection to allow the wheelchair footrests to extend over the edge protection where the wheelchair space extends beyond the depth of the platform? Comments should include information on sources to support the dimensions, where possible.

(c) Where the equipment provides supports for patients who stand (e.g., handrails), should the exceptions prohibit the supports from obstructing the 36 inch wide minimum and 48 inch deep minimum space outside the perimeter of the raised platform and above any edge protection?

Scooters have different wheelbases than manual and power wheelchairs. Diagnostic equipment with wheelchair spaces on raised platforms should also be usable by patients who use scooters. Patients who use scooters may have other options for using equipment with wheelchair spaces on raised platforms. For example, a weight scale with a raised platform for wheelchair use may provide a folding seat and supports for patients who can transfer independently from their mobility device to the scale.

Question 32. Comments are requested on the following questions regarding diagnostic equipment with wheelchair spaces on raised platforms and the use of such equipment by patients who use scooters:

(a) Is equipment with wheelchair spaces on raised platforms such as wheelchair scales currently usable by patients who use scooters?

(b) If the equipment is not currently usable by patients who use scooters, should the width and depth of the raised platform be changed so that the equipment is usable by patients who use scooters? Comments should include

information on sources to support the dimensions, where possible.

(c) Should folding seats and supports be required on equipment with wheelchair spaces on raised platforms for patients who can transfer independently from their mobility device to the raised platform?

(d) If folding seats and supports are provided on equipment with wheelchair spaces on raised platforms, should the raised platform also accommodate scooters?

Question 33. If exceptions are not permitted in the final standards to the minimum width and depth of wheelchair spaces on diagnostic equipment with raised platforms, comments are requested on the following questions:

(a) What would be the incremental costs for the design or redesign and manufacture of equipment with raised platforms to provide a wheelchair space that that can be entered from the front or rear and conforms to the dimensions proposed in M303.2.2 and M303.2.3 (i.e., 36 inches wide minimum and 48 inches deep minimum)?

(b) What would be the incremental costs for the design or redesign and manufacture of equipment with raised platforms to provide a wheelchair space that can be entered from the front or rear and conforms to the dimensions recommended by the Wheeled Mobility Anthropometry Project (i.e., 36 inches wide minimum and 58 inches deep minimum)?

Knee and Toe Clearance (M303.2.4)

M303.2.4 would require the depth of wheelchair spaces to include knee and toe clearance of 17 inches minimum and 25 inches maximum. Knee and toe clearance under breast platforms would be 25 inches deep. Knee and toe clearance are critical where patients seated in a wheelchair need to position their knees and toes next to or underneath a component of the diagnostic equipment. The component can be deeper than the 25 inches maximum depth required for knee and toe clearance, but a portion of the wheelchair space would be required to include knee and toe clearance of 17 inches minimum and 25 inches maximum under the component.

The dimensions for toe clearance in M303.2.4.1 and knee clearance in M303.2.4.2 are based on the 2004 ADA and ABA Accessibility Guidelines and are shown in the second column of the table below. The Wheeled Mobility Anthropometry Project showed that these dimensions do not accommodate many people in the sample and recommended alternative dimensions that would accommodate 95 percent of the people in the sample. The alternative dimensions recommended by Wheeled Mobility Anthropometry Project are shown in the last column of the table below. See *Final Report of the Wheeled Mobility Anthropometry Project*, pages 89–92. The Access Board is considering requiring in the final standards the dimensions for toe clearance and knee clearance recommended by the Wheeled Mobility Anthropometry Project.

	Proposed dimensions based on 2004 ADA and ABA accessibility guidelines	Dimensions recommended by wheeled mobility anthropometry project
Toe Clearance	6 inches deep maximum at 9 inches above the floor	5 inches deep maximum at 14 inches above the floor.
Knee Clearance	11 inches deep minimum at 9 inches above the floor, and 8 inches deep minimum at 27 inches above the floor. Between 9 inches and 27 inches above the floor, knee clearance is permitted to reduce at rate of 1 inch in depth for every 6 inches in height.	12 inches deep minimum at 28 inches above the floor. Knee clearance is same depth throughout and not sloped.

Question 34. Comments are requested on the following questions regarding the dimensions for toe clearance and knee clearance recommended by the Wheeled Mobility Anthropometry Project that the Access Board is considering requiring in the final standards:

(a) What would be the incremental costs for the design or redesign and manufacture of the equipment to include toe clearance and knee clearance that meets the dimensions recommended by the Wheeled Mobility Anthropometry Project?

(b) Are there types of equipment that cannot include toe clearance and knee clearance that meets the dimensions recommended by the Wheeled Mobility Anthropometry Project because of the structural or operational characteristics of the equipment?

M303.2.5 would require wheelchair space surfaces to not slope more than 1:48 in any direction. This is consistent with the 2004 ADA and ABA Accessibility Guidelines.

Changes in Level at Entry to Wheelchair Spaces (M303.3)

M303.3 includes technical criteria for changes in level at the entry to a wheelchair space as may occur at wheelchair weight scales with raised platforms. The technical criteria are consistent with the 2004 ADA and ABA Accessibility Guidelines. Level changes up to ¼ inch high are permitted to be vertical. Level changes between ¼ inch high and ½ inch high would be required to be beveled with a slope not steeper than 1:2. Level changes greater than ½ inch high would be required to be ramped. Ramp runs would be required to have a running slope not steeper than 1:12 and a cross slope not steeper than 1:48. The clear width of ramp runs would be required to be 36 inches minimum. Ramps with drop offs ½ inch or greater would be required to provide edge protection 2 inches high minimum on each side to prevent users from inadvertently travelling off the sides of the ramped surface.

Additional Technical Criteria Considered for Handrails on Ramps

M303.3.3.5 would require handrails to be provided on each side of the ramp when the vertical rise of the ramp exceeds 6 inches. This is consistent with the 2004 ADA and ABA Accessibility Guidelines. The Access Board is considering whether the technical criteria for handrails on ramps in section 505 of the 2004 ADA and ABA Accessibility Guidelines would be appropriate for handrails on diagnostic equipment ramps. These technical criteria are available at *http://www.access-board.gov/ada-aba/final.cfm#a505* and address continuity, height, clearance, gripping surface, cross section, surfaces, fittings, and handrail extensions.

Question 35. Comments are requested on the following questions regarding the technical criteria for handrails in section 505 of the 2004 ADA and ABA Accessibility Guidelines:

(a) Can handrails on diagnostic equipment ramps meet these technical criteria?

(b) What would be the incremental costs for the design or redesign and manufacture of the equipment to provide handrails on diagnostic equipment ramps that conform to these technical criteria?

Components (M303.4)

M303.4 would require the components of diagnostic equipment used to examine specific body parts to be capable of examining the body parts of a patient seated in a wheelchair. The height of the component and any adjustable feature would have to accommodate patients seated in a wheelchair. For example, an X-ray platform on which a patient places their arm or hand would have to be capable of examining the arm or hand of a patient seated in a wheelchair.

Mammography equipment was the subject of considerable discussion at the public meeting held by the Access Board in July 2010. The discussion highlighted the need for mammography equipment that is accessible to patients seated in a wheelchair. In addition to providing knee and toe clearance at the breast platform (see M303.2.4), the height of the breast platform was identified as critical to ensuring that mammography equipment is accessible to patients seated in a wheelchair. Mammography equipment with adjustable breast platforms is available. M303.4.1 would require the height of the breast platform to be 30 inches (760 mm) high minimum and 42 inches (1065 mm) high maximum above the floor when mammography equipment is used by patients seated in a wheelchair. The Wheeled Mobility Anthropometry Project showed that the seat heights of 96 percent of women using manual wheelchairs and 98 percent of women using power wheelchairs in the sample was between 17 inches and 24 inches above the floor. See Analysis of Seat Heights for Wheeled Mobility Devices at: *http://udeworld.com/analysis-of-seat-height-for-wheeled-mobility-devices*. Other anthropometric data show the heights of the midpoint of the breast to be 13 inches for the 5th percentile woman and 18 inches for the 95th percentile woman when measured from seat height. See Laura Peebles and Beverley Norris, Adultdata: The Handbook of Adult Anthropometric and Strength Measurements: Data for Design Safety (London, Department of Trade and Industry, 1998), page 71. The proposed height range for the breast platform is based on the above anthropometric data. Breast platforms can be located outside the proposed height range when not used by patients seated in a wheelchair.

Question 36. Comments are requested on the following questions regarding breast platforms:

(a) Is the proposed height range for the breast platform (30 inches high minimum and 42 inches high maximum above the floor) sufficient to accommodate patients seated in a wheelchair?

(b) Are there other features of the breast platform that the technical criteria should address to ensure accessibility and, if so, how should they be addressed? Comments should include information on sources to support the technical criteria for the features, where possible.

M304 Diagnostic Equipment Used by Patients in Standing Position

M304 provides technical criteria for diagnostic equipment used by patients in a standing position such as a weight scale and X-ray equipment that is used in a standing position for certain diagnostic procedures. M304.2 and M304.3 would require a slip resistant standing surface and standing supports to accommodate patients with mobility disabilities who ambulate, patients who have limited stamina, and patients who have other conditions that affect their ability to maintain the balance needed to position themselves on the equipment or to maintain a standing posture at an equipment component.

The proposed standards do not require diagnostic equipment to support more than one position. Where possible, it is recommended that diagnostic equipment be usable by patients with disabilities in as many positions as possible (i.e., standing position, seated position, and seated in a wheelchair). For example, mammography equipment with adjustable breast plates can be used by patients with disabilities in a standing position where standing supports are provided, in a seated position where a folding or removable seat is provided, and seated in a wheelchair where a wheelchair space is provided. A weight scale with a wheelchair space and ramped entry also can be used by patients with disabilities in a standing position where standing supports are provided and in a seated position where a folding or removable seat is provided.

Question 37. Comments are requested on the following questions regarding whether a folding or removable seat should be required on diagnostic equipment used by patients in a standing position:

(a) Should a folding or removable seat be required on weight scale platforms?

(b) Should a folding or removable seat be required on other types of diagnostic equipment used by patients in a standing position?

(c) What would be the incremental costs for the design or redesign and manufacture of the equipment to provide a folding or removable seat on weight scale platforms or other types of diagnostic equipment used by patients in a standing position?

(d) If folding or removable seats are provided on diagnostic equipment used by patients in a standing position, should the equipment be required to meet the technical criteria in M302 regarding transfer surfaces, supports, and lift compatibility for diagnostic equipment used by patients in a seated position?

Standing Supports (M304.3 and M305.3)

M304.3 would require standing supports to be provided on each side of the standing surface on diagnostic equipment used by patients in a standing position. M305.3 would require the standing supports to provide continuous support throughout the use of the diagnostic equipment and to not rotate within their fittings.

M305.3 also provides technical criteria for standing supports in horizontal and vertical positions. Standing supports can be provided in a horizontal position, vertical position, or a combination of horizontal and vertical positions, as long as the minimum length of gripping surface is provided for the support position used on each side of the standing surface. Standing supports that adjust from horizontal to vertical positions and at angles in between, such as a bar that folds up and locks into multiple positions, can be used. These kinds of adjustable supports are not required but would accommodate a broad range of patients with disabilities, particularly where a patient needs to assume multiple body positions for a diagnostic procedure or needs to step up onto a surface and then maintain balance afterwards.

For standing supports in a horizontal position, M305.3.1 would require the gripping surface to be 4 inches long minimum. The top of the gripping surface would be required to be 34 inches minimum and 38 inches maximum above the standing surface. The minimum length of the gripping surface is based on anthropometric data that provides specifications for men and women grasping cylinder grips which are stated as a range from 3.6 inches to 4.5 inches. See Henry Dreyfuss Associates and Alvin R. Tilley, The

Measure of Man & Woman: Human Factors in Design, (New York, John Wiley and Sons, 2002), page 43. Where possible, it is recommended that a longer gripping surface or multiple horizontal supports be provided. The minimum and maximum height of the gripping surface above the standing surface is based on the provisions for handrails in the 2004 ADA and ABA Accessibility Guidelines.

For standing supports in a vertical position, M305.3.2 would require the gripping surface to be 18 inches long minimum. The bottom of the support would be required to be 34 inches minimum and 37 inches maximum above the standing surface. The minimum length of the gripping surface is based on provisions for vertical grab bars at accessible bathing fixtures and toilets in ICC A117.1–2009 Accessible and Usable Buildings and Facilities. The minimum and maximum height of the bottom of the support above the standing surface is based on anthropometric data for the 1th percentile woman (minimum) and the 99th percentile man (maximum). See Henry Dreyfuss Associates and Alvin R. Tilley, The Measure of Man & Woman: Human Factors in Design, (New York, John Wiley and Sons, 2002), pages 13, 14, and 28.

Question 38. Comments are requested on the following questions regarding standing supports for diagnostic equipment used by patients in a standing position:

(a) What standing support configurations are currently provided and are they effective for patients with disabilities?

(b) Would alternative technical criteria for standing supports be appropriate? Comments should include information on sources to support the alternative technical criteria, where possible.

(c) Are angled standing supports effective for patients with disabilities and should technical criteria be provided for angled standing supports? Comments should include information on sources to support the technical criteria for angled standing supports, where possible.

(d) Are there industry standards for the structural strength of standing supports?

The 2004 ADA and ABA Accessibility Guidelines specify the following dimensions for grab bars to enable individuals with disabilities to firmly grasp the grab bars and support themselves during transfers:

- Grab bars with circular cross sections must have an outside diameter of 1¼ inches minimum and 2 inches maximum.
- Grab bars with non-circular cross sections must have a cross section dimension of 2 inches maximum and a perimeter dimension of 4 inches minimum and 4.8 inches maximum.

The Access Board is considering whether the above cross section dimensions would be appropriate for the gripping surfaces of standing supports on diagnostic equipment used by patients in a standing position.

Question 39. Comments are requested on the following questions regarding the above cross section dimensions for the gripping surfaces of standing supports on diagnostic equipment used by patients in a standing position:

(a) Can the gripping surfaces of standing supports on different types of equipment meet the above cross section dimensions?

(b) Are there alternative designs for the gripping surfaces of standing supports that enable patients with disabilities to firmly grasp the supports?

The Access Board is also considering whether a 1½ inches minimum clearance around the gripping surface of standing supports would be appropriate to ensure that the surface can be grasped.

Question 40. Can standing supports on different types of equipment provide 1½ inches minimum clearance around the gripping surface without encountering obstructions?

M305 Supports

M305 provides the technical criteria for transfer supports and standing supports. The technical criteria for transfer supports are discussed under M301 Diagnostic Equipment Used by Patients in Supine, Prone, or Side-Lying Position and M302 Diagnostic Equipment Used by Patients in Seated Position. The technical criteria for standing supports are discussed under M304 Diagnostic Equipment Used by Patients in Standing Position.

M306 Communication

Where diagnostic equipment communicates instructions or other information to the patient, M306 would require the instructions or other information to be provided in at least two of the following methods: audible, visible, or tactile. For example, magnetic resonance imaging (MRI) and X-ray computed tomography (CT) equipment may instruct the patient to hold their breath for a short period during a scan by means of a flashing light or icon. A flashing light or icon would be sufficient to notify a patient who is deaf to hold their breath, but a voice prompt, sound alert, or tactile vibration would be needed to notify a patient who is blind to hold their breath. For MRI equipment, auditory methods may not be effective due to the noise generated by the equipment and a tactile vibration may be the only effective method to notify a patient who is blind to hold their breath. ANSI/AAMI HE 75 recommends that vibration ''be used as a redundant mode for transmitting information such as an attention getting signal.'' See *ANSI/AAMI HE 75*, section 16.3.5.6.

Question 41. Comments are requested on the following questions regarding methods of communication provided by diagnostic equipment:

(a) Should diagnostic equipment that communicates instructions or other information to the patient be required to provide the instructions or other information in all three methods of communication (i.e., audible, visible, and tactile)?

(b) What would be the incremental costs for the design or redesign and manufacture of the equipment to provide all three methods of communication (i.e., audible, visible, and tactile)?

M307 Operable Parts

M307 provides technical criteria for operable parts used by patients to activate, deactivate, or adjust the diagnostic equipment (see defined terms in M102.1). For example, equipment used for an auditory examination may require the patient to press a button when sounds are heard. M307 does not apply to controls used only by health care personnel or others who are not patients.

M307.2 would require operable parts to be tactilely discernible without activation. Patients who are blind or have low vision have difficulty distinguishing a flat membrane button or similar control unless it is tactilely discernible from the surrounding surface and any adjacent controls. The most common method to ensure that buttons and similar controls are tactilely discernible is to raise part or all of the control surface above the surrounding surface and at a distance from any adjacent controls such that a relief of each individual control can be determined by touch. This also prevents unintended or accidental activation of the operable parts. M307.2 is consistent with recommendations in ANSI/AAMI HE 75 that ''features should be operable from controls that are tactilely discernible and that can be explored without being activated.'' *See ANSI/AAMI HE 75,* section 16.3.5.5.

M307.3 would require operable parts such as dials, switches, and levers to be operable with one hand without tight grasping, pinching, or twisting of the wrist. M307.4 would require the force to activate operable parts to not exceed 5 pounds. M307.3 and M307.4 are based on provisions for operable parts in the 2004 ADA and ABA Accessibility Guidelines. M307.3 and M307.4 are also consistent with recommendations in ANSI/AAMI HE 75 that ''devices should have at least one mode of use that does not require fine motor control or the performance of simultaneous actions.'' ANSI/AAMI HE 75 includes additional recommended practices for accessible controls. See *ANSI/AAMI HE 75,* section 16.3.3.

The Wheeled Mobility Anthropometry Project recommended that ''operable parts that require fine grips preferably should not require exertion of lateral pinch grip forces in excess of 2 pounds force to accommodate the vast majority of * * * users having at least some grasping capability.'' The Wheeled Mobility Anthropometry Project recommended that the 5 pounds maximum force be retained for other types of operable parts. See *Final Report of the Wheeled Mobility Anthropometry Project,* page 105. The Access Board is considering requiring in the final standards that operable parts used by patients that require fine grips to not exceed 2 pounds maximum operating force.

Question 42. Comments are requested on the following questions regarding the operating force (2 pounds maximum) that the Access Board is considering requiring in the final standards for operable parts used by patients that require fine grips:

(a) What would be the incremental costs for the design or redesign and manufacture of the equipment to provide operable parts that meet the above operating force?

(b) Are there types of equipment that cannot provide operable parts that meet the above operating force because of the structural or operational characteristics of the equipment?

The 2004 ADA and ABA Accessibility Guidelines require that operable parts be placed within certain reach ranges. For an unobstructed forward reach or side reach, the reach ranges are 48 inches maximum for a high reach and 15 inches minimum for a low reach. ANSI/AAMI HE 75 provides guidance on reach ranges based on provisions in an earlier version of accessibility guidelines for buildings and facilities issued by the Access Board, the 1991 Americans with Disabilities Act Accessibility Guidelines (ADAAG). ANSI/AAMI HE 75 also recommends a remote control as an alternative to a direct reach. See *ANSI/AAMI HE 75,* section 16.3.2.2. The reach ranges in the 2004 ADA and ABA Accessibility Guidelines provide greater accessibility than the reach ranges in the 1991 ADAAG.

Question 43. Comments are requested on the following questions regarding reach ranges for operable parts on diagnostic equipment that are used by patients:

(a) Would the reach ranges in the 2004 ADA and ABA Accessibility Guidelines for an unobstructed forward reach or side reach (48 inches maximum for a high reach and 15 inches minimum for a low reach) be appropriate for operable parts on diagnostic equipment that are used by patients?

(b) Would alternative technical criteria be appropriate for reach ranges for operable parts on diagnostic equipment that are used by patients? Comments should include information on sources to support the alternative technical criteria, where possible.

6. Regulatory Analyses

Executive Order 13563 (Improving Regulation and Regulatory Review) and Executive Order 12866 (Regulatory Planning and Review): Preliminary Regulatory Assessment

The Office of Management and Budget has reviewed this proposed rule in accordance with Executive Orders 13563 and 12866. Among other things, Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Access Board has prepared a preliminary regulatory assessment for the proposed standards. The preliminary regulatory assessment is available on the Access Board's Web site at: *http://www.access-board.gov/medical-equipment.htm.* The preliminary regulatory assessment is summarized below.

Need for and Benefits of the Proposed Standards

The U.S. Census Bureau reports that 54.4 million Americans, about one in five U.S. residents, reported some level of disability in 2005.[11] The number of individuals with disabilities is almost equal to the combined total population of California and Florida. The U.S. Census Bureau provides this breakdown of the population of people aged 15 and older:

- 27.4 million (11.9 percent) had difficulty with ambulatory activities of the lower body;
- 22.6 million (9.8 percent) had difficulty walking a quarter of a mile;
- 21.8 million (9.4 percent) had difficulty climbing a flight of stairs;
- 10.2 million (4.4 percent) used a cane, crutches, or walker to assist with mobility;
- 3.3 million (1.4 percent) used a wheelchair or other wheeled mobility device;
- 7.8 million (3 percent) had difficulty seeing words or letters in ordinary newspaper print, including 1.8 million who are completely unable to see; and
- 7.8 million (3 percent) had difficulty hearing conversations, including 1 million who are unable to hear conversations at all.

The prevalence of disability increases with age. The Administration on Aging reports that there were 39.6 million persons age 65 or older in the United States in 2009, and that this population is expected to increase to 55 million in 2020.[12] Among this population, 37 percent reported some type of disability in 2005.[13]

A national survey collected information on the types of medical equipment that is most difficult for individuals with disabilities to access and use.[14] The survey was completed by a diverse sample of individuals with a wide range of disabilities, including mobility disabilities and sensory disabilities. Survey respondents who had experience with specific medical

[11] ''Americans with Disabilities: 2005'' (2008) available at: *http://www.census.gov/prod/2008pubs/p70-117.pdf.*

[12] ''A Profile of Older Americans: 2010'' available at: *http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/index.aspx.*

[13] See footnote 11.

[14] The results of the survey are reported in Jill M. Winters, Molly Follette Story, Kris Barnekow, June Isaacson Kailes, Brenda Premo, Erin Schier, Sarma Danturthi, and Jack M. Winters, ''Results of a National Survey on Accessibility of Medical Instrumentation for Consumers,'' in ''Medical Instrumentation Accessibility and Usability Considerations,'' edited by Jack M. Winters and Molly Follette Story (Boca Raton, CRC Press, 2007), 13–27.

equipment rated their degree of difficulty when attempting to access or use the equipment as follows:

- 75 percent rated examination tables as moderately difficult to impossible to use;
- 68 percent rated radiology equipment as moderately difficult to impossible to use;
- 53 percent rated weight scales as moderately difficult to impossible to use; and
- 50 percent rated examination chairs as moderately difficult to impossible to use.

Survey respondents reported difficulties with getting on and off the equipment, positioning their bodies on the equipment, physical comfort and safety, and communication issues. Focus group sessions of individuals with disabilities reported that participants find examination tables, imaging equipment, and other diagnostic equipment not only difficult but unsafe to use, and that these negative health care experiences can result in their not scheduling regular medical examinations and diagnostic procedures.[15]

A report on the ''The Current State of Health Care for People with Disabilities'' issued by the National Council on Disability found that individuals with disabilities experienced significant health disparities and barriers to health care, as compared to individuals without disabilities.[16] Among the key barriers cited in the report is the lack of accessible examination equipment. A report on the ''Importance of Accessible Examination Tables, Chairs and Weight Scales'' issued by the Center for Disability Issues and the Health Professions discusses how the lack of accessible equipment reduces the likelihood that individuals with disabilities will receive timely and appropriate health care.[17] Health care providers may not perform some diagnostic procedures for patients with disabilities because they lack accessible equipment. This can result in suboptimal examinations, missed or delayed diagnoses, and worsening conditions that require more expensive and extensive treatments.

The proposed standards address many of the barriers that have been identified as affecting the accessibility and usability of diagnostic equipment by individuals with disabilities. The standards will improve the quality of health care for individuals with disabilities and ensure that they receive examinations, diagnostic procedures, and other health care services equal to those received by individuals without disabilities. The standards will facilitate independent transfers by individuals with disabilities onto and off of diagnostic equipment, and enable them to maintain their independence, confidence, and dignity. The standards will lessen the need for health care personnel to assist individuals with disabilities when transferring on and off of diagnostic equipment. Where assisted transfers are necessary, the proposed standards will also facilitate such transfers. The proposed standards will reduce the risk of injury during transfers to both health care personnel and patients.[18] The proposed standards will result in more positive health care experiences for individuals with disabilities and health care providers.

Entities Potentially Affected by Proposed Standards

The proposed standards do not impose any mandatory requirements on health care providers or medical device manufacturers. Thus, there are no compliance costs that can be attributed to the proposed standards. As discussed below, if an enforcing authority such as DOJ adopts the standards as mandatory requirements for entities subject to its jurisdiction, health care providers may experience some compliance costs. Medical device manufacturers may have an economic incentive to produce accessible products that conform to the standards for health care providers who need to acquire accessible medical diagnostic equipment.

Health Care Providers

As discussed under Department of Justice Activities Related to Health Care Providers and Medical Equipment, health care providers must provide individuals with disabilities full and equal access to their health care services and facilities to comply with the ADA and Section 504 of the Rehabilitation Act. Both the Federal government through DOJ and private parties, including individuals with disabilities, have entered into settlement agreements with health care providers to enforce the ADA and Section 504 of the Rehabilitation Act. In July 2010, DOJ and the Department of Health and Human Services issued a guidance document for health care providers regarding their responsibilities to make their services and facilities accessible to individuals with mobility disabilities under the ADA and Section 504 of the Rehabilitation Act. See Access to Medical Care for Individuals with Mobility Disabilities available at: *http://www.ada.gov/medcare_ta.htm.* The guidance document includes information on accessible examination rooms and the clear floor space needed adjacent to medical equipment for individuals who use mobility devices to approach the equipment for transfer; accessible medical equipment (e.g., examination tables and chairs, mammography equipment, weight scales); patient lifts and other methods for transferring individuals from their mobility devices to medical equipment; and training health care personnel. In July 2010, DOJ also issued an ANPRM announcing that, pursuant to the obligation that has always existed under the ADA for covered entities to provide accessible equipment and furniture, it was considering amending its regulations implementing Titles II and III of the ADA to include specific standards for the design and use of accessible equipment and furniture that is not fixed or built into a facility in order to ensure that programs and services provided by state and local governments and by public accommodations are accessible to individuals with disabilities. See 75 FR 43452 (July 26, 2010). Among other things, the ANPRM stated that DOJ was considering amending its ADA regulations to specifically require health care providers to acquire accessible medical equipment and that it would consider adopting the standards issued by the Access Board. DOJ also indicated its intention to include in its ADA regulations scoping requirements that specify the minimum number of types of accessible medical equipment required in different types of health care facilities. If DOJ proposes to amend its ADA regulations as announced in the ANPRM, it will publish a notice of proposed rulemaking (NPRM) requesting public comment and will prepare a regulatory assessment in accordance with Executive Orders 13563 and 12866.

Medical Device Manufacturers

If DOJ amends its ADA regulations as announced in the ANPRM, medical device manufacturers may have an

[15] The results of the focus group sessions are reported in Molly Follette Story, Erin Schwier, and June Isaacson Kailes, ''Perspectives of Patients with Disabilities on the Accessibility of Medical Equipment: Examination Tables, Imaging Equipment, Medical Chairs, and Weight Scales,'' Disability and Health Journal 2 (2009), 169–179.

[16] The report is available at: *http://www.ncd.gov/publications/2009/Sept302009.*

[17] The report is available at: *http://www.cdihp.org/products.html#tables.*

[18] Lifting and transferring patients is a major risk factor for back injury among nurses and health aides. See Alan Hedge, ''Back Care for Nurses'' available at: *http://www.spineuniverse.com/wellness/ergonomics/back-care-nurses.*

economic incentive to produce accessible products that conform to the standards for health care providers who need to acquire accessible medical diagnostic equipment. The size of the economic incentive will depend on the amount of accessible medical diagnostic equipment health care providers need to acquire and the manufacturers' incremental costs to design or redesign and manufacture accessible products that conform to the standards.

Many medical device manufacturers currently incorporate accessible features in some of their products such as patient support surfaces that are height adjustable, transfer and positioning supports, and scales designed for use by patients seated in a wheelchair. The incremental costs for manufacturers to conform these products to the standards are expected to be small because the features may already meet or closely meet the standards. The incremental costs may be greater for manufacturers that do not currently incorporate accessible features in their products but plan to do so in future designs or redesigns of their products. The incremental costs to design or redesign and manufacture accessible products that conform to the standards will be incurred voluntarily by manufacturers that choose to produce them for health care providers who need to acquire accessible medical diagnostic equipment. Some manufacturers may choose not to design or redesign and manufacture accessible products that conform to the standards, or may produce accessible products with less market appeal than that of their competitors, thereby losing market share and incurring losses. These economic impacts are not regulatory costs and are not generally social costs because for the most part, one manufacturer's loss is another manufacturer's gain.

The following questions in the preamble request comments on the incremental costs to design or redesign and manufacture accessible products that conform to the technical criteria in the proposed standards, as well as alternative and additional technical criteria that the Access Board is considering:

- Questions 9 and 10 on the technical criteria in Chapter M3;
- Questions 14 (a) and (b) on height adjustable patient support surfaces;
- Question 15 (b) on width of patient support surfaces on equipment used by patients in a supine, prone, or side-lying position;
- Question 18 (a) on structural strength of repositionable transfer supports;
- Question 19 (c) on location and size of transfer supports;
- Question 23 (a) on stirrups;
- Question 24 (b) on positioning supports;
- Question 29 (a) on alternative dimension for minimum depth of wheelchair spaces;
- Question 30 on edge protection for wheelchair spaces on raised platforms:
- Question 33 on dimensions for wheelchair spaces on raised platforms;
- Question 34 (a) on alternative dimensions for toe clearance and knee clearance at wheelchair spaces;
- Question 35 (b) on handrails on diagnostic equipment ramps;
- Question 37 (c) on a folding or removable seat on weight scale platforms or other types of diagnostic equipment used by patients in a standing position;
- Question 41 (b) on audible, visible, and tactile communications; and
- Question 42 (a) on operating force for operable parts.

The Access Board will consider the information provided in the comments when preparing the final standards, and will provide an analysis of the incremental costs with the final standards.

Product Data and Unit Costs

The Access Board and its contractor, Eastern Research Group, collected product data and unit costs for a broad sample of examination tables and weight scales, including products with accessible features. The Access Board and Eastern Research Group did not evaluate the products for conformance with the proposed standards and do not endorse any of the products included in the sample. The Access Board and Eastern Research Group used the Internet to collect the product data and unit costs. Medical equipment suppliers typically list the manufacturer suggested retail price (MSRP) for the products on their Web sites and sell the products at discounted prices. The discounted prices for the same product can vary widely among medical equipment suppliers. Health care providers typically purchase the products for less than the MSRP (i.e., actual price paid is less than MRSP). The unit costs in the tables below are the MSRP, and are shown as a range of lower cost and higher cost products rounded to the nearest $50. The data shows that there are a wide variety of examination tables and weight scales available to meet almost every budget.

Product data and unit costs for examination chairs and imaging equipment will be provided when the final standards are issued.

Examination Tables

Product data and unit costs were collected for examination tables produced by five manufacturers. The manufacturer's Web sites typically grouped the tables by the following types: Treatment tables, manual tables, and power tables. The number of each type of table made by the manufacturers, the number of tables included in the sample, and range of lower cost and higher cost products are summarized below.

Table type	Products	Products in sample	Lower cost products MSRP	Higher cost products MSRP
Treatment	74	20	$400–$850	$850–$1,450
Manual	15	9	1,250	2,250
Power	30	25	1,650–2,900	3,650–16,800

Question 44. Does the above sample fairly reflect the range of costs for examination tables?

Treatment tables typically have a flat top. Some models have adjustable backrests, but the backrests typically cannot support patients in a sitting position. Treatment tables typically have a fixed height of 31 inches measured from the floor to the top of the table. The lower cost products have an open base with an H-brace or shelf. The higher cost products have cabinets, drawers, or shelves. Adjustable height treatment tables are available, but are not included in the sample. The MSRP for adjustable height treatment tables ranged from $1,500 to $2,400.

Manual tables typically have a fully articulated, pneumatic backrest. The backrests typically can support patients in a seated position and recline to a lying position. Manual tables typically have a fixed height of 32 inches

measured from the floor to the top of the table. Manual tables typically have cabinets, drawers, or shelves.

Power tables have an electric motor that can adjust the table height to as low as 18 inches and as high as 40 inches above the floor on some products. The higher cost products have a fully articulated, pneumatic or powered, backrest that can support patients in a seated position and recline to a lying position. Some power tables have armrests, grab rails, side rails, and cabinets or drawers.

Weight Scales

Product data and unit costs were collected for weight scales produced by eight manufacturers. The scales are grouped by the following types: Stand-on scales and wheelchair scales. Within each group, there are mechanical and digital scales. Unit costs are presented for stand-on scales with and without handrails. Unit costs are presented for wheelchair scales with raised platforms and with flush platforms in the floor. The number of each type of scale made by the manufacturers, the number of scales included in the sample, and range of lower cost and higher cost products are summarized below.

Stand-on scales	Products	Products in sample	Lower cost products MSRP	Higher cost products MSRP
Mechanical without Handrails	22	3	$250	$550
Mechanical with Handrails	1	1	700	700
Digital without Handrails	50	15	300–600	700–1,200
Digital with Handrails	21	9	600–1,050	1,750–2,600

Question 45. Does the above sample fairly reflect the range of costs for stand-on scales?

Stand-on mechanical scales typically have a weight capacity ranging from 400 to 500 pounds. Stand-on digital scales without handrails typically have a weight capacity ranging from 400 to 750 pounds, and the higher cost products typically have larger platforms. Stand-on digital scales with handrails typically have a weight capacity ranging from 500 to 1,000 pounds, and the higher cost products typically are bariatric scales.

Wheelchair scales	Products	Products in sample	Lower cost products MSRP	Higher cost products MSRP
Mechanical with Ramped Platform	2	2	$1,200	$2,900
Digital with Ramped Platform	32	15	800–1,700	2,100–4,950
Digital with Flush Platform in Floor	8	5	3,300	6,500

Question 46. Does the above sample fairly reflect the range of costs for wheelchair scales?

Wheelchair mechanical scales with a ramped platform typically have a weight capacity ranging from 350 to 500 pounds. Wheelchair digital scales with a ramped platform typically have a weight capacity ranging from 800 to 1,000 pounds. Wheelchair digital scales with a flush platform in the floor typically have a weight capacity of 1,000 pounds. Some wheelchair digital scales have standard or optional handrails for use as a stand-on bariatric scale.

The Access Board has made a preliminary determination based on the preliminary regulatory assessment that the benefits of the proposed standards will justify the costs; that the proposed standards will impose the least burden on society, consistent with obtaining the regulatory objectives; and that the regulatory approach selected will maximize net benefits.

Regulatory Flexibility Act: Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires agencies to consider the impacts of their regulatory proposals on small entities, analyze alternatives that minimize the impacts on small entities, and make the analysis available for public comment. The proposed standards do not impose any mandatory requirements on any entity, including small entities. Nonetheless, in keeping with the Regulatory Flexibility Act, the Access Board has prepared this initial regulatory flexibility analysis.

Reason the Access Board Is Issuing the Proposed Standards

Section 510 of the Rehabilitation Act (29 U.S.C. 794f) requires the Access Board, in consultation with the Commissioner of the Food and Drug Administration, to issue standards that contain minimum technical criteria to ensure that medical diagnostic equipment used in or in conjunction with medical settings such as physicians' offices, clinics, emergency rooms, and hospitals is accessible to and usable by individuals with disabilities.

Objective of, and Legal Basis for, the Proposed Standards

The objective of the proposed standards is to ensure that medical diagnostic equipment is accessible to and usable by individuals with disabilities. The proposed standards address barriers that affect the accessibility and usability of medical diagnostic equipment by individuals with disabilities. The legal basis for the proposed standards is Section 510 of the Rehabilitation Act.

Small Entities Potentially Affected by Proposed Standards

The proposed standards do not impose any mandatory requirements on health care providers or medical device manufacturers. As discussed below, if an enforcing authority such as DOJ adopts the standards as mandatory requirements for entities subject to its jurisdiction, small health care providers may experience some compliance costs. Small medical device manufacturers may have an economic incentive to produce accessible products that conform to the standards for health care providers who need to acquire accessible medical diagnostic equipment.

Health Care Providers

As discussed under Department of Justice Activities Related to Health Care Providers and Medical Equipment, health care providers must provide individuals with disabilities full and equal access to their health care services and facilities to comply with the ADA

and Section 504 of the Rehabilitation Act. Both the Federal government through DOJ and private parties, including individuals with disabilities, have entered into settlement agreements with health care providers to enforce the ADA and Section 504 of the Rehabilitation Act. In July 2010, DOJ and the Department of Health and Human Services issued a guidance document for health care providers regarding their responsibilities to make their services and facilities accessible to individuals with mobility disabilities under the ADA and Section 504 of the Rehabilitation Act. See Access to Medical Care for Individuals with Mobility Disabilities available at: *http://www.ada.gov/medcare_ta.htm.* The guidance document includes information on accessible examination rooms and the clear floor space needed adjacent to medical equipment for individuals who use mobility devices to approach the equipment for transfer; accessible medical equipment (e.g., examination tables and chairs, mammography equipment, weight scales); patient lifts and other methods for transferring individuals from their mobility devices to medical equipment; and training health care personnel. In July 2010, DOJ also issued an ANPRM announcing that, pursuant to the obligation that has always existed under the ADA for covered entities to provide accessible equipment and furniture, it was considering amending its regulations implementing Titles II and III of the ADA to include specific standards for the design and use of accessible equipment and furniture that is not fixed or built into a facility in order to ensure that programs and services provided by state and local governments and by public accommodations are accessible to individuals with disabilities. See 75 FR 43452 (July 26, 2010). Among other things, the ANPRM stated that DOJ was considering amending its ADA regulations to specifically require health care providers to acquire accessible medical equipment and that it would consider adopting the standards issued by the Access Board. DOJ also indicated its intention to include in its ADA regulations scoping requirements that specify the minimum number of types of accessible medical equipment required in different types of health care facilities. If DOJ proposes to amend its ADA regulations as announced in the ANPRM, it will publish a notice of proposed rulemaking (NPRM) requesting public comment and will prepare an initial and final regulatory flexibility analyses in accordance with the Regulatory Flexibility Act.

Medical Device Manufacturers

If DOJ amends its ADA regulations as announced in the ANPRM, small medical device manufacturers may have an economic incentive to produce accessible products that conform to the standards for health care providers who need to acquire accessible medical diagnostic equipment. The size of the economic incentive will depend on the amount of accessible medical diagnostic equipment health care providers need to acquire and the manufacturers' incremental costs to design or redesign and manufacture accessible products that conform to the standards.

Many medical device manufacturers currently incorporate accessible features in some of their products such as patient support surfaces that are height adjustable, transfer and positioning supports, and scales designed for use by patients seated in a wheelchair. The incremental costs for manufacturers to conform these products to the standards are expected to be small because the features may already meet or closely meet the standards. The incremental costs may be greater for manufacturers that do not currently incorporate accessible features in their products but plan to do so in future designs or redesigns of their products. The incremental costs to design or redesign and manufacture accessible products that conform to the standards will be incurred voluntarily by manufacturers that choose to produce them for health care providers who need to acquire accessible medical diagnostic equipment. Some manufacturers may choose not to design or redesign and manufacture accessible products that conform to the standards, or may produce accessible products with less market appeal than that of their competitors, thereby losing market share and incurring losses. These economic impacts are not regulatory costs and are not generally social costs because for the most part, one manufacturer's loss is another manufacturer's gain.

The preamble requests comments on the incremental costs to design or redesign and manufacture products that conform to the technical criteria in the proposed standards, as well as alternative and additional technical criteria that the Access Board is considering. The Access Board will consider the information provided in the comments when preparing the final standards, and will provide an analysis of the incremental costs with the final standards.

Compliance Requirements in Proposed Standards

The proposed standards contain technical criteria for accessible medical diagnostic equipment. The proposed standards do not impose any mandatory requirements on medical device manufacturers or health care providers.

Other Relevant Federal Rules and Guidance Documents

As discussed above, DOJ and the Department of Health and Human Services issued a guidance document for health care providers regarding their responsibilities to make their services and facilities accessible to individuals with mobility disabilities under the ADA and Section 504 of the Rehabilitation Act. DOJ also issued an ANPRM announcing that it was considering amending its regulations implementing Titles II and III of the ADA to ensure that equipment and furniture used in programs and services provided by state and local governments and by public accommodations are accessible to individuals with disabilities. See 75 FR 43452 (July 26, 2010). Among other things, the ANPRM stated that DOJ was considering amending its ADA regulations to specifically require health care providers to acquire accessible medical equipment and that it would consider adopting the standards issued by the Access Board. DOJ also indicated its intention to include in its ADA regulations scoping requirements that specify the minimum number of types of accessible medical equipment required in different types of health care facilities.

The Access Board worked closely with the FDA–CDRH in developing the proposed standards. The FDA–CDRH may develop a guidance document to inform manufacturers how it intends to apply its regulatory authority to clearance or approval of medical devices addressed in the Access Board's standards. If the FDA–CDRH develops such a guidance document, it will provide the public notice and opportunity to comment on a draft of the guidance document in accordance with its procedures for issuing guidance documents. See 21 CFR 10.115.

Significant Alternatives

Questions are included in the preamble requesting comments on the economic and technical impacts of the technical criteria in the proposed standards, and whether alternative technical criteria would be appropriate. The Access Board plans to convene an advisory committee when the comment

period on the rulemaking closes to assist the Board in reviewing the comments and make recommendations on issues addressed in the rulemaking. The Access Board will analyze the comments submitted in response to the questions and the advisory committee's recommendations, including alternatives that achieve the statutory objectives of ensuring that medical diagnostic equipment is accessible to and usable by individuals with disabilities and minimize any significant impacts of the standards on small entities. The Access Board will prepare a final regulatory flexibility analysis when the final standards are issued that discusses any significant alternatives considered.

Executive Order 13132 (Federalism)

The proposed standards do not impose any mandatory requirements on State and local governments. The proposed standards do not have any direct effects on the state governments, the relationship between the national government and state governments, or the distribution of power and responsibilities among the various levels of government. The proposed standards do not preempt state law. Therefore, the consultation and other requirements of Executive Order 13132 (Federalism) do not apply.

Unfunded Mandates Reform Act

The proposed standards do not impose any mandatory requirements on state, local, or tribal governments or the private sector. Therefore, the Unfunded Mandates Reform Act does not apply.

List of Subjects in 36 CFR Part 1195

Health care, Individuals with disabilities, Medical devices.

Nancy Starnes,

Chair.

For the reasons stated in the preamble, the Access Board proposes to add part 1195 to title 36 of the Code of Federal Regulations to read as follows:

PART 1195—STANDARDS FOR ACCESSIBILE MEDICAL DIAGNOSTIC EQUIPMENT

Sec.
1195.1 Standards.
Appendix to Part 1195—Standards for Accessible Medical Diagnostic Equipment

Authority: 29 U.S.C. 794f.

§ 1195.1 Standards.

The standards for accessible medical diagnostic equipment are set forth in the appendix to this part. Other agencies, referred to as an enforcing authority in the standards, may adopt the standards as mandatory requirements for entities subject to their jurisdiction.

Appendix to Part 1195—Standards for Accessible Medical Diagnostic Equipment

Chapter M1: Application and Administration

M101 General

M101.1 Purpose. The standards contain technical criteria for medical diagnostic equipment that is accessible to and usable by patients with disabilities. The standards provide for independent access to and use of diagnostic equipment by patients with disabilities to the maximum extent possible.

M101.2 Application. The standards shall be applied to diagnostic equipment based on the patient positions that the equipment is designed to support. Where diagnostic equipment is designed to support more than one patient position, the standards for each patient position supported shall be applied to the equipment.

Advisory M101.2 Application. The following examples illustrate how the standards apply to diagnostic equipment designed to support more than one patient position:

- An examination chair converts to an examination table. The technical criteria in M302 for diagnostic equipment used by patients in a seated position; and in M301 for diagnostic equipment used by patients in a supine, prone, or side-lying position apply.
- A weight scale can be used by patients seated in a wheelchair, or seated on a built-in folding seat, or standing and holding onto supports. The technical criteria in M303 for diagnostic equipment used by patients seated in a wheelchair; in M302 for diagnostic equipment used by patients in a seated position; and in M304 for diagnostic equipment used by patients in a standing position apply.

M101.3 Equivalent Facilitation. The use of alternative designs or technologies that result in substantially equivalent or greater accessibility and usability than specified in the standards is permitted.

M101.4 Dimensions. The standards are based on adult dimensions and anthropometrics.

Dimensions that are not stated as ''maximum'' or ''minimum'' are absolute.

M101.5 Dimensional Tolerances. Dimensions are subject to conventional industry tolerances for manufacturing processes, material properties, and field conditions.

M102 Definitions

M102.1 Defined Terms. For the purpose of the standards, the following terms have the indicated meaning:

Enforcing Authority. An agency that adopts the standards as mandatory requirements for entities subject to its jurisdiction.

Medical Diagnostic Equipment (Diagnostic Equipment). Equipment used in or in conjunction with medical settings by health care providers for diagnostic purposes.

Operable Parts. A component of diagnostic equipment that is used by the patient to activate, deactivate, or adjust the equipment.

Transfer Surface. Part of diagnostic equipment onto which patients who use mobility devices or aids transfer when moving onto and off of the equipment.

M102.2 Undefined Terms. The meaning of terms not defined in M102.1 or in regulations or policies issued by an enforcing authority shall be defined by collegiate dictionaries in the sense that the context implies.

M102.3 Interchangeability. Words, terms, and phrases used in the singular include the plural and those used in the plural include the singular.

Chapter M2: Scoping

M201 General

M201.1 Enforcing Authority. The enforcing authority specifies the minimum number of types of accessible diagnostic equipment that are required to comply with the standards in different types of health care facilities.

Chapter M3: Technical Criteria

M301 Diagnostic Equipment Used by Patients in Supine, Prone, or Side-Lying Position

M301.1 General. Where diagnostic equipment is used by patients in a supine, prone, or side-lying position, it shall comply with M301.

M301.2 Transfer Surface. A transfer surface shall be provided and shall comply with M301.2.

M301.2.1 Height. The height of the transfer surface during patient transfer shall be 17 inches (430 mm) minimum and 19 inches (485 mm) maximum measured from the floor to the top of the transfer surface.

Advisory M301.2.1 Height. The transfer surface is permitted to be positioned outside of the specified height range when not needed to facilitate transfer.

M301.2.2 Size. The transfer surface shall be 30 inches (760 mm) wide minimum and 15 inches (381 mm) deep minimum.

Advisory M301.2.2 Size. The size requirements in this section apply only to the portion of the diagnostic equipment used for transfer.

M301.2.3 Transfer Sides. The transfer surface shall be located to provide options to transfer from a mobility device onto one short side (depth) and one long side (width) of the surface. Each transfer side shall provide unobstructed access to the transfer surface.

Exception: Temporary obstructions shall be permitted provided that they can be repositioned to permit transfer.

Advisory M301.2.3 Transfer Sides: Exception. Arm rests, footrests, side rails, and stirrups are examples of obstructions.

M301.3 Supports. Transfer supports, stirrups, and reclining surfaces shall comply with M301.3.

M301.3.1 Transfer Supports. Transfer supports shall be provided for use with the transfer sides required by M301.2.3 and shall comply with M305.2.

M301.3.2 Stirrups. Where stirrups are provided, they shall provide a method of

supporting, positioning, and securing the patient's legs.

M301.3.3 Head and Back Support. Where the diagnostic equipment is used in a reclined position, head and back support shall be provided. Where the incline of the back support can be modified while in use, head and back support shall be provided throughout the entire range of the incline.

M301.4 Lift Compatibility. Diagnostic equipment shall be usable with a patient lift and shall comply with M301.4.1 or M301.4.2.

M301.4.1 Clearance in Base. The base of the equipment shall provide a clearance 44 inches (1120 mm) wide minimum, 6 inches (150 mm) high minimum measured from the floor, and 36 inches (915 mm) deep minimum measured from the edge of the examination surface. Where the width of the examination surface is less than 36 inches (915 mm), the clearance depth shall extend the full width of the equipment. Equipment components are permitted to be located within 8 inches (205 mm) maximum of the centerline of the clearance width.

M301.4.2 Clearance Around Base. The base of the equipment shall provide a clearance 6 inches (150 mm) high minimum measured from the floor and 36 inches (915 mm) deep minimum measured from the edge of the examination surface. The width of the base permitted within this clearance shall be 26 inches (660 mm) wide maximum at the edge of the examination surface and shall be permitted to increase at a rate of 1 inch (25 mm) in width for each 3 inches (75 mm) in depth.

M302 Diagnostic Equipment Used by Patients in Seated Position

M302.1 General. Where diagnostic equipment is used by patients in a seated position, it shall comply with M302.

M302.2 Transfer Surface. A transfer surface shall be provided and shall comply with M302.2.

M302.2.1 Height. The height of the transfer surface during patient transfer shall be 17 inches (430 mm) minimum and 19 inches (485 mm) maximum measured from the floor to the top of the transfer surface.

Advisory M302.2.1 Height. The transfer surface is permitted to be positioned outside of the specified height range when not needed to facilitate transfer.

M302.2.2 Size. The transfer surface shall be 21 inches (610 mm) wide minimum and 15 inches (381 mm) deep minimum.

Advisory M302.2.2 Size. The size requirements in this section apply only to the portion of the seat used for transfer.

M302.2.3 Transfer Sides. The transfer surface shall be located to provide options to transfer from a mobility device onto one short side (depth) and one long side (width) of the surface. Each transfer side shall provide unobstructed access to the transfer surface.

Exception: Temporary obstructions shall be permitted provided that they can be repositioned to permit transfer.

Advisory M302.2.3 Transfer Sides: Exception. Armrests, footrests, and side rails are examples of obstructions.

M302.3 Supports. Transfer supports, armrests, and reclining surfaces shall comply with M302.3.

M302.3.1 Transfer Supports. Transfer supports shall be provided for use with the transfer sides required by M302.2.3 and shall comply with M305.2.

M302.3.2 Armrests. Where diagnostic equipment is used by patients in a seated position, armrests shall be provided.

Advisory M302.3.2 Armrests. Armrests on transfer sides are not permitted to obstruct access to the transfer surface. See M302.2.3 Exception.

M302.3.3 Head and Back Support. Where the diagnostic equipment is used in a reclined position, head and back support shall be provided. Where the incline of the back support can be modified while in use, head and back support shall be provided throughout the entire range of the incline.

M302.4 Lift Compatibility. Diagnostic equipment shall be usable with a patient lift and shall comply with M302.4.1 or M302.4.2.

Exception: Where diagnostic equipment meets the requirements of M303 and provides a folding seat, the equipment shall not be required to comply with M302.4.

M302.4.1 Clearance in Base. The base of the equipment shall provide a clearance 44 inches (1120 mm) wide minimum, 6 inches (150 mm) high minimum measured from the floor, and 36 inches (915 mm) deep minimum measured from the edge of the examination surface. Where the width of the examination surface is less than 36 inches (915 mm), the clearance depth shall extend the full width of the equipment. Equipment components are permitted to be located within 8 inches (205 mm) maximum of the centerline of the clearance width.

M302.4.2 Clearance Around Base. The base of the equipment shall provide a clearance 6 inches (150 mm) high minimum measured from the floor and 36 inches (915 mm) deep minimum measured from the edge of the examination surface. The width of the base permitted within this clearance shall be 26 inches (660 mm) wide maximum at the edge of the examination surface and shall be permitted to increase at a rate of 1 inch (25 mm) in width for each 3 inches (75 mm) in depth.

M303 Diagnostic Equipment Used by Patients Seated in a Wheelchair

M303.1 General. Diagnostic equipment used by patients seated in a wheelchair shall comply with M303.

M303.2 Wheelchair Spaces. A wheelchair space complying with M303.2 shall be provided at diagnostic equipment.

Advisory M303.2 Wheelchair Spaces. A wheelchair space can be used to accommodate patients who use wheelchairs as well as other mobility devices and seating.

M303.2.1 Orientation. Wheelchair spaces shall be designed so that a patient seated in a wheelchair orients in the same direction that a patient not seated in a wheelchair orients when the diagnostic equipment is in use.

M303.2.2 Width. Wheelchair spaces shall be 36 inches (915 mm) wide minimum.

M303.2.3 Depth. Where wheelchair spaces can be entered from the front or rear, the wheelchair space shall be 48 inches (1220 mm) deep minimum. Where wheelchair spaces can be entered only from the side, the wheelchair space shall be 60 inches (1525 mm) deep minimum.

M303.2.4 Knee and Toe Clearance. Wheelchair spaces shall include knee and toe clearance complying with M303.2.4. The depth of the wheelchair space shall include knee and toe clearance of 17 inches (430 mm) minimum and 25 inches (635 mm) maximum. Knee and toe clearance under breast platforms shall be 25 inches (635 mm) deep.

M303.2.4.1 Toe Clearance. Toe clearance shall be provided at a height of 9 inches (230 mm) above the floor to a depth of 6 inches (150 mm) maximum.

M303.2.4.2 Knee Clearance. Knee clearance shall be provided at a depth of 11 inches (280 mm) minimum and 25 inches (635 mm) maximum at 9 inches (230 mm) above the floor and at a depth of 8 inches (205 mm) minimum at 27 inches (685 mm) above the floor. Between 9 inches (230 mm) and 27 inches (685 mm) above the floor, the knee clearance shall be permitted to reduce at a rate of 1 inch (25 mm) in depth for every 6 inches (150 mm) in height.

M303.2.5 Surfaces. Wheelchair space surfaces shall not slope more than 1:48 in any direction.

M303.3 Entry. Where there is a change in level at the entry to a wheelchair space, the change in level shall comply with M303.3.

M303.3.1 Vertical. Changes in level of ¼ inch (6.4 mm) high maximum shall be permitted to be vertical.

M303.3.2 Beveled. Changes in level between ¼ inch (6.4 mm) high and ½ inch (13 mm) high maximum shall be beveled with a slope not steeper than 1:2.

M303.3.3 Ramped. Changes in level greater than ½ inch (13 mm) high shall be ramped and shall comply with M303.3.3.

M303.3.3.1 Running Slope. Ramp runs shall have a running slope not steeper than 1:12.

M303.3.3.2 Cross Slope. The cross slope of ramp runs shall not be steeper than 1:48.

M303.3.3.3 Clear Width. The clear width of ramp runs shall be 36 inches (915 mm) minimum.

M303.3.3.4 Edge Protection. Ramps with drop offs ½ inch (13 mm) or greater shall provide edge protection 2 inches (50 mm) high minimum on each side.

M303.3.3.5 Handrails. Ramps with a rise greater than 6 inches (150 mm) shall provide handrails on each side.

M303.4 Components. Where components of diagnostic equipment are used to examine specific body parts, the components shall be capable of examining the body parts of a patient seated in a wheelchair. Breast platforms shall comply with M303.4.1.

M303.4.1 Breast Platforms. The height of the breast platform shall be 30 inches (760 mm) high minimum and 42 inches (1065 mm) high maximum above the floor when in use by a patient seated in a wheelchair.

M304 Diagnostic Equipment Used by Patients in Standing Position

M304.1 General. Diagnostic equipment used by patients in a standing position shall comply with M304.

M304.2 Standing Surface. The surface on which the patient stands shall be slip resistant.

M304.3 Standing Supports. Standing supports shall be provided on each side of the standing surface and shall comply with M305.3.

M305 Supports

M305.1 General. Supports shall comply with M305, as applicable.

M305.2 Transfer Supports. Transfer supports shall comply with M305.2.

M305.2.1 Location. Transfer supports shall be located within reach of the transfer surface and shall not obstruct transfer onto or off of the surface when in position.

M305.2.2 Structural Strength. Transfer supports and their connections shall be capable of resisting vertical and horizontal forces of 250 pounds (1,112 N) applied at all points on the transfer support.

M305.2.3 Fittings. Transfer supports shall not rotate within their fittings.

M305.3 Standing Supports. Standing supports shall provide continuous support throughout use of the diagnostic equipment and shall comply with M305.3.

M305.3.1 Horizontal Position. Where the support is horizontal, the top of the gripping surface shall be 34 inches (865 mm) minimum and 38 inches (965 mm) maximum above the standing surface. The gripping surface shall be 4 inches (100 mm) long minimum.

M305.3.2 Vertical Position. Where the support is vertical, it shall be 18 inches (455 mm) minimum in length and the bottom end of the support shall be 34 inches (865 mm) high minimum and 37 inches (940 mm) high maximum above the standing surface.

M305.3.3 Fittings. Standing supports shall not rotate within their fittings.

M306 Communication

M306.1 General. Where instructions or other information is communicated to the patient through the diagnostic equipment, the instructions and other information shall be provided in at least two of the following methods: audible, visible, or tactile.

Advisory M306.1 General. Patients should not be required to adjust position to receive audible, visible, or tactile communications. A volume control can be helpful, particularly in diagnostic equipment where hearing aids cannot be worn. In selecting the methods of communication it is important to consider the diagnostic equipment characteristics. For example, audible communication may not be effective for magnetic resonance imaging (MRI) equipment due to the noise level when the equipment is in use.

M307 Operable Parts

M307.1 General. Operable parts for patient use shall comply with M307.

M307.2 Tactilely Discernible. Operable parts shall be tactilely discernible without activation.

M307.3 Operation. Operable parts shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist.

M307.4 Operating Force. The force required to activate operable parts shall be 5 pounds (22.2 N) maximum.

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